

SOUTH AFRICA / JUDGMENT

Ngqengqa v S (A239/2023) [2024] ZAWCHC 96 (4 March 2024)

[2024] ZAWCHC 96

COURT

Western Cape High Court, Cape Town

BEFORE

Wille, Katz

CASE / FILE NUMBER

A239/2023

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THE

REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

Number: A 239 / 2023

In

the matter between:

UVE

NGQENGQA

Appellant

And

THE

STATE

Respondent

Coram:

Wille J et Katz AJ

Heard:

(Determined on the papers as agreed with the parties)

Delivered:

4 March 2024

JUDGMENT**THE COURT:****Introduction:**

- [1] This is an appeal from the lower court only against a conviction of the rape and kidnapping of a minor. The appellant was convicted of one count of rape and one count of kidnapping. The complainant was ten years old at the time when these offences were allegedly perpetrated against her.[1]
- [2] The appellant was sentenced to eighteen years imprisonment for the rape offence and three years imprisonment for the offence of kidnapping. The offence of rape was defined in terms the targeted legislation dealing with matters of this nature.[2]
- [3] The appellant was legally represented in the court of first instance. He pleaded not guilty to the offences as preferred against him by the respondent and elected not to advance any plea explanation. The appellant was initially charged with three counts of rape but was acquitted on two counts of rape.[3]
- [4] Leave to appeal was granted against his convictions following the petition procedure. The charge of rape against the appellant, as preferred by the respondent, was also read with the relevant provisions of the minimum sentencing regime.[4]
- [5] The appeal against the convictions was initially based on the following grounds, namely: (a) that the respondent failed to allege sufficient particularity regarding the offences preferred against the appellant,
- (b) that the complainant did not sufficiently identify the appellant and, (c) that the evidence implicating the appellant was that of a single witness and was insufficient as it was not sufficient and satisfactory in every material respect.[5]
- [6] The respondent wisely conceded that the trial court erred in convicting the appellant of kidnapping. The alleged kidnapping of the complainant was inextricably linked to the alleged rape of the complainant. Put another way, the perpetrator of the rape upon the complainant had the intention to rape that complainant and clearly not to kidnap her. In our view, this amounted to a misdirection by the trial court, and the appellant should not have been found guilty of kidnapping. The only real remaining issue left was that of the correct identification of the appellant.[6]

Evidence

- [7] The complainant testified that she was raped by the appellant when she was ten years old. She testified that this incident happened when she was on her way to look for her friends. She said this happened in the afternoon when it was getting dark.[7]

- [8] She testified that somebody snatched her from the street, covered her face and mouth with a cloth, and dragged her into an informal settlement structure. Inside this structure were various appliances and a broken microwave oven. This structure housed two beds and only had one room.[8]
- [9] The person who dragged her into this structure proceeded to undress her, rubbed some lotion on her vagina and raped her. This person had a knife in his possession. She then left the structure after having been threatened that the perpetrator would murder her (and her family should she mention this incident again).[9]
- [10] After a few days, the complainant confided in her aunt regarding this incident. She identified her rapist as she had seen him on prior occasions. The complainant described the appellant as an 'odd' person in their community. She also knew his name because she had heard people in her village calling the appellant by this name.[10]
- [11] The complainant's aunt told the complainant that she had to tell her mother about this incident. The complainant obliged and told her mother. Her mother insisted that this matter be reported to the police. The complainant then decided to be untruthful with her mother about what had occurred, as she was fearful and did not wish to report this incident to the police.[11]
- [12] The complainant's foster mother testified that the complainant resides with her and is responsible for the complainant. The complainant has been in her care since infancy. The 'first report' of the alleged rape was not made to her. However, she confirmed that the complainant made the first report to her sister, whom the complainant regarded as her aunt. [12]
- [13] This led to a discussion with the complainant, who confirmed that the appellant had snatched her from the street and had taken her into his structure. The complainant said the appellant undressed her but that the appellant did not do anything to her during this time while she was in his shack with him. The complainant's mother decided (at that stage) not to pursue the report made to her by the complainant.[13]
- [14] Notably, the complainant's progress at school shortly after the incident deteriorated significantly. Sometime after the incident, she was at the local police station. She was attending a program at the police station and was told a story about a young girl who had also been raped. She then decided to confide in the police about the fact that she, too, had been raped.[14]
- [15] She made a statement and was taken to a local clinic for a medical examination. She told the medical practitioner that she had been traumatized by the actions of the appellant and was experiencing nightmares.[15]

- [16] The person to whom this report was made at the local police station testified that the complainant confided in him that she had been raped. The complainant confirmed that she was snatched off the street and taken into a shack, and raped. She was raped in the same year she had attended the program at the police station.[16]
- [17] The registered forensic nurse who examined the complainant testified that she completed the medico-legal report handed in as an exhibit. She confirmed that the complainant told her that the person who raped her rubbed some lotion on her before he raped her. Further, the perpetrator snatched her off the street and covered her mouth. The complainant also identified the appellant by his name.[17]
- [18] The clinical findings by the forensic nurse were of significance. She opined that penetration had occurred vaginally by means of a blunt object. This portion of the medical evidence was not challenged at all. The forensic nurse was also told by the complainant that the appellant was in the possession of a knife and that she was threatened and told to remain silent about the incident. This evidence was consistent with the complainant's previous statements in this connection and especially that the appellant was armed with a knife. Detailed notes were taken down by the forensic nurse at the time of the medical examination of the complainant.[18]

Consideration:

- [19] The respondent's case is that the tapestry of the available evidence proved that the appellant raped the complainant beyond reasonable doubt. Further, no evidence of any nature was presented to gainsay any evidence presented by the witnesses for the prosecution. It is undoubtedly so that an accused person enjoys the right to remain silent and not testify during any criminal proceedings against him or her. However, in these circumstances, circumstantial evidence indirectly supplies proof. Distinguishing direct and circumstantial evidence is crucial when an appellant does not testify or call witnesses supporting his or her case.[19]
- [20] Put another way, if there is evidence at a trial calling for an answer and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence may be sufficient in the absence of an explanation, to prove the guilt of the person so accused. This must as a matter of logic be so, bearing in mind always that a failure to testify (in circumstances such as these) does not relieve the prosecution of its duty to prove guilt beyond a reasonable doubt.[20]
- [21] This does not mean, as has sometimes been suggested, that an adjudicator of the facts is entitled to (or is expected to) speculate as to the possible existence of facts which, together with the proven facts, would justify a conclusion that an accused person may be innocent. Instead, this means that an accused person runs the risk that, absent any rebuttal on his or her part, the prosecution's case may be sufficient to prove the elements of the offence, which may, in turn, lead to his or her conviction.[21]

[22] Turning now to the facts of this case. The appellant did not testify and did not call any witnesses. This, the appellant was perfectly entitled to do. However, this election bore consequences. I say this because in view of the evidence

tendered by the prosecution, it could not have been expected of the prosecution to wallow in any kind of conjecture to search for and try and find answers to every possible inference that may be drawn in view of this strategy adopted by the appellant. In addition, the court is also not expected to search for speculative explanations for conduct, which on the face of it, is very incriminating.
[22]

[23] It must be so that any exculpatory suggestions or explanations that may have been put to the respondents' witnesses by the appellant's legal representative did not amount to evidence and carried no probative weight. Finally, on this score, the respondent is not required to plug every loophole, counter every speculative argument, and parry every shield that imaginative counsel could conceive without a scrap of evidence in substantiation thereof.
[23]

[24] The appellant's core complaint is that the evidence tendered by the complainant was unsatisfactory and that she was a young and

impressionable single witness. We disagree. The complainant was not a single witness. We say this because, in

its material terms, her evidence was corroborated by the other three witnesses who testified on behalf of the prosecution.[24]

[25] The probative value and weight of all the evidence presented must also be tested and considered in the correct context, as the evidence incriminating the appellant and the evidence possibly exculpating the appellant should not be considered in separate compartments.[25]

[26] In this case, there is no evidence exculpating the appellant. By contrast, there is only evidence against him. The identification of the appellant is not an issue in this appeal. This much was conceded. The only possible complaint remains about the evidence of a single witness and the so-called cautionary rule in sexual assault cases. The lower court's judicial officer was acutely aware that the complainant was a single witness, and no misdirection or irregularity occurred while assessing this evidence. Further, the test to be applied for the proper evaluation of the evidence in sexual assault cases has now been definitively determined. The so-called cautionary rule in sexual assault cases no longer finds direct application.[26]

[27] It is trite that an appeal court's powers to interfere with findings of fact made by a court of first instance are limited.

The factual findings are presumed to be correct if there is no material misdirection by the trial court. Thus, the findings

made by the trial court regarding the fact that the complainant was a single witness and how this evidence was to be evaluated can only be set aside if it was wrong. It was not wrong.[27]

[28] Finally, we need to deal with the conviction on the charge of kidnapping and the technical issue raised by the appellant that the charges preferred against him were defective for want of crucial information. The respondent has the advantage of formulating

the charges against an accused person and if by reason of any uncertainty the accused may be charged with any number of charges.[28]

[29] In this case, the charge of kidnapping (other than the lack of intention to commit the offence of kidnapping) may also have amounted to an impermissible splitting of charges. A further complaint is raised as to the lack of specificity and particularity regarding the rape charge. Time was not of the essence concerning this charge. Further, the particulars in the charge of rape (as formulated) were reasonably sufficient to have informed the appellant of the nature of the charge.[29]

Order

[30] In all the circumstances, the following order is granted, namely:

1. That the appeal against the appellant's conviction (and therefore sentence) on the charge of kidnapping (count 1) is upheld and is, with this, set aside.
2. That the appeal against the appellant's conviction on the charge of rape (count 2) is dismissed
3. That the conviction and sentence imposed upon the appellant in connection with the charge of rape (count 2) is, with this order, confirmed.

WILLE, J

I agree:

KATZ, AJ

[1] The complainant was thirteen years old when she testified.

[2] A contravention of section 3 of the Sexual Offences and Related Matters Amendment Act, 32 of 2007.

[3] These additional rape charges all related to the same complainant.

[4] Section 51 (1) of the Criminal Law Amendment Act, 105 of 1997.

[5] The appellant effectively advanced that the evaluation of the evidence by the trial court was wrong.

[6] The appellant later conceded that the issue of identification was correctly decided in the court of first instance.

- [7] Her evidence was that this happened near a depot, and it was in January 2019.
- [8] This is what is commonly known in an informal settlement as a ‘shack’.
- [9] From this evidence it is apparent that the perpetrator of this crime knew her and her family.
- [10] She knew the appellant by the name of Uwe. According to her he looked like a “thug” and he had “big”
hair.
- [11] Her aunt’s name is Mantombi. The person she referred to as her mother was Sophia Morris who is her “foster” mother.
- [12] Mantombi who is described by the complainant as her aunt, is the sister of her foster mother.
- [13] This complainant was busy with her examinations, and she did not want to upset the complainant during this time.
- [14] The complainant attended a program called “Love Life” at the police station situated in Hout Bay.
- [15] The medical report -J88- was entered into the record as an exhibit and will be referenced later in this judgment.
- [16] This was in 2019. The chronology makes sense, considering the complainant’s lack of progress at school.
- [17] Uwe or Hoover.
- [18] She noted the appellant fell asleep after the incident, and the complainant managed to escape from the appellant’s shack.
- [19] *S v Mthetwa* 1972 SA 766 (A) 769.
- [20] *S v Boesak* 2001 (1) SACR 1(CC).
- [21] *Osman and Another v Attorney-General, Transvaal* 1988 (4) SA 1224 at para [22].
- [22] *S v Sauls and Others* 1981 (3) SA 172 (A) at 182 G - H.
- [23] *S v Ntsele* 1988 (2) SACR 178 (SCA).
- [24] The other witnesses who testified on behalf of the respondent all corroborated portions of the complainant’s testimony.
- [25] *S v Van Der Meyden* 1999 (1) SACR 447.
- [26] *S v M* 1999 (2) SACR 548 (A).
- [27] *Masango v S* (A175 / 2021) [2024] ZAGPPHC 64 (5 February 2024).

[28] Section 83 of the Criminal Procedure Act, 51 of 1977. (The uncertainty may be on the facts which can be proved).

[29] Sections 83, 84 and 92 of the Criminal Procedure Act, 51 of 1977.

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