

SOUTH AFRICA / JUDGMENT

S v Baloleleki (CA6/2012) [2012] ZANWHC 24 (4 June 2012)

[2012] ZANWHC 24

COURT

North West High Court, Mafikeng

BEFORE

A A Landman, M M Leeuw

CASE / FILE NUMBER

CA6/2012

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IN THE NORTH WEST

HIGH COURT

MAFIKENG

CASE NO.:

CA6/2012

In the matter

between:

TEKOYAME JACOB

BALOLELEKIAPPELLANT

and

THE STATE

.....RESPONDENT

CRIMINAL APPEAL

LEEUEW JP AND

LANDMAN J

JUDGMENT

LANDMAN J:

- [1] The appellant was charged with eight counts of rape. He appeared before the Regional Court of the North West Southern Division held at Ganyesa under case number RC49/2009, before the Learned Regional Court Magistrate, Mr Savlall.

- [2] The appellant was acquitted on counts 3 to 8. However the appellant was found guilty on counts 1 and 2, i.e. two counts of Common Law Rape, allegedly committed during June 2001.
- [3] The appellant was sentenced to 15 years imprisonment on each count. The court a quo ordered that the sentences run concurrently.
- [4] The court a quo granted leave to appeal to this court on the counts 1 and 2. The appellant does not appeal against the sentences imposed upon him.

The appellant's contentions

- [5] Mr W A F Strydom, who appeared on behalf of the appellant, submitted that:
 - (a) the weight of all the evidence (on all 8 counts) are against the conviction in counts 1 and 2, and that the principle in *R v Hodges* 1838, in *South African Law of Evidence*, Fourth Edition, Hoffmann and Zeffret, stated the following on p 589, note 8, is applicable:

"The mind was apt to take a pleasure in adapting circumstances to one another, and even straining them a little, if need be, to force them to form part of one connected whole; and the more ingenious the mind of the individual, the more likely was it, in considering such matters, to overreach and mislead itself to supply some little link that is wanting, to take for granted some facts consistent with its previous theories and reasoning to render them complete."

- (b) The following missing links and inconsistencies appeared in the evidence of the complainant which the Magistrate overlooked or strained too far:
 - (i) The charge sheet and the evidence of the complainant stated that the complainant was raped during June 2001, when she was 7 years old. The Magistrate made a mathematical calculation that, if she was raped during June 2001, she was 9 years and 6 months old at the time.
 - (ii) If one argues the other way round, and she was 7 years old, then the rape took place during June 1999.
 - (iii) The complainant alleges that she was raped 3 times during June 2001. The charge sheet only mentions 2 offences of rape in
2001. Either in a statement or in consultation with the prosecutor she must have said that she was only raped twice in 2001.
 - (iv) The complainant's statement to the police dated 2 February 2008 states that she was only raped on 2 occasions during
2001. She stated in her evidence that the appellant started abusing her in 2001 during March and June.

(v) In her statement to the Police dated 2 February 2008 she stated that after she was raped (on the premises where she lived with her grandmother) her grandmother bathed her and she was 11 years old at that time. If she was 11 years old at that stage, she must have been raped during 2003.

(vi) In her statement, exhibit “B”, she did not state that her grandmother instructed her to have intercourse with the appellant so that he should buy her some shoes. In her evidence she said: “What made you to eventually agree? I agree because my mother forced me to agree to that and also that I did not have shoes so that I can wear whilst going to school.” The complainant’s evidence in this regard was that she was instructed by her grandmother three times to have sexual intercourse with the appellant in order to get a pair of shoes.

(vii) The complainant’s evidence concerning the shoes is highly improbable. The normal and probable attitude of her and the

grandmother would have been that of “pay up before you have sex again”. Her evidence in this regard has the sound of

untruthfulness.

(viii) She gave evidence that her grandmother came to her and she asked her whether she had had sexual intercourse with the appellant and she replied that she had. She did not mention this in her statement exhibit “B”.

(ix) According to the psychiatrist’s report the complainant told her that the abuse started in the year 2000.

(x) In exhibit “J” (J88 completed by Dr De Villiers) which was admitted by consent, the complainant told the doctor that she was abused for the last six years. She was examined in 2008. On this basis the sexual abuse started in 2002.

(xi) The totality of the evidence which the Magistrate accepted, manifests four different days when the first of these rapes occurred, namely 1999, 2001, 2002 and 2003 (11 years old).

[6] Mr Strydom submitted that:

(a) The courts have often said that a trier of facts should in general not be too ready to rely on the evidence of a single witness. See De Villiers JP in *R v Mokoena* 1932 OPD 79 at 80:

“The uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by section 284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect.”

(b) The discrepancies, set out above, demonstrate that Magistrate erred in finding that the single evidence of the complainant, was clear and satisfactory in every material respect.

(c) The Magistrate did not apply his mind properly to the principle laid down by the courts concerning a single witness and also a youthful witness (child), in the following aspects.

- (d) It is highly improbable that a grandmother of a seven year old girl would instruct her grandchild to have sexual intercourse with an adult person in order to obtain a pair of shoes. This promise was not fulfilled even after the appellant had intercourse with the complainant on three occasions.
- (e) The complainant did not mention her grandmother's instruction in her statement to the Police.
- (f) The complainant did not mention in her testimony that these two or three acts of sexual intercourse with the appellant were painful or that she screamed for help or cried. She did not cry during the trial when she gave evidence.
- (g) Exhibits "J" and "K", the letters that the complainant wrote to her teachers during 2008 and 2009, did not identify her rapist.
- (h) It is also highly improbable that the complainant, after the rape in 2001, she reported this matter to a teacher and was sent to the clinic. In spite of this report to the teacher, and the visit to the clinic, nothing transpired, which on probabilities shows that she was either not raped or she could not identify her rapist.

[7] Mr Strydom further submitted that:

- (a) Her evidence with regard to the identification of the rapist is unreliable. She was asked: "Did you ever mention to anybody that you were being rape by Douglas – only teachers no one else." Record, page 126, line 24-25. This is a serious contradiction to the complainant's evidence concerning identification. She alleged that she also called Douglas Ra-Mogolo and that the appellant, Jacob, is also called Ra-Mogolo.
- (b) The complainant identified the appellant as Jacob and Ra-Mogolo, but in her statement to the Police, exhibit "B", she identified him as "Wellempie".
- (c) The fact that no evidence was led by the complainant concerning counts 3 – 5 of being raped, means that an inference can be drawn that during consultation with the senior prosecutor or in a statement either to the Police, or to Dr De Villiers that she did not make these allegations. An adverse inference can be drawn as to the complainant's credibility and her objectivity towards the appellant.
- (d) Exhibit "B" contains inconsistencies and contradictions with the complainant's evidence. There are serious contradictions and inconsistencies in regard to counts 3 and 8. The inconsistencies and contradictions are even more pronounced concerning counts 1 and 2.

[8] Mr Strydom also contended that:

- (a) The Magistrate did not caution himself in evaluating the evidence of the complainant, being a young child, especially when the event took place, according to the complainant, when she was only seven years old.

- (b) The Magistrate did not take into consideration the cautionary rule for children's evidence. It has been emphasised that children's evidence should be scrutinized with great care. The danger is not only that the children are highly imaginative but also that their story may be the product of suggestion by others. In sexual cases, for example, a child who is prompted by leading questions, when he or she first makes her complaint, is quite likely to believe that things that were suggested to him or her really happened. In this regard the police, who took the two statements of the complainant, were not called. See the judgment of Diemont JA in *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028 A – E where he said:

“The question which the Trial Court must ask itself is whether the young witness's evidence is trustworthy. Trustworthiness . . . depends on factors such as the child's power of observation, his power of recollection and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears 'intelligent enough to observe'. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion 'to remember what occurs' while the capacity of narration or communication raises the question whether the child has the capacity to understand the question put, and to frame and express intelligent answers . . . there are other factors . . . does he appear honest – is there a consciousness of the duty to speak the truth?”

Diemont JA also stated that the nature of the evidence may be such as practically to exclude the risk of suggestibility. At page 1028E he stated:

“At the same time the danger of believing a child where evidence stands alone must not be underrated.”

- [9] It was submitted that in view of these principles the evidence of the complainant was insufficient and the state did not prove its case beyond reasonable doubt.
- [10] It was also submitted that the Magistrate did not take into consideration that the State did not call a possible corroborating witness, Agnes Baloleleki, to corroborate that the complainant complained to her of being raped. See exhibit “B”. And at this a detrimental inference should have been drawn by not calling her, against the State's case in totality. This was also not taken into consideration by the court a quo.
- [11] The following submissions were based on the fact that the conviction on counts 1 and 2 dates back to 2001:
- (a) During 2001 the Regional Court according to statutory law, had no jurisdiction to sentence an accused who raped a child of seven to eleven years old.
- (b) The record had to be sent to a judge at circuit court, normally Vryburg, to peruse the record and to give the accused legal representative the opportunity to argue whether the conviction was in accordance with the law and after that, to sentence the particular accused.
- (c) The instructions from the Director of Public Prosecution to the Magistrate to complete the matter and sentence the accused deprived the appellant of an opportunity to challenge the conviction. This amounts to a procedural misdirection.

The State's contentions

[12] Mr Ndimande, who appeared on behalf of the respondent, submitted that:

- (a) The fact that the evidence of a single witness may contain contradictions or has omissions may not necessarily have a negative impact on the credibility of the witness. See *S v Janse van Rensburg and Another* 2009 (2) SACR 216 (C). The ability of witnesses to recall or to remember the events fade with passing of time. Taking into account the time lapse it is not surprising that the complainant could not narrate some of the events with clarity.
- (b) The complainant testified that the rapes on her began in 2001 when she was seven years old and staying with her grandmother who was the appellant's sister. Her grandmother told her to have sexual intercourse with the appellant. Clearly the complainant was from the outset placed in an impossible situation. She had no one to turn to as her grandmother was clearly encouraging her violation.
- (c) The grandmother had already passed on by the time the case was tried. There is nothing improbable about the complainant's version as the complainant was only a child of seven years, who was not protected by her own grandmother. She was at the mercy of the appellant in order to get shoes which she did not have. It appears that the grandmother was also destitute. She could not afford the shoes which the complainant desperately needed.

[13] Mr Ndimande submitted further that the State was entitled to charge the appellant with common law rape and further that the trial court was entitled to convict the appellant accordingly.

Evaluation

- [14] The complainant was born on 10 January 1992. She lived with her mother, Makosi at the home of her great grandmother until her mother died in 1999. This date was not in dispute. At this stage the complainant would have been about 7 years old. The complainant was taken to live with her grandmother Tshenolo (or Tolono). Tshenolo was the appellant's sister. Tshenolo, the complainant and others lived at the home of Tshenolo and the appellant's mother. The complainant called Tshenolo "grandmother" and sometimes "mother". When Tshenolo died the complainant went to live with her uncle Oupa Douglas Baloleleki.
- [15] The complainant says that while she was living with the grandmother Tshenolo in 2001 she, at Tshenolo's suggestion had sexual intercourse with her uncle, the appellant, on three occasions, although she only gives details of two occasions. She had intercourse with the appellant in order to secure a pair of school shoes. Intercourse was painful and she bled. The appellant did not provide the shoes and a quarrel between him and Tshenolo ensued. It was not disputed that she did not have school shoes. This indicates that she was impoverished and desperate.

- [16] Her tale, explaining why she agreed to intercourse, is one which a young girl would hardly be able to invent. I should add that at all material times a girl under 16 could not lawfully consent to sexual intercourse.
- [17] Mr Strydom made much of the name or manner by which the appellant was called and how the appellant was referred to in Police statements nothing turns on this. The complainant was well acquainted with the appellant. There was no room for mistaken identity.
- [19] There is no evidence on record which corroborate the complainant's evidence but her evidence accords with the known facts. Her tale has the ring of truth about it.
- [20] The truth is that the complainant had been sexually abused and subjected to sexual intercourse. There is no medical evidence of the complainant's condition in 2001. The Medical Report by Dr De Villiers, who examined the complaint in 2008, confirms sexual abuse. The appellant's evidence that he did not visit his mother's home, where the complainant was living at the relevant time, is unconvincing.
- [21] The learned Regional Magistrate observed the parties. He was aware of the reasons for acquitting the appellant on the other charges. In view of his judgment it cannot be said that he ignored those impressions in assessing the credibility of the complainant as regards counts 1 and 2.
- [22] I am not convinced that the learned Regional Magistrate misdirected himself in any respect save as regard the age of consent to sexual intercourse, but nothing turns on this. I would dismiss the appeal against the conviction and confirm the conviction to the extent that it is necessary.

[23] In the premises I make the following order:

The appeal against the conviction is dismissed and the conviction is confirmed.

A A LANDMAN

JUDGE OF THE HIGH COURT

I concur

M M LEEUW

JUDGE PRESIDENT

APPEARANCES:

DATE OF HEARING : 18 MAY 2012

DATE OF JUDGMENT : 04 JUNE 2012

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