

SOUTH AFRICA / JUDGMENT

S v Motswasele (7/2004) [2004] ZANWHC 27 (29 October 2004) [2004] ZANWHC 27

COURT

North West High Court, Mafikeng

BEFORE

Gura, Nkabinde

CASE / FILE NUMBER

7/2004

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Case No.: 7/2004

IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

In the matter between:

ALFRED BUTI MOTSWASELE Appellant

and

THE STATE Respondent

CRIMINAL APPEAL

MAFIKENG

NKABINDE J, GURA AJ

DATE OF HEARING : 10 September 2004

DATE OF JUDGMENT : 29 October 2004

Counsel for the Appellant : Advocate S.J. Senatle

Counsel for the Respondent : Advocate A. Mogoeng

GURA AJ:

The appellant was convicted of attempted rape on count 1 and rape on the second count by the Regional Court and sentenced to six and ten years imprisonment, respectively. He now appeals against both convictions and the resultant sentences.

The victim in the first count is J N, a nine year old girl. Her evidence is that she did not know the appellant before this incident. Around 18h00 – 19h00 on 4 January 1999 she was sent by her mother to buy achar. She was in the company of Obakeng. They met the appellant on the way. The appellant asked them if they knew where a teacher called Ubani stayed. O then volunteered to take him to Ubani's place. All three went there. Upon their arrival, appellant sent J to buy cigarettes. Appellant then ordered O to remain at Ubani's neighbours as he and J were proceeding to buy cigarettes. They proceeded to a place with reeds where he had sexual intercourse with her through her anus. A day subsequent to this event the complainant travelled with the police and on the way she identified the appellant. He was arrested. Subsequent to his arrest, she pointed him out at an identification parade.

O U, a ten year old boy corroborated the version of complainant. He testified that after the appellant and complainant disappeared in the reeds, he went to report to his parents. His father then accompanied him to search for the complainant. At the said reeds they found appellant's wallet. They saw the complainant approaching. She was in the company of two women. Initially, when they met appellant, in front of complainant's gate, he told them that he was Buti. O did not know appellant prior to this incident. He identified the appellant at an identification parade. However, at the parade, before he pointed him out, he saw the appellant and other detainees as they were being put in a straight line.

The conviction regarding the second count is a sequel to the events which took place on 12 February 1999. The complainant in that matter was playing with her friends, Mapale and Neo at Neo's place. She is eight years old. The appellant gave her money and asked her to go and buy cigarettes and matches for him. The appellant asked her to go to a house which has broken windows. He went with her. Thereat he raped her. Thereafter he gave her R0-50. She went back to Mapale's place. She testified that she did not know the appellant before.

Keitumetse Jacobs, a twelve year old testified that she knows the appellant as he usually comes to her place. Infact the appellant is her neighbour although not an immediate neighbour. On the day of the incident the appellant gave the second complainant R0-50 to buy ice. Both the appellant and second complainant entered a "broken house". Thereafter complainant came back crying alleging that Buti had sexual intercourse with her.

The appellant denied all the allegations levelled against him. His version was that some of the state witnesses saw him at the police station just before they pointed him out at the identification parade. He testified that Thoko showed him to the first complainant and advised her to point him out at the parade. His contention was that the first complainant was implicating him falsely because there was a grudge between the mother of the appellant and the first complainant's mother.

7. The trial court warned itself about the dangers of convicting on the evidence of a single witness who is also a child. It found that in both instances the offences were committed during the day and that the state witnesses had a good opportunity to observe the appellant. It found J N to be “a good witness who never contradicted herself”. The same was said about Obakeng. Tshepiso’s evidence was found to be “clear and satisfactory in all material respects”. She never contradicted herself or other witnesses.

These factual findings were attacked on appeal on the basis that the children did not have sufficient opportunity to observe the assailant. Counsel on behalf of the appellant further submitted that the purported identification parade was flawed in that the identifying witnesses were allowed to see the people on the parade before they could go and identify the culprits. His alternative submission was that at least the appellant should have been convicted of indecent assault on the first count.

9. It is true that the identification parade where O

pointed the accused out was flawed. The identifying witness, Obakeng, was able to see the suspect as they were busy standing in the line. But at that stage, the only identifying witness who was at the police station was Obakeng. No weight can be placed therefore on his evidence of pointing out the appellant. I am satisfied that all the witnesses had sufficient opportunity to identify the appellant on the day of the incident. The first complainant was so sure about his identity so much that the subsequent day she accompanied the police to identify the appellant. When they met him, per chance on the road, she pointed him out. Keitumetse knew the appellant very well. In my view, the state witnesses who identified appellant were

not only honest young children, but also had ample opportunity to observe him on the day of this incident.

10. The next question to be considered is whether appellant should have been convicted of attempted rape on the first count. There is no evidence that he penetrated the complainant on the anus by mistake. It is clear from the evidence that he intended to penetrate her though her anus. Beyond that, he made no other attempt to penetrate her through her vagina. The sexual intercourse in rape consists of the penetration of a female’s sexual organ by that of a male (*S v V* 1960
- (1) SACR 117 (T)) therefore in attempted rape there must be an attempt to penetrate a female’s sexual organ. In casu there was no such attempt. Intercourse with a woman per anum who does not consent constitutes indecent assault (CR Snyman: Criminal Law 4th Ed Page 438; See also *S v M* (2) 1990 (1) SACR 456 (NPD)).
11. The appellant was 17 years old as at the date of his sentence (27 March 2003). When he committed these offences (January – February 1999) he was 13 years old. The trial court misdirected itself when it imposed an effective sentence of 16 years imprisonment on this youngster. It took into account his age when he was sentenced instead of his age when he transgressed. I am inclined to say that a sledge hammer was used.

12. The facts in *S v Theron* 1986 (1) SA 872 (AA) were the following:- At the age of 15 the accused raped a 12 year old girl. He was convicted and sentenced 18 years later i.e. when he was already 33 years old. He was sentenced to six years imprisonment. The court held that “account had to be had not only of the youthfulness of the appellant at the time of the offence but also of the fact of his maturity at the time of sentence -----”

13. In my view, the sentence which was imposed induces

a sense of shock. Rape is a serious offence and it is also prevalent. But mental maturity of the offender goes a long way in determining an appropriate sentence. The appellant was very young when he committed these offences. He was still young when he was sentenced. In the old days, when a cane was still a competent sentence, he would probably have been given four lashes with a light cane for both counts.

14. In the result the following order is made:

(1) Count 1:-

(a) The appeal against both the conviction and sentence

is upheld. The conviction is set aside and replaced by that of indecent assault.

(b) The sentence is set aside and the following substituted therefor:

“Two years imprisonment which is entirely suspended for three years on condition that the accused is not convicted of indecent

assault or assault in respect of which he is sentenced to imprisonment without an option of a fine, committed during the period

of suspension”.

(2) Count 2:-

The appeal against the conviction is dismissed but the appeal against the sentence is upheld. The conviction is confirmed and the sentence is accordingly set aside and substituted with the following:

“Six (6) years imprisonment half of which is suspended for five years on condition that the accused is not convicted of rape committed during the period of suspension”.

SAMKELO GURA

ACTING JUDGE OF THE HIGH COURT

I agree

B.E. NKABINDE

JUDGE OF THE HIGH COURT

Attorneys for the Appellant : M.A. Koena Attorneys

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