

SOUTH AFRICA / JUDGMENT

S v Sindane (CC 166/04) [2008] ZANWHC 34 (12 September 2008) [2008] ZANWHC 34

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

CC 166/04

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IN THE HIGH COURT OF SOUTH
AFRICA
(BOPHUTHATHSWANA PROVINCIAL
DIVISION)
CASE NO: CC 166/04

In the matter between:

REUBEN SINDANE
Applicant
and
THE STATE
Respondent
APPLICATION FOR LEAVE
TO APPEAL
COUNSEL FOR THE
APPLICANT : ADV
ZWIEGELAAR
COUNSEL FOR THE
RESPONDENT : ADV
MOROKA
DATE OF HEARING : 29
AUGUST 2008
DATE OF JUDGMENT : 12
SEPTEMBER 2008

JUDGMENT

HENDRICKS J

[A] Introduction:-

- [1] This is an application for leave to appeal to either the Full Bench of this division or the Supreme Court of Appeal against the conviction of rape and the sentence that was imposed on the Applicant.

[B] Background:-

- [2] The Applicant was convicted in the Regional Court, GaRankuwa of the rape of a girl aged thirteen (13) years. The matter was transferred to the High Court for sentence in terms of section 52 of Act 105 of 1997. The proceedings in the Regional Court was found to be in accordance with justice and the conviction was confirmed. A term of imprisonment of eighteen (18) years was imposed on the Applicant.

[C] Merits and grounds of appeal:-

- [3] It is contented by the Applicant that the learned Magistrate erred by ordering that the complainant testified by means of closed circuit television:-

[i] without enquiring from her whether she is prepared to consent thereto as required in section 158 (2) of the Act and satisfying himself that the requirements of section 158 (3) of the Act had been met by the prosecution;

[ii] failing to appreciate that the requirements set out in section 158 (3)(a) of the Act, namely that it had to appear to the court that the order would “(a) prevent unreasonable delay; (b) save costs; (c) be convenient” had to co-exist with each other as well as with any requirements set out in paragraph (d) or (e) of subsection (3), i.e. “(d) be in the interest of the security of the State or of public safety or in the interest of justice or the public” or “(e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings”;

[iii] failing to appreciate that the words “if it appears to the court” in section 158 (3) of the Act connote a degree of proof not lower than that of proof on a balance of probabilities;

[iv] failing to appreciate that the mere statement of the representative of the State referred to in paragraph 7 (supra) could not be persuasive enough to enable him to make a finding on a balance of probabilities that the requirements of the Act had been met and more particular that the complainant would be exposed to harm or prejudice were she to testify in the normal course as contemplated in section 158 (3)(e) of the Act;

[v] not satisfying himself that the application was not being made on trivial grounds;

[vi] not exercising the discretion giving to him in section 158 in a proper and judicial manner;

and

[vii] failing to ensure a fair and just trial by not imposing conditions as envisaged in section 158 (4) of the Act.

[4] Section 158 (3) gives the court a discretion and the court may make an order in terms of sub-section (2) “on its own initiative or on application by the public prosecutor ...” :... in the interest of justice.”

[5] The prosecutor made the following application:-

“Prosecutor:- Your worship the state applies that the proceedings be dealt with in terms with section 152,2 and section 83 of the criminal procedure act, your worship. That the witness be allowed to testify through a closed circuit television, your worship, as during consultation, your worship, it came out that the court environment is not a familiar place to the witness, your worship as she is 13 years old. And she informs me your worship, that she will be free and comfortable to testify, to give evidence in a separate room from the court, your worship.”

See:- Record page 2 lines 6 -16.

[6] To crown it all, this application was not opposed by Adv Khumalo who appeared for the Applicant during the trial.

See:- Record page 2 lines 19 – 20.

[7] In my view, there is no merit in this ground of appeal.

[8] Furthermore, it is contended that the learned Magistrate erred in failing to warn the complainant in the form prescribed in terms of section 164 (1) of Act 51 of 1977 (the Criminal Procedure Act) after she indicated that she doesn’t know what it means to make an oath.

[9] The learned Magistrate said the following to the complainant:-

“Presiding Officer:- You were called here now to testify about something which happened on the 29th of January this year. You will hear the voice of the prosecutor, who will ask you questions about that day. The court might also ask questions as well as the accused’s advocate. Now when the questions are posed and when you respond, please tell the court what you have observed with your own senses. Do not tell the court what someone has told you to say and if there is anything that you don’t understand, please tell us so that we can help you.”

See:- Record page 3 lines 19 – 30.

[9] It is contended that the learned Magistrate failed to ascertain whether the complainant was able to distinguish between the truth and a lie and whether she appreciated the risks of telling lies and to admonish her in the prescribed form. Because of this failure, so it was submitted, the complainant’s evidence is inadmissible.

- [10] From what the Magistrate told the complainant, it is clear that she was admonished to tell the truth about what she had observed. The fact that the Magistrate did not use the word “admonish” does not mean that the complainant was not asked to inform the court what happened. The Magistrate had a different way of admonishing the complainant by explaining to her that she must tell the court what she observed with her own senses.
- [11] In my view, this ground of appeal too, is without merit.
- [12] It was further submitted that the Magistrate allowed the witnesses Andrew Tshabalala, Refilwe Selekela and Jacqueline Selokela to testify without ensuring that the oath had been administered on them by the interpreter or that the interpreter did so in accordance with section 162 (1) of Act 51 of 1977.
- [13] It is apparent from the record that the Magistrate did ask the interpreter to administer the oath on these witnesses, which the interpreter must have done or else counsel for the Applicant would have objected if it was not done and similarly the Magistrate would have detected if his instruction was not complied with. It defies all logic that the Magistrate would ask that a witness be placed under oath and the oath not being administered or administered properly upon the witness. There is in my view no merit in this ground of appeal.
- [14] The submission that it is highly unlikely that the Applicant would have made the disclosure to Tshabalala that he had sexual intercourse with the complainant is with respect unfounded. The learned Regional Magistrate accepted the version of Tshabalala and there is no valid criticism that can be leveled against it. Looking at all the evidence tendered holistically and upon careful analysis of the judgment of the learned Regional Magistrate I can find no meaningful misdirection being committed.
- [15] In my view, the report made by the complainant to her mother as testified to by her and the evidence of the complainant is also not materially different. I find also nothing strange or sinister in the conduct of the complainant that can be labeled as inconsistent with that of a rape victim as submitted.
- [16] The Regional Magistrate applied the correct test in evaluating the evidence and came to the correct decision. I am of the view that there are no prospects of success on appeal. No other court would come to a different decision than that of the trial court. The application for leave to appeal against the conviction should therefore fail.
- [D] Sentence:-
- [17] It is submitted that the court erred in over-emphasizing the seriousness of the offence and the interest of society at the expense of the personal circumstances of the Applicant.
- [18] I have carefully studied the reasons for imposing the sentence on the Applicant and I could find no misdirection. All the factors relevant to the imposition of a suitable sentence was indeed properly evaluated and taken into account.

[19] I am of the view that no other court would come to a different conclusion with regard to a suitable sentence than what this court had arrived at.

[20] There is therefore no reasonable prospect of success on sentence and the application must be refused.

[E] Order:-

[21] Consequently, I make the following order:-

The application for leave to appeal to the Full Bench of this division or the Supreme Court of Appeal against both conviction and sentence is refused.

R D HENDRICKS

JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPLICANT: HERMAN SCHOLTZ ATTORNEYS

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