

SOUTH AFRICA / JUDGMENT

S v Zondo (CC13/2021) [2024] ZAGPPHC 985 (20 September 2024)

[2024] ZAGPPHC 985**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mosopa

CASE / FILE NUMBER

CC13/2021

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****Case****number: CC13/2021****(1)****REPORTABLE: YES/NO****(2)****OF INTEREST TO OTHER JUDGES: YES/NO****(3)****REVISED: YES/NO****SIGNATURE****DATE:**

20/09/2024

In

the matter between:

THE

STATE

versus

BAFANA

STEPHEN ZONDO

ACCUSED

JUDGMENT

MOSOPA J

1. What is at issue at the current proceeding is the determination of admissibility of the evidence of Professor Labuschagne, a clinical psychologist who testified on behalf of the state, mainly to provide psychological insight into the delayed reporting of the complaints, impact of rape myths and sexual abuse by religious figures. The defence objected to the introduction of this evidence based on irrelevancy and inadmissibility. Further, that the admissibility of such evidence will prejudice the accused.
2. I had an opportunity of listening to submission on behalf of both the state and the defence on whether or not to introduce the evidence of Professor Labuschagne into record and at the end of submissions I made the following ruling;
 - 2.1. The state is allowed to introduce the evidence of Professor Labuschagne, a clinical psychologist, into the record.
3. In addition to the aforesaid ruling, following was said,

“I am therefore of the considered view that such evidence should be introduced by the state. This must not be construed to mean that I accept such evidence as relevant and admissible, but such determination will be made as the trial matter progresses further.”
4. I must pause to mention that at the time of this ruling, the report compiled by Professor Labuschagne had not served before me. I refrained from setting guidelines as I was requested by the state, based on the above.
5. An expert witness is someone with specialized knowledge, skill and expertise in a particular field. They assist the courts on issues which cannot be decided without expert guidance. The witness provides inter alia, valuable insights and analysis to assist the courts in understanding certain scientific, technical or specific subjects (see Schwikkard “Principles of Evidence” in Juta 5th ed (2023) Chapter 8 pg 92). The expert evidence provided must be solid, have a bearing on the case and reconcile with all the evidence of the case, (MR v Road Accident Fund [2020] ZAFSHC 24 at par 17) and be supported by valid reasons depending on the nature of the issues. In providing such expertise and knowledge, the expert must have necessary qualifications, practical and theoretical experience acquired in the field of expertise.
6. The above view found support in Munday v Protea Assurance Co Ltd 1976 (1) SA 565 (E) where the following was stated;

“However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic. The dangers of holding otherwise - of being overawed by a recital of degrees and diplomas - are obvious; the Court has then no way of being satisfied that it is not being blinded by pure 'theory' untested by

knowledge or practice. The expert must either himself have knowledge or experience in the special field on which he testifies (whatever general knowledge he may also have in pure theory) or he must rely on the knowledge or experience of others who themselves are shown to be acceptable experts in that field.”

7. An expert is entitled to rely on evidence that is considered hearsay, however the admission of such evidence must comply with the requirements and conditions that I have listed above. Where evidence is based on both international and local studies, the court in *S v Kimimbi* 1963

- (3) SA 250 (C) stated that;

“It would seem clear that no single individual, even though he had examined hundreds of thousands of fingerprints or palm prints, could from his own observations alone make such a statement with certainty. As is pointed out by Wigmore in his treatise on Evidence, vol. 2 para. 665 (b), the data of every science are enormous in scope and variety. No one professional man can know from personal observations more than a minute fraction of the data which he must every day treat as working truths. Hence a reliance on the reported data of fellow scientists learned by perusing their reports in books and journals. The law must and does accept this kind of knowledge from scientific men. On the one hand, a mere layman who comes to Court and alleges a fact which he has learned only by reading a medical or mathematical book cannot be heard. But on the other hand, to reject a professional physician or mathematician because the fact or some of the facts to which he testifies are known to him only upon the authority of others, would be to ignore the accepted methods of professional work and to insist on impossible standards.

The learned author then goes on to comment on the degree of professional competency required of a witness to give such testimony and refers in particular to three factors;

- a) professional experience giving the witness a knowledge of the trustworthy authorities and the proper sources of information;
- b) an extent of personal observation in the general subject enabling him to estimate the general plausibility, or probability of soundness, of the views expressed; and
- c) the impossibility of obtaining information on the particular technical data except through reputed data in part or entirely.”

8. In *S v Molimi* [2008] ZACC 2; 2008

- (3) SA 608 (CC), Nkabinde J when dealing with the right to a fair trial stated that;

“The right to a fair trial... it has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those

distressed by the audacity and horror of crime'. It is not open to question that a ruling on the admissibility of evidence after the accused has testified is likely to have an adverse effect on the accused's right to a fair trial. It may also have a chilling effect on the public discourse in respect of critical issues regarding criminal proceedings. More importantly, proceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy.”

9. The admissibility of hearsay evidence is dealt with by section 3(1) of the Law of Evidence Amendment Act (Hearsay Act). It is trite that where the state has led hearsay evidence as was demonstrated in the authorities and international journals that Professor Labuschagne relied on when compiling his report it is important for the for the court to pronounce on the admissibility of such hearsay evidence before the close of the state’s case. The import is to avoid the risk of ambush to the accused late in the proceedings about the said hearsay evidence. The accused must know the case before he decides to take to the stand or close his case, at the end of the state’s case. (S v Ndhlovu is instructive on this aspect).
10. After I allowed the state to lead the evidence of the Professor, Mr Pistorius on behalf of the accused objected on a number of occasions on a leading of particular evidence mainly based on foreign research and literature. I made several rulings relating to such objection which I will later in this judgment deal with.

11. In S v Van der Walt 2020

- (2) SACR 371 (CC), the following was stated;

“Firstly, that he can, by reason of his own training, affirm (at least in principle) the correctness of the statements in that book; and, secondly, that the work to which he refers is reliable in the sense that it has been written by a person of established reputation or proved experience in that field.”

12. It is plain from evidence that the majority of the complainants in casu, reported the rape allegations against them very late. The complainant mentioned in count 1, alleges that the rape incidents took place during the 1980’s when she was still a young child.
13. The complainants were cross-examined at length by Mr Pistorius on their late reporting of rape allegations against them and I consider that this prompted the state to source the expert testimony of Professor Labuschagne.
14. The legislation deemed it fit to deal with this topic of delay in reporting of sexual offences matters and enacted the Criminal Law (Sexual offences and Related Matters) Amendment Act (“Sexual Offences Act”). Sexual offences Act 32 of 2007, provides the following;

“[59] In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.”

15. From the above, it is plain that it is not fatal to the State's case for the complainants in the alleged sexual offence matter, to delay reporting their complaints. A period of time which lapsed between the commission of an alleged offence and reporting of such an offence is no longer a consideration.
16. Section 210 of Act 51 of 1977 is instructive and makes the following provision;
"[210] No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings."
17. The relevance of an item of evidence refers to logical tendency to show or indicate the material fact for which the evidence is offered.
18. In evidence Mr Pistorius objected to reference to European countries, United States and Ghana on the basis of irrelevancy and that references to such countries be structured off the report. It is after this objection was raised that the state conceded that they will only rely on South African references. Mr Pistorius also objected on questions raised by the State to Professor Labuschagne on the basis that they are meant to usurp the court duties. Mr Pretorius also objected on what he called "generalized typical references" as it amounts to generalized speculation which is inadmissible.
19. I allowed the state to lead evidence on the topic and Professor Labuschagne testified that it is his experience of having worked with rape victims and it is also supported in other literature. It must be noted, specifically for the reason that the report served before me when the Professor was testifying, indicated to the parties that I will be making rulings if objections are raised on other parts of the report.
20. It appears that as a result of this ruling, that parties were confused as to what the exact ruling which was made by court. Ms Cronje on behalf of the state made a submission that the rulings that I made are interlocutory in nature and the court is entitled to revisit such rulings that I had earlier made. It was Ms Cronje's contention that in compiling his report, Professor Labuschagne referred to international authorities and some of the authors he had an experience working with them and he is locally and internationally
trained. He is a Clinical Psychologist and a Criminologist. Ms Cronje further contended that Professor Labuschagne cannot be limited to South African books or publication regarding his evidence.
21. From this, it became plain that Ms Cronje was now abandoning a concession she earlier made of limiting Professor Labuschagne to South African authorities. Mr Pistorius on record said he was going to object to every line on the report read on record. I then afforded the parties another opportunity to address me on the use of foreign literature by Professor Labuschagne and after such submissions, I allowed the state to lead such evidence based on what was decided in Munday and Van Der Walt.

22. It was then the testimony of Professor Labuschagne that when dealing with this case he used his personal experience and looked at the research that is out there. He has many years of working with the victims of rape and gathered reasons for delaying rape incidents and not reporting at all. He started working with rape victims when he was in the police attached to violent and sexual crimes cases. Prior to that, he was employed at Weskoppies as a Psychologist and will have patients admitted with history of being sexually violated.
23. The references that he quoted, he agrees with them and they are sourced from University library website for academic online journals. He knows some of the authors he referred, and their work has been peer-reviewed. Meaning that the author will present the article to the editorial board, without disclosing his or her name, and the article will be independently assessed whether it meets the professional standards of the journal. From his experience he can say that the references are reliable. He also listed the authorities that he co-authored. He also sits on both local and international editorial boards. He sits on the editorial board by the International Journal Investigative Psychology and offender profiling.
24. Professor Labuschagne confirmed that he did not make any credibility finding on what the complainants told him after he interviewed them, and he did not believe that they were telling him the truth. When Professor Labuschagne dealt with the heading in this report “Analysis of each complainants case” no objection was raised, safe to state that the witness was cross-examined at length pertaining to that heading.
25. At the end of Professor Labuschagne evidence in chief “Exhibit FF3” was introduced into record. I must pause to mention that it was not a new exhibit which was introduced, but what was contained in “Exhibit FF2” being the list of references. The only distinct feature plain in “Exhibit FF3” was the fact that Professor Labuschagne mentions Q-Factor and the ratings.
26. In cross-examination Professor Labuschagne listed a number of cases both in the Regional Courts and High Courts in which he testified at the instance of the defence. He also testified as being a witness in the Pretoria-North Regional Court testifying about rape myths. Professor Labuschagne testified that he did not do the psychological assessment and Psychometric testing of the complainants.
27. Professor Labuschagne was criticized of being partisan and one sided as he relied only on what the state’s case is and did not consider the accused testimony as he has not yet testified. It must be noted that that Professor Labuschagne was extensively cross-examined by the defence.
28. It is reiterated hereinunder that opinion drawn by an expert witness do not replace the task of the court to determine issues in dispute. Professor Labuschagne was cross-examined on certain parts of his report that the state conceded that they must be excluded. The state also conceded that statistics ought to be excluded, but Professor Labuschagne was cross-examination on the topic.

29. It must be noted that the probative value of the expert witness or its cogency do not play any role in the determination of the admissibility of the hearsay evidence of the expert witness, an aspect that can be determined at the end, when evidence is assessed and evaluated in totality.
30. Section 35(3) of the Constitution safeguards the accused right to a fair trial. If I find that the accused will be prejudiced by the admission of such evidence then such should be rendered inadmissible, at this stage I cannot ponder how the accused will be prejudiced by the hearsay admission of the expert testimony.
31. Following Kimimbi it is clear that an expert can rely on evidence that is considered hearsay, but subject to requirements listed above. Kimimbi is also instructive on the reliance of an expert on local and international studies and stated that; “but on the other hand, to reject a professional physician or mathematician because the fact or some of the facts to which he testifies are known to him only upon the authority of others, would be to ignore the accepted methods of professional work and to insist on impossible standards.”
32. The professor was cross-examined at length with regard to references that he relied on. Mr Pistorius also indicating to him that he read several references he referred to, indicating the Japanese author Yamawaki which the state conceded that such reference should be excluded, it is therefore my considered view that the hearsay evidence of Professor Labuschagne be ruled admissible as it falls within the requirement set out in Munday and Van der Walt, such reliance of hearsay evidence is relevant to the facts in dispute.
33. It is the evidence of Professor Labuschagne that the literature he relied on underwent peer review. It is this trite that an expert witness can rely on literature review to support his or her testimony. Literature is often if not mostly a vital component of an expert opinion because it demonstrates the expert’s knowledge and expertise based on established research. However, the expert witness must ascertain and confirm its correctness, which Professor Labuschagne testified that he went through that exercise. The expert is there to assist the courts and must be neutral.
34. His evidence is of little value where he or she is partisan and consistently assets the cause of the party who calls him. Professor Labuschagne denied that he is partisan and said in many ways that he did not mean to believe what the complainants told him to be the truth. The fact that he did not consider the evidence of the accused, to me does not mean that he is a partisan witness. As I have already alluded to elsewhere in this judgment that the accused is entitled to know what type of case he must answer to before he elects to testify or close his case, this determination is made before the accused testifies. I therefore find this contention to lack merit.
35. Mr Pistorius contended that the complainants were not made available by the state to be assessed by the expert appointed by the accused and this aspect had the element of prejudicing the accused, Ms Cronje contended that the defence was requested to make a formal application for such, which the defence refused or fail to do. This aspect was only

brought to my attention now during argument and it is little that the court can do now to assist the defence. If this aspect should have timeously be brought to my attention, taking into account that the defence knew early in the commencement of the trial that the state intends leading evidence of an expert witness and also the fact that already they where furnished with the report and raised certain concerns about that, I should have most definitely intervened and made a specific order.

ORDER

In the result, the following order is made;

1. The hearsay evidence of Professor Labuschagne is found to be admissible and it is admitted into the record on the basis of relevancy.

MJ MOSOPA

JUDGE OF THE HIGH COURT,

PRETORIA

APPEARANCES:

FOR THE STATE: ADVOCATE CRONJE AND ADVOCATE HARMZEN INSTRUCTED BY: DIRECTOR
OF PUBLIC PROSECUTION FOR THE ACCUSED: ADVOCATE PISTORIUS SC INSTRUCTED BY:
RAHLAGANE ATTORNEYS

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