REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Date: 2011-07-29

Case Number: A754/2009

In the matter between:

JACKSON SONDI MOLOKOMME Appellant

and

THE STATE Respondent

JUDGMENT

SOUTHWOOD J

[1] The appellant appeals against his convictions of rape and indecent assault and his sentence of 21 years imprisonment. (The two offences were taken together for purposes of sentence).

[2] On 18 October 2004 the appellant was convicted in the Pretoria Regional Court of rape and indecent assault. Acting in terms of section 52(1)(b) of the Criminal Law Amendment Act 105 of 1997 the regional court referred the appellant to the High Court for sentence. On 2 August 2005 the Pretoria High Court (per Els J) confirmed the convictions and sentenced the appellant to 21 years imprisonment for both offences, taking them together for purposes of sentence. After unsuccessfully applying for leave to appeal against the convictions and sentence on 25 April 2007 the appellant petitioned the Supreme Court of Appeal for leave to appeal and on 5 September 2008 the Supreme Court of Appeal granted the appellant leave to appeal to the full court of this division.

[3] The charge sheet alleged that during or about 2002 and at Pretoria the appellant raped PM (12 years) by having sexual intercourse with her without her consent and that during or about 2002 and at Pretoria the appellant indecently assaulted PM (12 years) by touching her breasts and genitals. The charge sheet did not provide any other details of the crimes. As will appear later the allegations regarding the indecent assault are of particular importance.

[4] The appellant is the complainant's biological father. At the time of the alleged offences the appellant and his wife, Diane Molokomme, and their four children (including the complainant, then 12 years old and PM, then 10 years old) lived together in a two room dwelling in

Mandela Village on the outskirts of Pretoria. The complainant testified that one night, during August 2002, when Diane Molokomme, her biological mother, was attending a funeral in Polokwane, the appellant came home drunk and after beating her with a metal studded belt, forced her to sleep on the bed with him and raped her and that on an undetermined date thereafter, he playfully touched her buttocks. There was no evidence at all to support the allegations in the charge sheet that the appellant had touched the complainant's breasts and genitals and there is no explanation for these allegations in the charge sheet. When the appellant testified he persisted in the contention which he advanced throughout the trial, namely, that he had done nothing to the complainant and that he was the victim of a conspiracy.

[5] Sexual offences present a number of problems not the least of which is that allegations of sexual misconduct are easy to make and difficult to refute. Accordingly it is essential that the facts be carefully investigated before a finding is made that the accused is guilty. In ***S v Vilakazi*** **2009 (1) SACR 552 (SCA)** para 21 the court emphasised the care that must be taken:

'The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is

in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important. From those who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound.'

[6] This case is no different with the added difficulty for the presiding officer that the appellant was an undefended accused who despite repeated warnings by the regional magistrate insisted on conducting his own case. With regard to youthful witnesses in ***Woji v Santam Insurance Co Ltd*** **1981 (1) SA 1020 (A)** at 1028A-D the court said that a court must be satisfied that the young witness' evidence is trustworthy and this depends upon a number of factors which require careful consideration by the court. With regard to the undefended witness it is clear that the presiding officer must assist an undefended accused in the presentation of his case to ensure that the accused receives a fair trial. In ***S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO*** **1989 (3) SA 368 (E)** at 377D-379C the court dealt extensively with what is required from the presiding officer. Of particular importance in the present case are the following:

(1) 'At all stages of a criminal trial the presiding judicial officer acts as the guide of the undefended accused. The judicial officer is obliged to inform the accused of his basic procedural rights – the right to cross-examine, the right to testify, the right to call

witnesses, the right to address the court both on the merits and in respect of sentence – and in comprehensible language to explain to him the purpose and significance of his rights' (378A-B);

(2) 'During the State case a presiding judicial officer is at times obliged to assist a floundering undefended accused in his defence. Where an undefended accused experiences difficulty in cross-examination the presiding judicial officer is required to assist him in (a) formulating his questions; (b) clarifying the issues and (c) properly putting his defence to the State witnesses' (378C-D);

(3) 'Where, through ignorance or incompetence, an undefended accused fails to cross-examine a State witness on a material issue, the presiding judicial officer should question – not cross-examine – the witness on the issue so as to reduce the risk of a possible failure of justice' (378E-F);

(4) 'The judicial officer should assist an undefended accused whenever he needs assistance in the presentation of his case' (378J);

(5) '… the presiding judicial officer in the trial of an undefended accused is required to take a more active part than a judicial

officer is permitted in the orthodox accusatorial system, thereby, in some measure, redressing the disadvantage the undefended accused may suffer from the lack of legal representation. The value to an undefended accused of, and the benefit he derives from, judicial assistance emphasises the importance of an unfaltering judicial observance of the rules of practice intended for the protection of the undefended accused, but in no way minimises the importance of legal representation' (379A-C).

[7] In this case, as in all criminal cases, the proper application of the onus is of crucial importance. In ***S v Shackell*** **2001 (2) SACR 185 (SCA)** para 30 the court dealt with the onus in criminal proceedings as follows:

'It is trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.'

[8] In ***S v Van Aswegen* 2001 (2) SACR 97 (SCA)** para 8 the court emphasised the necessity for a court hearing a criminal case to take all the evidence into account. The court referred with approval to the following passage from ***S v Van der Meyden* 1999 (1) SACR 447 (W)** at 450a:

'It is difficult to see how a defence can possibly be true if at the same time the state's case with which it is irreconcilable is "completely acceptable and unshaken". The passage seems to suggest that the evidence is to be separated into compartments, and the "defence case" examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence …

I am not sure that elaboration upon a well-established test is necessarily helpful. On the contrary, it might at times contribute to confusion by diverting the focus of the test. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be

unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[9] It is of particular importance in this case that the complainant was a single witness and that in order to convict on her evidence the court had to be satisfied that the truth had been told. In ***S v Sauls and Others*** **1981 (3) SA 172 (A)** at 180E-H the court said:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness (see the remarks of Rumpff JA in ***S v Webber*** **1971 (3) SA 754 (A)** at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 may be a guide to a right decision but it does not mean

"that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded"

(per Schreiner JA in ***R v Nhlapo*** (AD 10 November 1952) quoted in ***R v Bellingham*** **1955 (2) SA 566 (A)** at 569). It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[10] It is clear that the appeal against the conviction of indecent assault must succeed. There is no evidence at all to support the allegation in the charge sheet that (on a different occasion from the rape) the appellant touched the complainant's breasts and genitals. The complainant testified only that on an unspecified date after the alleged

rape, the appellant approached her while she was washing dishes and playfully touched her on the buttocks. When he did this the appellant did not say anything so it is impossible to find that he had an indecent intention. Objectively it cannot be said that this was an indecent act. In any event there must be doubt about whether this is what happened. It obviously was not what the complainant reported to the SAPS because that is not what the prosecutor alleged in the charge sheet.

[11] As far as the rape is concerned the principal issue to be decided by the court in the light of all the evidence was whether the complainant was trustworthy and whether the truth had been told. For the reasons which follow I am of the view that the regional court should not have accepted the complainant's evidence as trustworthy and rejected the appellant's version. (I did not understand the respondent's representative to dispute this).

(1) There was a glaring contradiction between the case alleged in the charge sheet and the evidence given by the complainant. The charge sheet alleged that the appellant indecently assaulted the complainant by touching her breasts and genitals. This is obviously what the complainant told the SAPS who must have recorded this in the statement given to the prosecutor. The allegation that the appellant approached her while she was washing the dishes and playfully touched her buttocks was clearly not conveyed to the SAPS and the prosecutor and is

clearly an afterthought. These discrepancies should have been investigated by the regional magistrate and given the most careful consideration in relation to the complainant's credibility. Unfortunately this did not happen. In my view the discrepancies seriously detract from the complainant's credibility.

(2) The complainant did not report the alleged rape at the earliest opportunity. It is trite that in the case of a sexual offence evidence is admissible to prove that the victim of the crime made a complaint to the first person to whom he or she could reasonably have complained – see **Hiemstra's *Criminal Procedure*** 24-18; ***R v Kgaladi* 1943 AD 255** at 261 and ***R v Lillyman* [1896] 2 QB 167.** Hiemstra lists among the requirements for admissibility of such a complaint:

(a) The complaint must have been made at the first possible opportunity although the court may take all the circumstances into account. When there has been a delay, but an explanation is given, evidence of the complaint can nevertheless be allowed.

(b) The complaint must be directed at a person to whom the complainant would naturally complain, such as the mother or another family member. While this depends on

who is available, the complaint must take place at the first reasonable opportunity.

(c) The complaint must be made freely. It cannot be admitted if it was elicited by questions of a leading or intimidating nature.

The complainant cannot even remember who she first complained to. According to her mother, Diane Molokomme, when she (Diane) returned from Polokwane, the complainant complained to her that the appellant had beaten her with a metal studded belt. She did not mention a sexual assault. Diane Molokomme also testified that the complainant told her about the rape only after she had been questioned by her aunt, Matlodi Madiseng. To add to the confusion, Matlodi Madiseng testified that Diane Molokomme told her that the complainant had told her (Diane) that the appellant had raped her and it took some persuasion before the complainant would speak to her. It is therefore clear that there was no admissible evidence of a first complaint. This also seriously affects the complainant's credibility.

(3) The complainant admitted at a meeting with members of the community that the appellant had done nothing to her and that her mother and aunt had forced her to say that he had. This evidence, which is not in dispute, supports the appellant's

defence and at the very least provides a basis for finding that the appellant's defence is reasonably possibly true. This evidence had to be satisfactorily explained by the state otherwise there could not be a conviction. Yet when the complainant testified she was not asked to explain why she had made these statements. Diane Molokomme's evidence that the complainant is so afraid of the appellant that she would not tell the truth in his presence and that the complainant is afraid of him because when he raped her he threatened to kill her if she told anyone is clearly hearsay and inadmissible. In the absence of cross-examination by the appellant the regional magistrate was obliged to investigate the circumstances in which the complainant made the statements to establish whether she had intended to make them (i.e. that they were true) or had been frightened into making them (i.e. that they were untrue). Diane Molokomme's evidence about the threat is not convincing, coming as it does only after the appellant had elicited the evidence from her and seems to be an afterthought.

(4) The complainant's evidence about the alleged rape is unconvincing. According to the complainant the appellant came home drunk and forced her to sleep on the bed with him. Initially, when she refused to sleep on the bed, the appellant beat her with a metal studded belt. When she complied the appellant lay on the bed next to her. After a long while he took

off her clothes, opened her thighs and raped her. According to the complainant he simply inserted his penis into her vagina and then quickly withdrew it. That is all he did. She gave no further description of the incident. She said the appellant never repeated this. The evidence is improbable for a number of reasons. The complainant also contradicted herself about how long this penetration persisted. At first she said he withdrew his penis immediately and later she said penetration took place for a short while without saying what this meant. It is also contradicted by other evidence. The beating with the belt, which is common cause, took place because the appellant said the complainant had taken his R5 not because he was trying to get her to sleep on the bed with him.

(5) P M, who slept in the same room on the night of the alleged incident, saw and heard nothing to indicate that the appellant raped the complainant. She saw the appellant beat the complainant because he said she had taken his R5 but she simply went to sleep after this without noticing anything untoward. It is beyond belief that she would simply go to sleep if the appellant was using force to get the complainant to sleep on the bed with him.

(6) The medical evidence of Dr. Madiba is, at best for the state, neutral. Dr. Madiba found no injuries and merely reported that

the complainant's hymen was torn and on examination could easily admit one finger. She did not find that this was the result of sexual intercourse although it was consistent therewith. It is important however that Dr. Madiba expressed the view that there had been penetration on more than one occasion. This means that if the hymen was torn by sexual intercourse this took place on more than one occasion and obviously with a third party. This gives rise to the real possibility that the complainant's hymen was torn by having sexual intercourse with someone other than the appellant. Finally it must be noted that the state did not question Dr. Madiba about when the hymen was torn. It would have been expected that the state would have been anxious to establish that the injury was recent and could have been caused during August 2002.

(7) The evidence of Diane Molokomme and Matlodi Madiseng was unsatisfactory. They were called to prove the first report made by the complainant. According to Diane Molokomme, when she returned from Polokwane the complainant told her that the appellant had beaten her with a belt and later she told her (Diane) that the appellant had touched her buttocks. The complainant did not tell her about the rape. She only heard about that after the complainant had told Matlodi Madiseng everything. This evidence is contradicted by Matlodi Madiseng who testified that Diane Molokomme told her that the

complainant had reported to her (Diane) that in the middle of the night the appellant wanted the complainant to go and sleep with him on the bed and that when she refused the appellant beat her until she got onto the bed. Armed with this information Matlodi Madiseng confronted the complainant who initially did not want to say anything but then told her that she had slept with her father and that he had touched her buttocks. None of this was further explained. The contradictions on the crucial issue are a great concern and are an additional reason to question the reliability of the state's evidence. It is also significant that the two witnesses embellished their evidence as it progressed. For example, according to Diane Molokomme, the first doctor they took the complainant to said she had been raped. Despite this evidence the doctor was not called and it remains hearsay and it is significant that it is not supported by Dr. Madiba's evidence.

(8) The appellant's evidence did not assist the state. He was a poor witness but he did not deviate from his version other than to add to the number of conspirators. Nevertheless whatever he said did not justify a finding that he was guilty of the rape.

[12] It is a matter of great concern that this appeal has taken three years to be heard. (This is the first occasion on which the appeal has been enrolled.) We were informed from the Bar that appeals are enrolled by the Director of Public Prosecutions and that the record of the appeal

was filed in September 2009. Obviously the appellant has been prejudiced by the delay and the cause of the delay should be investigated by the Director of Public Prosecutions to ensure that this does not occur again.

[13] I make the following order:

I The appeal is upheld and the convictions and sentence are set aside.

II The Director of Public Prosecutions is requested to investigate the delay in the hearing of this appeal in the light of the comments in paragraph [12] of this judgment.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

G. WEBSTER
JUDGE OF THE HIGH COURT

I agree

P.C. VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

CASE NO: A754/2009

HEARD ON: 25 July 2011

FOR THE APPELLANT: Mr. P.M. Mositsa

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. P. VORSTER

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 29 July 2011