

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 562/2013

In the matter between:

MUSA NGOBESE Appellant

And

THE STATE Respondent

JUDGMENT

NTSHANGASE J

[1] The appellant was convicted of rape and sentenced to imprisonment for twenty years. The trial court granted him leave to appeal against conviction.

[2] The conviction is assailed on the grounds that -

2.1 it followed upon a failed analysis of the testimony of the complainant, a child and a single witness;

- 2.2 the complainant failed to report at once on the first occasion which presented itself after the incident to S..... who, she said, is her 'uncle's daughter;
- 2.3 the complainant's statement to the Police was in some respects at variance with her testimony in court in that the complainant said more in her evidence than she did in her statement to the Police;
- 2.4 the version of the appellant was reasonably possibly true and should have evoked a reasonable doubt.

[3] The trial magistrate appears to have been alive to the gullibility of young children and their susceptibility to influence. In that regard his judgment reads:

'It happens that young children can be influenced to fabricate evidence against a person and evidence of sexual matters are difficult to rebut.'

[4] The Magistrate's judgment records the court's appreciation of the need *'to determine whether there was any danger of these persons – M....., S..... and L..... giving false evidence about this matter.'* The judgment further records *that '(t)he court anxiously scrutinised the evidence of the complainant to establish whether there was any possibility of her being untruthful.'* In my view the Magistrate proceeded cautiously in his evaluation of the evidence and in assessing the credibility of the complainant and other witnesses. Criticism of his conclusions on the facts as being a product of a failed analysis of the testimony of the complainant is without merit.

[5] The second point of criticism of the conviction questions why the complainant had not reported her odious experience on the first opportunity which presented itself and it impugns the court's failure to accord due consideration to the complainant's failure in that regard.

[6] When she reached home after the incident she found her aunt but did not at once report to her. On this aspect the Magistrate specifically questioned the complainant as to why she had not at once reported to anyone about the appellant. It appears that the Magistrate found the complainant's following explanations to be efficient answers:

'Because I was shocked and my aunt was saddened.'

She also said –

'Because she had just lost her child and she was grieving for the child.'

For not reporting to S..... she explained as follows:

'(T)he reason I did not tell S..... soon after the incident is because the child that had passed away is S.....'s brother, so she was also sad about the passing away of her brother.'

[7] L..... N..... told the court that the complainant had worked in the appellant's tuck shop at the request of the appellant. This was on the day of the alleged rape. At midday he went to the appellant's house to call her. When she emerged from the appellant's house he saw her wiping off tears. This dispatched a report of a preceding saddening event. This lends support to the complainant's evidence that while in his room the appellant had engaged in sexual intercourse with her without her consent. It appears that she was traumatised.

[8] The essence of the criticism on variance between the complainant's statement to the Police and her evidence in court finds the following answer in the Magistrate's judgment:

'It is a well known fact that witnesses do not always give evidence entirely consistent with the contents of statements recorded by some officer in limited time, and that not all the complainant's evidence in court is recorded on such statements.'

[9] In regard to the variance between a witness's evidence in court and his or her statement made to the Police, the court in *S v Xaba* 1983(3) SA 717(A) at 730B - C said the following:

'.. Police statements are, as a matter of common experience, frequently not taken with the degree of care, accuracy and completeness which is desirable.'

[10] In *S v Bruiners en 'n Ander* 1998(2) SACR 432 (SE) at 437h – i the court said the following:

'Ek is van mening dat ten einde 'n Staatsgetuie te diskrediteer sover dit sy getuieverklaring betref, dit steeds 'n vereiste is dat daar 'n wesenlike afwyking deur die getuieverklaring moet wees alvorens 'n negatiewe afleiding gemaak kan word.'

In the same passage the court states that the statement of a witness to the Police is not a precursor to that witness's evidence in court. In what follows the court stated the obvious:

'Dit is vergesog om van 'n getuie te verwag om in sy getuieverklaring reeds presies dieselfde weergawe te verskaf as wat hy in die ope hof gaan getuig.'

[11] A reading of the record of proceedings in this matter yields support for the Magistrate's conclusion that there were no material discrepancies in the evidence of the complainant. The court made credibility findings in which it described the complainant's version as *'trustworthy and reliable.'* The court also found that *'(S.....s) demeanour enhanced her credibility.'* Conversely the court found that *'(t)he (appellant) exposed himself to the court as an untruthful, unimpressive witness.'*

[12] In the normal course the appellant in a criminal appeal has to satisfy the appellate court that the verdict was wrong. Where there has been no misdirection by the trial court the presumption is that its conclusion is correct (See *S v Dhlumayo* 1948(2) SA 677 at 706). The trial court's conclusion was, in the present matter, in my view, correct.

[13] I make the following order:

The appeal against conviction is dismissed.

NTSHANGASE J

I agree.

K PILLAY J

DATE OF HEARING: 6 November 2014
DATE OF JUDGMENT: 3 February 2015
FOR THE APPELLANT: Z Anastasiou instructed by Legal Aid SA.
FOR THE RESPONDENT: N Ranbali instructed by The Director of
Public Prosecutions for KwaZulu-Natal.