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

CASE NO: AR531/14

In the matter between:

BONGANI THULANI MPONTSHANE **APPELLANT**
Vs

THE STATE **RESPONDENT**

ORDER

The following order is granted:

1. The appeal against conviction and sentence to life imprisonment on counts one and two of rape is upheld.

2. The order of the trial court on these counts is substituted as follows:

'The accused is acquitted of the charges in counts one and two.'

JUDGMENT

D. Pillay J (A.N Jappie JP et T.S.I Mthembu AJ concurring)

1. The appellant was convicted on two counts of rape and one count of theft in the Regional Court. He was sentenced to life imprisonment on each count of rape and to a term of four years imprisonment for housebreaking with

intention to steal and theft. This appeal against the convictions and sentences on the rape counts proceeds with the leave of the trial court.

2. The state's case was that in the early hours of 13 October 2001 the appellant broke into the home of the complainants. He raped the first complainant who when she was testifying almost three years later was thirteen years and in grade eight, and the second complainant who was eleven years and in grade six. The appeal against conviction proceeds on three grounds.

3. Firstly, the trial court did not ascertain that the child complainants understood the difference between truth and falsehood; it did not administer the oath and warn the complainants properly. What did the trial court actually do?

4. In respect of both children the magistrate enquired whether they knew and understood the importance of taking the oath. He ascertained that they understood the difference between truth and lies. They said that they would get into trouble or be punished if they lied. In the case of the first complainant she understood the nature and importance of the oath. The second complainant understood the nature and importance of the oath. He then administered the oath to the first complainant and admonished the second complainant.

5. In the circumstances I find that the trial court satisfied itself that the complainants were able to distinguish between truth and falsehood. Accordingly it found both complainants to be competent witnesses. The approach that the trial court adopted in testing the competency of the child witnesses is unassailable.[1] This ground of appeal must fail.

[1] *Du Toit The Criminal Procedure Act Service 46*, 2011 23-24, 23-25; ss 192 and 193 of *The Criminal Procedure Act 51 of 1977.*

6. Secondly, the appellant contended that the trial court failed to warn itself sufficiently or at all to exercise caution when dealing with the evidence of young children especially when identification was at issue. The appellant challenged the complainants' identification of him as the perpetrator.

7. The state's case was that the complainants were able to identify the appellant when the electric light was switched on albeit briefly, and in the light of a candle. There was also light from the street. The state witnesses knew the appellant.

8. The first complainant testified in chief that she knew that the appellant lived a kilometre away from her home. She had a long opportunity to look at him before he attacked her. She tried to recall who he was. She recognised him by his bloodshot eyes and big cheeks. The top of his head pointed up. She was adamant that the appellant was her assailant. She did not shout out his name whilst he was attacking her because she was afraid that he would realise that she recognised him and would stab her. When she reported the rape to her mother the latter enquired whether that 'Bongani' was the appellant and she replied 'yes.'

9. Under cross-examination she conceded that she did not inform the police who her assailant was. She merely described his facial features and what he was wearing. Although she alleged that she knew the identity of her assailant she did not disclose this to the police apparently because they did not ask her. Later she said that she forgot to tell the police and remembered only on her way back from the police station. She recalled his name later when she returned home. Further into the cross-examination she said that she did not know her assailant but it was not the first time that she had seen him. She also recognised him by his voice. When she telephoned her mother who was still in Johannesburg that morning she informed her that she did not know the person who had raped her. It was only after her mother who had returned from Johannesburg had asked her whether it was 'Bongani' that she named the appellant as her assailant. It took all of two days for her to recall that it was the appellant.

10. She knew the appellant for about five years. She also knew his other name which was Thulani. It emerged for the first time towards the end of her cross-examination that she had suggested to the second complainant that it was Thulani but the latter had insisted that it was Bongani. Eventually she conceded that she did not know her assailant and that she was certain that it was the appellant only after the t-shirt was recovered from him.

11. The second complainant did not identify her assailant to the police because she alleged they did not ask her to do so. She repeated this evidence thrice under cross-examination. When she was confronted with an extract from her statement to the police that she 'did not see that person because he was wearing a Khopha hat and it was dark' she conceded that she had not seen him. She conceded that she told the police that she did not know her assailant and could not identify him. It emerged under further cross-examination that it was her mother who had asked her whether it was not the appellant and she replied that it may be him. She also conceded that the only reason she implicated the appellant was because one of the boys had said that he thought that he had recognised the appellant's voice. In a further statement she made six months later she still referred to her assailant as 'the suspect' implying that she did not know his identity.

12. Mr H a relative of the complainants was also uncertain of the identity of the assailant even though he saw him briefly when he switched on the electric light. Hence he did not tell the police that it was the appellant. It was much later that he realised that it was the appellant.

13. According to the statement of Inspector Mngomezulu Mr H had informed him early in the morning following the incident that they had been attacked by an

'unknown male', that he would be able to identify the suspect if he saw him again but that he had seen the suspect for the first time.

14. According to Inspector Mngomezulu's statement the first complainant made the following statement to him: 'an unknown male went back to my sister. I can see that man if I came across him, he covered his face with a woollen hat.'

15. The first complainant also contradicted the evidence of Inspector Mngomezulu who testified that he arrived at the home of the complainant to deliver Mrs K's goods. Mr H had informed him that the complainants had been raped. The first complainant denied any knowledge of Inspector Mngomezulu arriving at their home. Her evidence was that she met the police on the way to the police station.

16. Inspector Mngomezulu was conscientious and attentive to the needs of the complainants having escorted them to the police station and to the hospital and by securing them with their neighbour until their mother, Mrs K returned. He was a policeman of 16 years' experience. He was unlikely to have taken their statements incorrectly or haphazardly, especially as regards the identity of the assailant.

17. Against this evidence I find that the evidence of the complainants of the identification of the appellant is fraught with contradictions and inconsistencies. On its own it cannot be relied on. Does the appellant's admission in terms of s 220 of the Criminal Procedure Act, 1977 that the t-shirt was found in his possession bolster the state case?

18. The third ground of appeal was that the state failed to prove recent possession by the appellant of the t-shirt and radio belonging to the

complainants. The state failed to prove when the complainants last had the t-shirt. The appellant contended that he had received it from V M, his cousin.

19. V M who testified for the state could also not say when he received the radio from the appellant. As for the t-shirt he denied giving it to the appellant. He saw the accused wearing it on a date he could not recall but it was when the police arrived in search of the appellant at a family function. The appellant went to the toilet when the police arrived. When he returned from the toilet he informed Mr M that he was scared that the police would recognise the t-shirt. Mr M evidence also does not support the trial court's finding of recent possession.

20. The investigating officer Inspector Shandu set out to arrest the appellant on the same day that the incident occurred. It was then that he recovered the t-shirt from the appellant and the radio from Mr Mpontshane. However, the charge sheet erroneously reflects the appellant's date of arrest as 10 October 2001 when the offence was committed on 13 October 2001. His first appearance is recorded as 3 October 2002 almost a year later. Seemingly he was arrested a year later. It is not clear therefore when the police arrested the appellant and retrieved the complainants' property. More significantly, the state failed to prove beyond a reasonable doubt when and how the appellant came to be in possession of the complainants' property.

21. If this finding implicates his conviction on the third count of housebreaking with intent to steal and theft it cannot be dealt with in this judgment because that conviction is not before us on appeal. Nor did the appellant petition against the refusal of leave to appeal on that count.

22. The appellant was not a credible witness. For instance, he instructed his counsel to challenge the police witness's evidence that he was hiding under

the bed when they found him. His counsel put to the police witness that he was behind the door. The prosecutor did not clarify in cross-examination what he was doing behind the door. But the appellant contradicted himself later. He testified that his back was under the bed when the police found him. He had forgotten that he had put to the police witness about a year before when the trial commenced that the police found him behind the door and not under the bed.

23. This supports the state's evidence per Mr Mpontshane and Inspector Shandu that the appellant was hiding from the police. However the fact that the appellant behaved suspiciously by avoiding the police is not an indication on its own that he had a guilty mind because he raped the complainants. The fact that the complainant's t-shirt was found in his possession also does not go to proving his guilt on the rape counts because the state failed to prove when and how he came to possess it.

24. Although the appellant was not a credible witness, he bore no onus of proving his innocence. The state failed to discharge its burden of proving the identity of the assailant beyond reasonable doubt. The appellant's admission that he had the t-shirt also did not assist the state in discharging its onus. Conflating the appellant's possession of the t-shirt and the radio as confirmation of his identity was a misdirection. So was the failure to apply the cautionary rule in assessing the evidence of the children. However, these findings do not go so far as to say that the appellant did not rape the complainants; it merely concludes that the state failed to discharge its onus beyond a reasonable doubt.

25. It was undisputed that the child complainants had been raped. Hence two issues raise concerns. Firstly, the child complainants testified without the assistance of intermediaries. There is no explanation why they were not so assisted. In *DPP Transvaal* v *Minister* of *Justice CC*Case CCT 36/08 [2009] ZACC 8 para 86-. The CC held: '

> '[98] Section 170A(1) must therefore be construed so as to give effect to its object to protect child complainants from exposure to undue mental stress or suffering when they give evidence in court. This objective is consistent with the objective of section 28(2) as understood in the light of Article 3 of the CRC to ensure that a child's best interests are of paramount importance in all matters concerning the child. In particular, it conforms to the Guidelines which proclaim the right of child complainants to be protected from hardship and trauma that may result from their participation in the criminal justice system.96 As these Guidelines make clear, the protection of child complainants includes modified court environments, making them child-friendly, allowing the child complainant to testify out of sight of the alleged perpetrator and testifying with the assistance of a professional, such as an intermediary..'

It explained at length the rights of children as being paramount. Therefore when children testify they should be afforded the assistance of intermediaries.

26. Secondly, the state failed to explain why the forensic DNA evidence was not produced. Inspector Mngomezulu had taken the two complainants to the hospital where J88 medical report forms were completed for each of them after they were examined. Specimens on swabs had been obtained from the complainants.

27. In circumstances in which the prosecution rests on the evidence of children the state must obtain DNA evidence when samples are taken from these complainants. At the very least the state must account to the complainants and the court whether samples were tested and what the results were. Fifteen years have passed since the samples were taken from the complainants. Assuming that the forensic laboratory was unable to produce the results of its tests timeously to the trial court sitting more than two years later it should have applied to lead fresh evidence to produce the results to this court,

irrespective of whether they were conclusive.[2] In *S v Ndweni and others* 1999 (2) SACR 230 at 230b-c Grosskopf JA held:

> 'The dictates of fairness require that all relevant information bearing on the applicants' guilt or innocence should be before the trial Court to enable it to determine the true facts, lest there be an injustice either to the applicants or the State.'

28. *S v N* 1988 (3) SA 450 AD at 458J-459B; 463C-464A was an appeal to reopen a rape trial *de novo*. At the trial the prosecutor had the results of a forensic test of the swabs and slides taken from the complainant. However he had not tendered it in evidence nor did he inform the defence attorney of its existence and contents. On appeal his explanation on affidavit was that the report contained a negative result in that it was not only inconclusive but neutral as to whether ejaculation had taken place. Corbett JA regarded the prosecutor's failure to place the affidavit before the court or at the very least to inform the defence of it as 'an error of judgment and breach of his general duty to disclose information favourable to the accused… It was for the Court, not the prosecutor, to evaluate the cogency of the evidence.' [3]

29. Turning to the merits of the application the Appellate Division pointed out that the case law over the previous forty years showed that in the vast majority of cases applications to reopen a case had been refused. When relief was granted it was usually when the evidence sought to be lead 'related to a single critical issue.'[4] However in that case the court considered the application for a

[2] Section 19(b) of the Superior Courts Act 10 of 2013 empowers an appeal court to receive further evidence. Subsection (c) empowers the court to remit the case to the court of first instance for further hearing, with instructions regarding the taking of further evidence. See The role, function, powers and duties of the prosecution in Du Toit et al *Commentary on the Criminal Procedure Act* service 54, 2015 22-3 to 22-10B.

[3] *S* v *N* at 463 E
[4] *S* v *N* at 458 J

fresh trial *de novo.* But on the facts it refused the application[5] and dismissed the appeal.[6]

30. Would the production of DNA evidence improve prosecutorial and adjudication services? Undoubtedly. As objective scientific evidence it would go a long way to assist decision makers in determining vital questions of fact, especially in sexual offences in which complainants and accused are likely to give unreliable versions either because they deliberately choose to mislead or because of a loss of memory and powers of recollection fail. Institutionally, efficiencies in the criminal justice system would improve remarkably. Decision-making by prosecutors about whether to prosecute or not, and the courts in assessing the credibility of complainants and accused would be more certain, reliable and acceptable to the litigants and the community at large. Producing DNA evidence could corroborate either the version of the defence or the state. It could ensure that an innocent person is not sentenced to life imprisonment and a guilty person is not set free. An innocent accused would not have to face the trauma of a protracted trial. A guilty accused would be more inclined to reconsider his plea thus sparing the complainant the trauma of reliving her ordeal. Bearing in mind that a huge proportion of the court rolls are filled with rape and murder cases the savings gained from these efficiencies for court services would be great. These savings could go to bolstering the medical and forensic services.

31. On the authority of *S v N* and possibly a constitutional right to information it seems to me that an accused may insist on knowing whether the state obtained a forensic report on DNA evidence and what the contents of the report are. Insistence by an accused in appropriate cases on such tests being conducted and on receiving such reports could favour his credibility. A converse inference unfavourable to the accused may not be drawn as it would infringe his right to silence. It must be remembered that DNA evidence is

[5] *S* v *N* at 465 C
[6] *S* v *N* at 459 E

circumstancial and may or may not be conclusive proof that an accused raped the complainant. These remarks are made in passing and with a view to promoting and encouraging efficiencies, justice and fairness for complainants and accused alike.

32. The appeal against sentence is well founded. The charge sheet informed the appellant that he was being prosecuted in terms of Schedule 2 of Part III of Act 105 of 1997. Consequently if convicted of rape he could be sentenced as a first offender to a term of fifteen years imprisonment, as a second offender to a term of twenty years imprisonment and as a third offender to a term of twenty-five years imprisonment. Section 51 (2)(b)(ii) prescribes a term of twenty not twenty-five years imprisonment for a third or subsequent offender. The appellant was not informed that he faced a term of life imprisonment as prescribed in Schedule 2 Part 1(c)(i) read with s 51(1). To impose a term of life imprisonment in these circumstances amounts to an irregularity that must be set aside.

The order I propose is the following:

1. The appeal against conviction and sentence to life imprisonment on counts one and two of rape is upheld.

2. The order of the trial court on these counts is substituted as follows:

‘The accused is acquitted of the charges in counts one and two.’

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D. Pillay J

I agree

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A.N Jappie JP

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T.S.I Mthembu AJ

APPEARANCES

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Date of Hearing	:	25 July 2016
Date of Judgment	:	01 August 2016