



IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)

CASE NO. CC68/2008

In the matter between:

THE STATE

Vs.

SAMUEL MOATLHUDI RAKOBANE

MMABATHO

Date of Hearing:

04 AUGUST 2008

Date of Judgement:

29 AUGUST 2008

For the State:

ADVOCATE DIKGOPO

For the Accused:

ADVOCATE MOJUTO

JUDGMENT

GURA J

- [1] The accused was convicted of rape by a Regional Court. The victim of this crime was a fifteen (15) year old girl. The Magistrate then referred the case to this Court for sentence in terms of **Section 52** of the **Criminal Law Amendment Act, No. 105 of 1997**.
- [2] When the proceedings resumed in this Court on 4 August 2008, Counsel for the accused had serious reservations about the correctness of the conviction. He raised two questions of law; being:
- [2.1] The Magistrate's failure to approach the evidence of complainant, being a single witness, with caution; and
- [2.2] The admissibility of the evidence of complainant's aunt.
- [3] The version of the state as to how the crime was perpetrated is as follows: The accused grabbed the complainant near her gate on the night in question. He pulled her, whilst assaulting her, to a secluded place where he raped her.
- [4] Whilst he was busy raping her, two gentlemen emerged at the scene and the accused hit on the run. Complainant then made a report to the two men. These men then took her to her parental home where she made a second report to her aunt (who was her guardian at that time).

[5] At the trial, none of these two men testified about the report which the complainant made. One of them was subpoenaed to attend court, he failed to attend. Nothing is said about the second man. The state then, without any explanation why the second man was not called to come and testify, called complainant's aunt and she gave the Court a detailed report from the complainant.

[6] Throughout the judgment, the Magistrate never mentioned that he was aware that he was dealing with the evidence of a single witness, being complainant and that such evidence was subject to the cautionary rule. *Ex facie* the case record, no reference is made to caution.

[7] I deal first with the cautionary rule. It is an accepted practice that evidence of a single witness should be approached with caution. This rule of procedure has been there in our legal system for more than 75 years; see **R. V. Mokoena 1932 OPD 79**. The effect of a failure to apply the cautionary rule results in the danger of exclusively relying on the sincerity of a single witness. The inherent danger includes, at worst, the risk of a wrong finding.

[8] In **S vs. Stevens [2005] 1 All SA 1 (SCA)** at paragraph 1, it was held:-

"Courts in Civil or Criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behaviour are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such

behaviour, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural safeguards are properly applied and adhered to."

[9] In my view therefore, the Magistrate, in the present case, failed to ensure that the well- established judicial practice and procedural safeguards are properly applied and adhered to. He disregarded the cautionary rule.

[10] The second issue is the report in sexual cases. Evidence that the victim in an alleged sexual offence made a complaint soon after its occurrence, and the terms of that complaint, is admissible to show the consistency of the victim's evidence and the absence of consent. The complaint serves to rebut any suspicion that the complainant has fabricated the allegation. The following are the requirements of admissibility of the complaint.

(a) It must have been made voluntary and not as a result of questions of a leading and inducing or intimidating nature; and

(b) It must have been made without undue delay and at the earliest opportunity in all circumstances, to the first person to whom the complainant could reasonably be expected to make it.

The question as to what is reasonable time within which the complaint should have been made is a matter for the discretion of

the Judge. A great deal will depend upon the age and understanding of the complainant, and her opportunities for speaking to the person to whom the complaint might be reasonably confided **(D.T. Zeffertt et al: The South African Law of Evidence, at page 404 to 407).**

[11] The first opportunity which presented itself to the complainant to report the alleged rape was at the scene of the crime, when the two strangers (men) came there. In fact, her evidence is to the effect that she reported to them. The subsequent report, which was made to complainant's aunt, at home, does not, in my view, constitute a first report especially in the absence of any explanation by the state why it preferred her above the two men.

[12] In the result the following order is issued:

[12.1] The conviction is set aside.

[12.2] The trial against the accused should be started *de novo* before a different Magistrate.

SAMKELO GURA

JUDGE OF THE HIGH COURT