THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 256/05
Not reportable

In the matter between :

N P NONYANE APPELLANT

and

THE STATE RESPONDENT

CORAM : SCOTT, CLOETE, VAN HEERDEN JJA

HEARD : 2 MARCH 2006

DELIVERED : 20 MARCH 2006

Summary: Rape – version of complainant not corroborated – no reason to reject appellant's evidence and that of defence witness – guilt not proved.

Neutral citation: This judgment may be referred to as *Nonyane v The State* [2006] SCA 23 (RSA).

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] After this appeal was heard and on the same day we made an order allowing the appeal and setting the conviction and sentence aside. By then the appellant had been in custody for four and a half years. These are the reasons for the order.

[2] The appellant, a teacher 39 years old at the time of the trial, was convicted by the regional magistrate at Itsoseng of raping an 11 year old schoolgirl. The appellant was then committed for sentence to the High Court of Bophuthatswana in terms of the provisions of s 52(1) of the Criminal Law Amendment Act 105 of 1997. Friedman JP sentenced the appellant to life imprisonment. As Friedman JP had retired, the application for leave to appeal came before Mogoeng JP, who refused it on 26 November 2004. Reasons for the order were only furnished on 10 March 2005. They had been requested in November 2004. Despite reminders in January and February 2005, there was a delay before the request was put before the Judge President. It appears from the reasons given by Mogoeng JP that the cause of the delay is being investigated, and rightly so. Leave to appeal was granted by this court on 28 April 2005.

[3] The appellant's version was that on the day in question she was passing the house of the appellant on her way home from school and he sent her to purchase a cold drink. He thereafter sent her to purchase four cigarettes. On her return she watched a video. She went to the toilet, after which the appellant forced her into a bedroom and raped her. She said that she did not see Mr Thabo Lethokwe, who was called as a defence witness, at all on the day in question. Four months later she was taken to a clinic because she was suffering from a vaginal discharge. The cause of this condition was not established and no attempt was made to link it to the alleged rape.

[4] The appellant denied having had sexual intercourse with the complainant. He gave a different sequence of events. He said that he sent the complainant to buy a

cold drink and on her return, she ate what he had prepared for her and she watched a video. After Lethokwe arrived, he sent her to the shop again to purchase four cigarettes for Lethokwe whereafter she continued watching the video. She left before he (the appellant) and Lethokwe were collected from the appellant's house by a third person in his motor vehicle. These events, said the appellant, had happened on a Sunday.

[5] Lethokwe confirmed the sequence of events to which the appellant testified, namely, that when he arrived, the complainant was eating and watching a video; that the appellant sent the complainant to purchase cigarettes for him (Lethokwe); that on her return, the complainant continued watching the video; and that she left and thereafter he and the appellant were collected by the third party in his motor vehicle. Lethokwe also confirmed that these events had happened on a Sunday.

[6] The magistrate committed a number of misdirections in his judgment convicting the appellant:

(1) The magistrate found that the only differences between the version of the complainant and that of the appellant were whether sexual intercourse took place and whether the incident had happened on a school day or on a Sunday. In making this finding the magistrate completely overlooked the different versions as to the sequence of those events and the conflicting evidence as to whether Lethokwe was at the appellant's house on the day in question. It seems probable that the complainant was sent to the shop on the second occasion to purchase cigarettes for Lethokwe — otherwise the appellant would have asked her to purchase cigarettes when he asked her to purchase the cold drink. For the same reason, it also seems probable that Lethokwe did come to the appellant's house. It is unlikely that the complainant was raped before Lethokwe arrived, as he had ample opportunity to observe her and he would surely have noticed that she was upset, as she obviously would have been; and it is even more unlikely that the appellant would have raped her after Lethokwe had arrived.

(2) The magistrate found corroboration for the complainant's version in the events

which were common cause. This court pointed out in *S v Gentle*[1]:

'The representative of the State submitted on appeal that (I quote from the heads of argument):

"(T)here was sufficient corroboration or 'indicators' to support the occurrence of the rapes."

It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, *on the issues in dispute* (cf *R v W* 1949 (3) SA 772 (A) at 778-9). If the evidence of the complainant differs in significant detail from the evidence of other State witnesses, the Court must critically examine the differences with a view to establishing whether the complainant's evidence is reliable. But the fact that the complainant's evidence accords with the evidence of other State witnesses on issues not in dispute does not provide corroboration. Thus, in the present matter, for example, evidence that the appellant had sexual intercourse with the complainant does not provide corroboration of her version that she was raped, as the fact of sexual intercourse is common cause. What is required is credible evidence which renders the complainant's version more likely that the sexual intercourse took place without her consent, and the appellant's version less likely that it did not.'

In this matter the evidence of the complainant was entirely uncorroborated. There was not even medical evidence to show that she was no longer a virgin.

(3) The magistrate said that the appellant had not made a good impression on him because:

(a) he was evasive in cross-examination; and

(b) he answered what had not been asked.

The record on appeal left much to be desired, but the defence evidence was properly recorded and transcribed. Neither of the criticisms levelled by the magistrate at the appellant's evidence appear from the record, as the State's counsel on appeal was constrained to concede.

(4) The magistrate entirely ignored the evidence of Lethokwe, for two reasons. First, said the magistrate, he and the appellant were friends. That fact, of itself, did not justify the approach of the magistrate. Second, said the magistrate, it was surprising that the witness could remember what the complainant was eating when he arrived; the magistrate asked the rhetorical question: 'What is it that makes him remember what the child was eating?' The answer is: No-one knows, because the witness was not asked. Cross-examination of Lethokwe was perfunctory and took up only one page of the appeal record: the prosecutor merely put to him the

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[1] 2005 (1) SACR 420 (SCA) para 18.

complainant's version that he was not there and that if the events had happened on a weekday he would have been at work. The magistrate was not entitled to disregard Lekhotwe's evidence. As Nugent J said in *S v Van der Meyden*,[2] in a passage subsequently approved by this court in *S v Van Aswegen*:[3]

'What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or 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.'

(5) The magistrate said that he could not find any reason why the complainant would lie, nor could the appellant provide one. Such an approach has repeatedly being criticised by higher courts. Mahomed J said in *S v Ipeleng*:[4]

'Even if the court believes the State witnesses, it does not automatically follow that the appellant must be convicted. What still needs to be examined is whether there is a reasonable possibility that the evidence of the appellant might be true. Even if the evidence of the State is not rejected, the accused is entitled to an acquittal if the version of the accused is not proved to be false beyond reasonable doubt. (See *S v Kubeka* 1982 (1) SA 534 (W) at 537E; *R v M* 1946 AD 1023 at 1027.)

It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him. The accused has no *onus* to provide any such explanation. The true reasons why a State witness seeks to give the testimony he does is often unknown to the accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways. They often seek to curry favour with their supervisors; they sometimes need to placate and impress police officers, and on other occasions they nurse secret ambitions and grudges unknown to the accused. It is for these reasons that the Courts have repeatedly warned against the danger of the approach which asks: "Why should the State witnesses have falsely implicated the accused?"

The case of *S v Makobe* 1991 (2) SACR 456 (W) is instructive on this point. At 459 of the judgment, reference is made to certain earlier authorities. The learned Judge refers to the case of *R v Mtembu* 1956 (4) SA 334 (T) at 335-6 where Dowling J said the following:

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[2] 1999 (2) SA 79 (W) at 82D-E.
[3] 2001 (2) SACR 97 (SCA) at 101e.
[4] 1993 (2) SACR 185 (T) at 189b-i.

> "The magistrate in his reasons for judgment obviously takes the view that if the evidence of the traffic inspector is accepted then the accused was guilty of driving to the danger of the public. In coming to the conclusion that that evidence is to be accepted he said that the inspector either saw the accused drive as he says or he has come to court to commit perjury. That is not the correct approach. The remarks of the late Millin J in *Schulles v Pretoria City Council*, a judgment delivered on 8 June 1950, but not reported, are very pertinent to this point. He says:
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> 'It is a wrong approach in a criminal case to say "Why should a witness for the prosecution come here to commit perjury?" It might equally be asked: "Why does the accused come here to commit perjury?" True, an accused is interested in not being convicted, but it may be that an inspector has an interest in securing a conviction. It is, therefore, quite a wrong approach to say "I ask myself whether this man has come here to commit perjury, and I can see no reason why he should have done that; therefore his evidence must be true and the accused must be convicted." The question is whether the accused's evidence raises a doubt.'"

After quoting from this passage the learned Judge in *Makobe's* case went on to say that "the remarks of Millin J in my view are particularly apposite in regard to what the magistrate has stated in his judgment and the passages to which I have referred".

In the present case it is entirely unhelpful to speculate on what prompted the complainants to give the evidence they did.'

The same reasoning applies with equal force in the present appeal.

[7] Because of the misdirections to which I have referred, this court is at large to disregard the magistrate's findings of fact, even if based on credibility, and to come to its own conclusion on the record as to whether the guilt of the appellant was proved beyond a reasonable doubt; and the onus accordingly becomes all important: *R v Dhlumayo and another*.[5]

[8] Even accepting the magistrate's finding that the complainant was a good witness, there is simply no basis for rejecting the version of the appellant or the evidence of Lethokwe. The appellant should accordingly have been acquitted by the magistrate but when he was not Friedman JP should have set the conviction aside

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[5] 1948 (2) SA 677 (A) at 705-6 paras 10, 12 and 13.

when the matter came before the High Court.

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T D CLOETE
JUDGE OF APPEAL

Concur: Scott JA
Van Heerden JA