THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 327/07
No precedential significance

S NYABO Appellant

and

THE STATE Respondent

Neutral citation: *Nyabo v S* (327/07) [2008] ZASCA 150 (27 November 2008)

Coram: HEHER, COMBRINCK and CACHALIA JJA

Heard: 12 NOVEMBER 2008

Delivered: 27 NOVEMBER 2008

Corrected:

Summary: Criminal procedure – single witness – identification – factors influencing reliability.

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ORDER

On appeal from: High Court, SECLD (Kroon J, sitting as court of first instance; Jansen, Nepgen JJ and Nhlangulela AJ as Court of Appeal).

The appeal succeeds. The order of the court below is set aside in so far as it relates to counts 1 and 2. In its place there is substituted a finding of not guilty and discharged in respect of those counts.

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JUDGMENT

HEHER JA (Combrinck and Cachalia JJA concurring):

[1] The appellant, a man of about 28 years of age, was convicted by Kroon J of several serious offences of which only one count of robbery and one count of rape are presently relevant. His appeal to the Full Court of the Eastern Cape Division was dismissed (by Jansen J, Nepgen J and Nhlangulela AJ concurring). The present appeal, limited to the said counts, results from special leave granted by this Court.

[2] The complainant on each count was the same person, a woman in her early twenties. She was a single witness. Both offences were committed on the night of 30 November – 1 December 2002 in the Port Elizabeth area. The appellant was arrested on 29 February 2004. When tried in September 2005 he pleaded not guilty and denied all knowledge of the complainant or the offences. The commission of the offences was not in serious doubt. The real question throughout has been whether the complainant reliably identified the appellant as one of her assailants.

[3] The trial judge found the complainant to be both credible and reliable. He disbelieved the appellant. The Full Court simply held that he had not misdirected himself and that there were accordingly no grounds for interference with the convictions. An abbreviated account of the evidence before the trial court is necessary for present purposes.

[4] At about 10 o'clock at night the complainant was abducted in a public street by two men. One pointed a gun at her head and the other at her body. She was instructed to look at the ground and walk with them or she would be killed. After some 20 minutes they reached a darkened shack which one of them unlocked. There she was raped by each in turn while held at gunpoint by the other. One then left and she remained seated with his companion, whom she later identified as the appellant, for, she said, about two hours, all the while threatened by his firearm. The appellant then raped her a second time. He then also disappeared and the complainant was able to dress and leave.

[5] According to the complainant she furnished the police with a description of the appellant who was otherwise totally unknown to her. In February 2004, at the instance of the police she identified the appellant in circumstances which I shall describe hereinafter.

[6] In the course of his judgment Kroon J set out certain general principles which he regarded as defining his evaluation of the case against the appellant. First, he noted that demeanour in the witness box 'is at best a problematic indicator of reliability' and 'apparent confidence in the witness box is also no guarantee of reliability'. More important, he said, is 'the content of a witness's evidence, seen in the totality of the evidence and in the light of the probabilities'. Second, the learned judge cautioned himself, the fact that the complainant was a single witness enjoined him to approach

her evidence with circumspection. Third, he referred to the well-known catalogue identified in *S v Mthetwa* 1972 (3) SA 766 (A) at 768A-D as examples of measures of the reliability of single witnesses upon whom evidence of identification depends.

[7] With all these preliminary observations of the learned judge I cannot but wholeheartedly agree.[1] However when I come to examine the substance of his judgment I am regretfully bound to conclude that they were honoured in the breach rather than the observance.

[8] Demeanour, it seems, did play an important and perhaps, decisive role with the trial court. The learned judge described the complainant as 'confident, straightforward, frank, ready and unhesitating' and 'a particularly impressive witness'. On a later occasion he said, 'I took careful stock of her in the witness box . . . I am satisfied that
she had the maturity and objectivity to exclude that influence [ie the effect of having been informed by the police before identifying the appellant that he had confessed to raping her] . . . I am satisfied that she was honest and confident in her identification of the accused': strong findings, and highly subjective and speculative as regards her supposed maturity and objectivity of which I find no particular indication on a close perusal of the record. (By contrast, the learned judge described the demeanour of the appellant as 'neutral'.) These are however reservations about the weight which the learned judge ascribed to the subjective impression which the complainant made on him. As he pointed out, of more importance, was her evidence judged in the total context including the probabilities.

[9] The first aspect which struck me on reading the record (and borne out by closer

[1] As to the weight to be accorded to demeanour see *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) at paras 77 to 79. As to the caution with which the evidence of a single witness to identification must be approached the cases are legion; *S v Mlati* 1984 (4) SA 629 (A) (which has parallels with the case before us) warrants mention.

analysis) was the extent to which the complainant's evidence in relation to opportunity for identification on the night in question was adduced by leading questions to which neither the court nor the appellant's counsel raised objection. The result was a superficially presentable chronicle of events which had its genesis in undisguised prompting of the witness by the state counsel. There is no mention of this aspect in the judgment of either court.

[10] Then the trial court made the crucial findings that 'the lighting that prevailed was good and such as to enable her properly to observe the appearance of her assailant. She was in the nature of things, in close proximity to him. They were in each other's company for several hours and she took note of his appearance. She was therefore in a position to identify the accused as her assailant when he was subsequently presented to her at the police station, or, conversely, to say that he was not her assailant'.

[11] The evidence is however far more equivocal than the learned judge's summary would suggest – a brief opportunity while the shack door was being unlocked illuminated by the light of a street lamp on a mast and two hours in a dark room in which only furniture was visible despite some light cast through a window by the said lamp or one like it. All or almost all the time the complainant was under great emotional pressure and threatened by a gun and she had been warned at the outset not to look at her abductors. Her evidence both of opportunity and the length and extent of such opportunity as she enjoyed in the shack was never investigated in evidence. Of course her evidence of identification may have been both true and reliable but in order to reach that conclusion a much more careful and detailed investigation was necessary.

[12] It seems to me that an overall evaluation required consideration and setting off of the following aspects against her proven credibility and her determined assertion

that the appellant was one of her assailants: the assailant was totally unknown to her; the lighting conditions and opportunity for identification were unfavourable and restrictive; her assertion that the visibility was sufficient and that she made use of the opportunity is incapable of verification and depends entirely on her say-so; she was first asked to put her observation and recollection to the test about fifteen months after the event; the 'test' turned out to be a charade of little and perhaps no value, first because it was preceded by an allegation made to her by a policeman that the suspect had confessed to raping her and, second, because instead of facing a properly constituted identity parade, she was simply confronted with the appellant and asked to look at him from different angles to see whether she recognised him; assuming that the complainant was reliable in testifying that she had furnished the police with the description of her assailant which she voiced in the witness-box—

'I noticed that he was not tall and that he did not have long hair and noticed the mark I indicated on his lower lip . . . the mark that one would normally see with the person that is drinking brandy a lot, the pink mark shown on the lower lip . . . I noticed his skin complexion on his face was not that of a person with a light complexion . . . I noticed that he had short hair . . . He was not stout.'—

such identifying features (other than the mark) were essentially bland and neutral, while it was common cause that the distinctive pink facial mark was not to be seen on the appellant at the 'identification' or during the trial. This last feature must surely be regarded as an aspect favouring the appellant's denial and I think the trial judge misdirected himself in saying that it 'may be left out of consideration in that her subsequent identification . . . was not based thereon'.

[13] The sad but inescapable fact was that there was no corroboration for the complainant's identification of the appellant and no means of reliably testing her account of such opportunity as she may have been afforded before and during the abduction and assault.

[14] The trial judge made much of the alleged defects in the evidence of the

appellant as reasons for disbelieving him. Having perused the record I am unable to find any support for his criticisms.

[15] The learned judge found that the appellant had 'lied when he denied in evidence that the complainant was brought to the police station to identify him'. He termed this 'a material criticism of his credibility' which represented a belated attempt falsely to deny the reliability of the identification. But the record does not bear this out:

'You have referred to Miss N's evidence that at the KwaZakhele police station she was asked to look at you.---Yes, as far as what she said, it is so.

Did she in fact come there and have a look at you?---I do not want to tell a lie M'Lord, I never saw her.

Do I understand you to say that that event never occurred?---No, I never saw her M'Lord.'

That this evidence amounted to a dishonest denial is in itself a dubious conclusion; read with the evidence of the complainant it appears perfectly explicable since the appellant had no sight of the identifying witness:

'Miss N I would like to know something more about your pointing out of the accused at the police station. Do I understand you to say that you accompanied Mjekula to the KwaZakhele police station?---Yes, it was myself, Mjekula and my boyfriend M'Lord.

Were you taken into the building?---Yes.

Where were you taken to?---I stood outside the room in which the accused was.

And what happened?---The accused was taken into that room having been brought from the other rooms and he was ordered to stand in that room and change positions, facing different directions, and I was requested to look at him and I was asked whether he was the person. I confirmed that he was the man.'

[16] The trial court rejected as 'improbable to the extent of inevitable rejection' certain evidence of the appellant relating to his arrest by Mjekula which the judge summed up as follows:

'In my view it is improbable to the extent of inevitable rejection that, as the accused claimed, Mjekula would take him into custody advising him that he is a suspect, but without putting any

specified charge against him, look on the computer at KwaZakhele police station to determine whether there were any outstanding cases against the accused, and when none was found, advise the accused that the computer at New Brighton police station would be consulted, and if no outstanding cases against him were found, he would be released, and then return to advise the accused that there were four cases against him, but apart from identifying the nature of the offences in question, not furnish him with any details of the charges in question, and he, the accused, would only learn of the charge relating to the rape of Miss Neer when the papers in that matter were served on him.'

[17] This was, however, an over-robust conclusion given that the appellant's evidence (although repeated under cross-examination) was not challenged and Mjekula did not testify. In addition I cannot, with respect to the learned judge, agree that there is any particular weight of inherent improbability in the evidence to which he refers. Finally, it must be said that the criticism, even if well-founded, hardly concerned a matter of much import in the context of the case.

[18] There is some indication in the judgment of the trial court that it regarded certain dishonest testimony of the appellant relating to charges other than those with which this appeal is concerned as reflecting adversely on his overall credibility. There will be instances when such an evaluation is justified. This however was not such a case because the charges were unconnected and it was not shown, even as a probability that the appellant's proven falsehoods extended beyond the scope of the charges to which they were related.

[19] In the light of the misdirections which I have drawn attention to, both in the evaluation of the complainant's evidence and the assessment of the appellant's credibility, this court is at large to reconsider the strength of the case against him.

[20] What the learned judge should have treated as important (but did not mention) was the following: the appellant's case was that he was not present at the incident and was unable to remember, given the lapse of time, where he had been or what he was

doing on the night in question. If the appellant was innocent that inability was explicable and reasonable. But if he was not, the defence was patently very difficult to disturb by cross-examination and, in truth, the state counsel made no pretence of trying to disturb it. In the circumstances, the state case had to fail unless the evidence of the complainant was of itself so clear and unanswerable as to justify the conclusion that the appellant's version was, although without apparent flaw on the face of it, nevertheless false beyond a reasonable doubt. Given all the questions which her evidence raised, but did not answer, to which I have referred above, it is plain that the complainant's evidence fell well short of that standard. In the absence of a reliable identification it was not possible to find that the appellant's evidence was false beyond a reasonable doubt. He should have been acquitted.

[21] In the result the appeal succeeds. The order of the court below is set aside in so far as it relates to counts 1 and 2. In its place there is substituted a finding of not guilty and discharged in respect of those counts.

[22] I wish to add the following cautionary remarks. A complainant in a rape case who is a single identifying witness needs and deserves close attention from police and prosecution. Unless she is given it her chances of obtaining due justice are diminished. In this case both services failed her. Both lacked insight into what was required for a successful prosecution. The police did not prepare sketches or photographs of the scene which might have provided evidence of the conditions in which the offence occurred; they informed the complainant that the suspect had confessed to raping her before asking her to identify him; and they made no attempt to hold a proper identity parade but instead confronted the complainant with the suspect on his own and made a pretence of asking her to identify him. The prosecution was bedevilled by a surfeit of leading questions on important issues and seems to have failed to appreciate the need to lay an adequate basis to support the complainant's identification of the suspect at

the scene of the crime. These matters require the attention of the responsible authorities.

J A HEHER
JUDGE OF APPEAL

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