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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 572/13

NOT REPORTABLE

In the matter between:

KHOROMMBI NTSHENGEDZENI ALFRED

First Appellant

KHOROMMBI THIFHELIBILU KENNETH

Second Appellant

And

THE STATE

Respondent

Neutral citation: *Khorommbi & another v The State* (527/2013) [2013] ZASCA 199
(2 December 2013)

Coram: Navsa ADP, Malan and Tshiqi JJA

Heard: 27 November 2013

Delivered: 2 December 2013

Summary: appeal against convictions for rape – version of the complainants inherently improbable – report made to the mother inadmissible – good cause shown to set aside the conviction.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Hetisani J sitting as a court of first instance):

- (a) The appeal is upheld.
 - (b) The convictions and sentences imposed by the trial court are set aside.
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JUDGMENT

Tshiqi JA (Navsa ADP and Malan JA concurring):

[1] The appellants, Alfred and Kenneth Khorommbi, were each convicted in the Limpopo High Court, Thohoyandou, on two counts of rape and sentenced to effective terms of 23 and 21 years' imprisonment respectively. They now appeal to this court against both the convictions and sentences, leave having been granted by that court, (per Boo AJ), in respect of the first appellant and subsequently in respect of the second appellant (per Victor J).

[2] The appellants were implicated through the evidence of the two complainants who testified that they met the two appellants and an unidentified male whilst walking together in M Village on their way to I Village, Venda. The two appellants were walking in the opposite direction towards M Village. The first appellant grabbed the second complainant by her belt and the second appellant, the first complainant by her hands.

They then dragged them and forced them to head back in the direction of M Village. The second appellant was known to the first complainant. None of the appellants was armed but one of them threatened the second complainant with assault. They arrived at a shebeen where they sat with the appellants who forced them to drink beer. Whilst there, one V, the wife of the second appellant arrived, confronted and slapped the first complainant after accusing her of having a romantic relationship with the second appellant. Thereafter they left the shebeen in the company of a third male, one Z, and spent the night at his house. There, according to the complainants, the two appellants threw the key away and took turns to rape them until the following morning. According to the second complainant, Z was present when the rapes took place but according to the first complainant, he opened the house for them and left. In the morning the two appellants asked them to leave.

[3] The complainants went to the second complainant's aunt at I Village. She gave them fresh clothing, as their clothing was dirty, and they remained there until the second complainant's mother Mrs G M arrived. According to the second complainant, when Mrs M arrived she called a policeman and asked him to beat the second complainant so that she would tell the truth. After the policeman had beaten her she said that they had been raped by the appellants. They were then taken to hospital and to the police station to lay a charge.

[4] Mrs M testified that she did not know the whereabouts of the second complainant on the day of the rape because the latter had neither sought her permission nor informed her when she had left a week earlier. She was informed that the second complainant was in I Village. When Ms M got there she found the first and the second complainants and they told her about the rapes. She then took them to the police station to lay a charge. Mrs M did not mention in her evidence that she had arranged for the second appellant to be beaten so that she could tell her about the rapes. She also testified that after the appellants were arrested, they approached her and according to her: '... told me that they are from Block L, a police van had come to them, so they are bringing money so that I could go and drop the charges'. She went with them to Mr T,

her neighbour who said that they needed to be locked up. Mr T, however, contradicted her evidence in that he testified that the appellants approached him directly and did not offer him any money. In any event, the evidence of Mrs M and Mr T does not suggest an unequivocal admission by the appellants that they had indeed committed the rapes.

[5] In order to prove the ages of the complainants at the date of the alleged offences the State presented the birth certificate of the second complainant, indicating that she was born on 25 October 1990 and a clinic card in respect of the first complainant, reflecting her date of birth as 12 March 1990. Both complainants were approximately 13 years old at the time of the alleged offences, but were both approximately 18 years old at the time of the trial. Medical reports (J88 form) completed by medical practitioners on 13 October 2003, two days after the date of the alleged rape, were admitted into evidence by consent. In both instances no fresh injuries were noted. However it was also noted that 'absence of fresh injuries does not exclude penetration.'

[6] Both appellants testified and denied having had sexual intercourse with the complainants. However, they admitted that they had been in the company of the complainants at the shebeen but that the complainants were there voluntarily and that when they left the shebeen to go to Z's home where they spent the night, they did so voluntarily. The appellants denied that they had sexual intercourse with the complaints. Their version in that regard was corroborated by Z who testified that he was present the whole night and no sexual intercourse took place.

[7] The State bears the onus to prove the guilt of an accused person beyond any reasonable doubt. The only evidence implicating the appellants was that of the complainants. Their evidence was fraught with so many improbabilities that it should have been rejected by the trial court as unreliable. When the complainants arrived at the shebeen they found other patrons who were busy drinking. There is no suggestion that those patrons had anything to do with the fact that they were detained there by the appellants against their will or even knew what was taking place. If indeed they were

dragged there and detained against their will it is improbable that they would not have seized that opportunity to flee, seek help or alert someone that they were there against their will. Instead, they remained in the shebeen and continued to consume alcohol with the rest of the patrons. A perfect opportunity to flee presented itself when V, the wife to the second appellant arrived accused the first complainant of having a relationship with the second appellant and assaulted her. Neither of the complainants seized that opportunity to either tell V that there was no relationship between the first complainant and the second appellant and that they were in fact detained there against their will. On the contrary, immediately after that altercation, they simply left with the appellants with no apparent resistance. That kind of behaviour is inconsistent with their version that they were in the company of the appellants against their will.

[8] Apart from the improbabilities in the evidence of the complainants, the evidence of the report made to the second complainants' mother is also problematic in that, the alleged rape was disclosed only after she had been beaten up by the policeman. The evidence of the complainant's report should have been rejected by the trial court. See *S v T* 1963 (1) SA 484 (A) at 486H.

[9] The only objective evidence, the J88 form, also does not take the State's case any further because it states that there were no fresh tears observed in the genital area and does not state at all that there was evidence of penetration in respect of either complainant.

[10] The version of the appellants on the other hand was corroborated by Z. According to Z, who even on the version of the first complainant was present in his house the whole night, no sexual intercourse took place. There is no basis to reject his evidence in that regard.

[11] For all those reasons it follows that a case has been made to set aside the convictions by the trial court. I therefore make the following order:

(a) The appeal is upheld.

(b) The convictions and sentences imposed by the trial court are set aside.

ZLL TSHIQI

JUDGE OF APPEAL

APPEARANCES:

For Appellant:

M Madima

Instructed by:

Justice Centre, Thohoyandou

Justice Centre, Bloemfontein

For Respondent:

RJ Makhera

Instructed by:

The Director of Public Prosecutions, Thohoyandou

The Director of Public Prosecutions, Bloemfontein

