



IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 155/13

Not Reportable

In the matter between:

THINANDAVHA PHENIAS MANGOMA

Appellant

and

THE STATE

Respondent

Neutral Citation: *Mangoma v S* (155/13) [2013] ZASCA 205 (02 December 2013)

Coram: NAVSA ADP, MAYA and SALDULKER JJA

Heard: 26 November 2013

Delivered: 02 December 2013

Summary: Rape – Child witnesses – Assessment of evidence – State failed to satisfy the onus.

ORDER

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

The following order is made:

The appeal against the conviction and sentence is upheld. The conviction and sentence are set aside.

JUDGMENT

SALDULKER JA (NAVSA ADP and MAYA JA CONCURRING):

[1] This is an appeal against a conviction of rape in the Limpopo High Court and the related sentence of life imprisonment imposed on the appellant, Mr Thinandavha Phenias Mangoma (Mangoma), for the rape of the complainant, his 13 year old daughter. It is before us with the leave of that court.

[2] One of the bases of the appeal is that the complainant and her brother who were both minors when they testified at the trial, had not been properly sworn in or admonished to tell the truth and that the evidence adduced by them could therefore not be relied on to found the conviction. Furthermore, it was submitted that their evidence was riddled with contradictions and inconsistencies. The admissibility of the medical report relied upon by the court below is also challenged, as is its reliability. The trial court is also criticized for having descended into the arena, and it is contended that the appellant did not have a fair trial.

[3] In its heads of argument, the State conceded that the two child witnesses, the complainant and her brother, had not been sworn in and were not admonished to speak the truth, and that therefore their testimony cannot be relied upon to support the conviction of the appellant on the charge of rape. For reasons that will become apparent the concession was unwarranted, and the State was constrained to admit that it was made without proper thought and due to a misreading of the record.

[4] At this juncture it is necessary to set out the background culminating in the present appeal. The State's case rested on the testimony of the complainant and her brother who were 13 and 12 years old, respectively, at the time of the incident. It was alleged that the complainant was raped by the appellant, her father, when she arrived home from the playground at 15h00 on the afternoon of 8 February 2001, and that the rape was witnessed by her younger brother. The appellant's defence was one of alibi. He testified that he was not at home at the time the rape allegedly occurred. He had been looking for employment in Sibasa, having left home around 8h00 and returned later that same evening, and thus could not have committed the act of rape. He called two witnesses in his defence, a taxi marshall, his alibi witness, and his second wife. Because of the conclusion we arrive at in relation to the quality of the evidence of the State witnesses. The alibi evidence need not detain us any further. After the appellant testified, the State reopened its case and called Mrs Mangoma, the mother of the complainant, in rebuttal of the appellant's alibi. I intend to deal with her evidence in due course.

[5] I turn to consider the contention that the two child witnesses were not properly sworn in. First, it should be noted that it is clear from the record that the witnesses were sworn in and that thereafter a very curt enquiry about whether each understood the meaning of telling the truth followed. Had there been any doubt concerning the ability of the child witnesses to understand the nature and import of the oath the precaution set out in s 164 of the Criminal Procedure Act 51 of 1977 ought to have been followed. The enquiry in relation to the witnesses' ability to understand the importance of telling the truth appears to have been resorted to after the oath had been administered. The sequence was wrong. That notwithstanding, there is nothing

on the record to indicate that a doubt about the witnesses' ability to understand the truth ought to have been entertained. In this regard the principles set out in *S v B* 2003 (1) SACR 52 (SCA) at 63d-e apply.¹ The State was constrained to concede that the appeal ought to be decided on the merits.

[6] I turn to another aspect which causes me concern in relation to child witnesses, particularly a complainant. Courtroom atmosphere can be intimidating for child witnesses. The use of an intermediary is a salutary practice to adopt in court proceedings involving young children. No thought appears to have been given to receiving the complainant and her brother's evidence through an intermediary. In this regard see *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (4) SA 222 (CC).

[7] I now turn to consider the evidence adduced on behalf of the State. A troubling feature of the complainant's testimony is in relation to the time the rape incident was reported by her. Her evidence is inconsistent and is not supported by her brother. In her examination-in-chief she stated that she reported the incident to her mother on the day it occurred, which was a Friday. When she was cross-examined she said that she had told her mother about it the following day, a Saturday. She did not tell her mother immediately because she was afraid that her mother would 'assault' her or 'quarrel' with her. When pressed on this aspect, she stated that it was her brother who had in fact reported the rape incident to her mother on the following day in her absence. This evidence was contradicted by her brother who testified that both he and the complainant had both reported the incident to their mother on the following day. He too, when pressed on this contradiction, stated that he had in fact reported the incident to his mother and that thereafter the complainant had joined him and they had discussed it together with their mother. The mother was not called before the State closed its case to clarify this important aspect of the complainant's testimony. The State had an opportunity to clarify this aspect when it re-opened its case and called the mother in rebuttal of the appellant's alibi. Her evidence concerning when the

¹ See also *S v Nedzamba* 2013 (2) SACR 333 (SCA) at para 26.

incident was reported was elicited only under cross-examination. The failure of the state to lead the evidence of the mother on the main issue counts against it.

[8] Initially the mother said that the complainant had reported the incident to her on 8 February, being the Friday. When pressed on this aspect she changed her version and said that the complainant had reported the matter to her on the 9 February, the Saturday. She also contradicted both the complainant and her son as to when they had reported the incident to her. In this regard, initially she stated that both had reported the incident to her, and then later changed this to her son telling her about the incident and thereafter the complainant also reporting it.

[9] It was further put to the mother under cross-examination by the appellant's legal representative, that she had made a statement to the police that the complainant had reported the incident on the day it had occurred, being the Friday. The statement reads as follows:

'On the year 8 February 2001 in the evening, I was at home busy cooking food. [The complainant] came to me in the kitchen and told me that on 8 February 2001 her father had sexual intercourse with her. I asked her why she didn't tell me yesterday and said that she was afraid because her father was present, because her father told her that if she ever tells me he will chase both of us away from our home.'

Her attempts to explain this statement were poor and unconvincing.

[10] Another matter that raises concerns is the version of the complainant and her brother in regard to the actual rape incident. It was the brother's evidence that he had no difficulty looking through the window notwithstanding his height. It is clear from the later testimony of the mother that he would not have been able to see through the window unless he had stood on a mud wall which neither he nor his sister had referred to in their evidence. Thus this casts doubt on his version that he had witnessed the rape through the window.

[11] It is common cause that both the complainant and her brother are young, children, who would not be aware of the legal requirements to establish the offence of rape. During the brother's testimony he used the word 'consent' to describe the rape that he witnessed:

'Now when you say your father was raping your sister what do you mean by that? - - - It is because he was raping her without any consent.'

[12] The evidence of the State witnesses must be considered as against the common cause fact that there was bad blood between the complainant's mother and the appellant due to the fact that he wanted to bring his second wife into their home. Despite their denial, this is something that the children could not have been unaware of.

[13] It is troubling that the trial judge made the following statement during the appellant's testimony:

'Let me tell you the court finds it very hard to believe the story you are telling it, very hard, that your own blood children could tell against you and the one who is not your blood child is the one you say is more reliable, it is more stranger than fiction, particularly the boy who is named after you.'

[14] In any event, it appears to us that the appellant is entitled to an order that his conviction and sentence is set aside because the state failed to discharge the onus resting on it. The evidence of the child witnesses was not carefully scrutinised. The contradictions and inconsistencies were not properly considered, nor the possibility that they might have been put up to it by their mother. In this fundamental regard the trial court erred.

[15] In the result the appeal against both the conviction and sentence is upheld and the conviction and sentence are set aside.

H K SALDULKER

JUDGE OF APPEAL

APPEARANCES:**FOR APPELLANT:**

Mr Alberts

Instructed by:

Legal Aid Justice Centre, Pretoria

FOR RESPONDENT:

Mr Nekhambele

Instructed by

Director of Public Prosecutions, Thohoyandou