



IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG
JUDGMENT

NOT REPORTABLE
CASE NO: AR21/2017

In the matter between:

NELSON SANELE NZIMANDE

APPELLANT

and

THE STATE

RESPONDENT

Coram : Seegobin J et Chili J

Heard : 22 August 2017

Delivered : 29 August 2017

ORDER

On appeal from the Regional Court, Pietermaritzburg (sitting as a court of first instance):

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

SEEGOBIN J:

[1] The appellant, a 29 year old male, was convicted in the regional court, Pietermaritzburg, of the rape of a young girl who was 11 years old at the time. The charge sheet alleged that the complainant was raped more than once by the appellant during October 2012. The provisions of section 51(1) Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 applied and the appellant was sentenced to life imprisonment. The present appeal is against conviction and sentence.

[2] The appellant was legally represented throughout the trial. He pleaded not guilty and while alleging that he knew the complainant by sight, he denied the allegations of rape against him.

[3] The State's case rested on the evidence of the young complainant, her young brother who was 16 years old when he testified, their aunt *S D ('D')* who resided close by and the doctor who examined the complainant later on and compiled the J88 medical form. The accused testified in his defence and closed his case without calling any witnesses. In addition to all this evidence, the court *mero motu* called two other witnesses in order to clarify certain issues which arose in the course of the trial. The first witness was a *Miss Z M* who was allegedly a friend of the accused and who he visited from time to time and, the second witness was the mother of the complainant. The complainant's mother confirmed that both she and Ms M were friends of the accused and that he did visit their homesteads on occasion.

[4] On the evidence it became common cause that the complainant and the appellant knew each other and that the appellant was accustomed to visiting her mother and a neighbour in the area. It was also common cause that the complainant was penetrated vaginally and that she had sustained an internal injury to her hymen at the 7 o'clock position. The only real dispute was whether the appellant was the culprit.

[5] The complainant testified that on two occasions in October 2012, the appellant who she referred to as 'Masa' (the appellant did not deny that he was known by this name) came to her house on the pretext of looking for her mother. He would then chase her around until he caught her. On the first occasion he raped her near a rondavel. To prevent her from screaming out, he placed a towel over her mouth. When the complainant returned to her home after the incident, she noticed blood on her panties and on the pair of jeans she wore. Fearing that her mother will notice the blood on her clothing, the complainant proceeded to dispose of these items in the toilet pit.

[6] A similar incident occurred on the second occasion. On this day as well the appellant arrived at the complainant's home looking for her mother. He then started chasing the complainant who tried to flee from him. After catching hold of the complainant, the appellant once again proceeded to rape her. The second incident took place near the toilet. When he finished he informed the complainant that if she told anyone about what had happened he would shoot her. On returning home, the complainant again noticed blood on her clothing. She once again disposed of the clothes in the toilet pit. She testified that she did not tell her mother anything for fear that the appellant would carry out his threat.

[7] The complainant had testified that on the first occasion her brother *T* was at home and she believes that he saw what happened to her because at a later stage he informed her accordingly. In his evidence, however, *T* did not confirm that he witnessed the appellant raping the complainant. He does confirm, however, that he saw the appellant chasing after the complainant and that they disappeared towards the opening in the fence. The complainant re-emerged about 30 minutes later. It was not clear from his evidence which incident he was really referring to. It is also not clear from *T*'s evidence that he did in fact inform the complainant that he saw what happened to her, in other words, that he saw the appellant raping her.

[8] As correctly submitted by Mr *Ngubane* on behalf of the appellant, there are material contradictions in the evidence of the complainant and her brother. Additionally the complainant has contradicted herself in certain respects. For instance, she testified that on the first incident no one was at home except for herself and no one witnessed that rape incident. On the second occasion her brother was present and had witnessed the incident. However, under cross-examination she stated that in fact on the second occasion her brother was not there and that he did not witness the second incident of rape but only the first. It was submitted on behalf of the appellant that these contradictions give rise to reasonable doubt as to which incident of rape was actually witnessed by *T*, if indeed he witnessed anything at all, and whether sexual intercourse had taken place as alleged by the complainant.

[9] Despite the contradictions and self-contradictions in the evidence, the learned magistrate concluded that the evidence of the complainant was given 'in the most clear and satisfactory manner in all material respect and the evidence was not self-contradictory'. She further found that the complainant's evidence was corroborated by that of her brother.

[10] In my view, the contradictions in the evidence are glaring and no attempt was made either by prosecutor or the court to clarify the evidence. Had the learned magistrate analysed all the evidence carefully she would have found that the evidence was unreliable for a safe conviction. In any matter in which contradictions and inconsistencies arise, the aim is not to establish which of the versions is correct but rather to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. In *S v Mafaladiso and Others*¹, Oliver JA set out the approach to be followed when a court is faced with evidence of this nature. The following approach to contradictions between two witnesses and contradictions between the versions of the same witnesses (such as, *inter alia*, between his/her *viva voce* evidence and a previous statement), is identical.

- Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail.
- Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant.

¹ 2003(1) SACR 583 (SCA).

- Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up.
- Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the *viva voce* evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.

[11] In the present matter I consider that the evidence of the complainant and her brother was adduced in a most haphazard and unsatisfactory manner, the witnesses not only contradicted themselves but also each other and no effort whatsoever was made to clarify the issues as they arose. The contradictions were material and affected the overall credibility of the witnesses. The learned magistrate's finding that the evidence was clear and satisfactory in all material respects was arrived at without conducting a careful assessment of all the evidence before her. In this regard I consider that she misdirected herself. In my view, the learned magistrate ought to have entertained serious doubts about the guilt of the appellant having regard to the material contradictions which arose in the evidence before her. It follows, in my view, that the conviction cannot stand and must be set aside.

ORDER

[12] The order I propose is the following:

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

_____ I agree

CHILI J

Date of Hearing	:	22 August 2017
Date of Judgment	:	29 August 2017
Counsel for Appellant	:	A Ngubane
Instructed by	:	MN Mbanjwa Attorneys
Counsel for Respondent	:	Mr Truter
Instructed by	:	Director of Public Prosecutions, Pietermaritzburg