

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A41/2010

In the case between:

TSHEPO CHARLES RAMATSOSA

Appellant

and

THE STATE

Respondent

CORAM:

MOCUMIE, J *et* MTHEMBU, AJ

JUDGEMENT:

MOCUMIE, J

HEARD ON:

3 MAY 2010

DELIVERED ON:

8 JULY 2010

MOCUMIE J

- [1] The appellant was convicted on 15 April 2009 of the rape of a 14 year old girl in the Regional Court, Edenburg, Free State. On 21 May 2009 he was sentenced to 12 (twelve) years imprisonment. With leave of the trial Court he now appeals against his conviction. The appellant's defence was that they had consensual sexual intercourse.

- [2] Mr Nkhahle, the appellant's counsel who did not represent him at the trial, raised as a preliminary issue that the record was defective because portions of the appellant's evidence which was mechanically recorded could not be transcribed because of inaudibility. It is trite that when a record of proceedings is lost, destroyed or defective in material parts an order should be issued for the reconstruction thereof from all available sources along the guide lines set out in **R v Wolmarans** 1942 TPD 279.
- [3] The investigation that we have to undertake is firstly whether the inaudible portions or missing areas of the evidence is material. The applicable principle was enunciated in these terms by **Brand JA** in **S v Chabedi** 2005(1) SACR 415 (SCA) at 417d-h (para 5 and 6)

“[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has

been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible (see, eg, S v Collier 1976 (2) SA 378 (C) at 379A - D and S v S 1995 (2) SACR 420 (T) at 423b - f).

[6] The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal. ”

See also **S v Joubert** 1991(1) SA 119 (A) at 126 D-H.

- [4] In this case the following happened in connection with the reconstruction as noted by the Regional magistrate at p. 119 of the record:

“Mr Scheepers has provided us with his notes pertaining to the proceedings of the 23/9/2008 which have been confirmed by me and the prosecutor as a true reflection of what happened in court on 23/9/2008 (these notes will be typed and provided to Advocate Nkhahle). The evidence of each and every witness that testified in these proceedings have again been summarized in my judgment which has also been transcribed.

Thello (court witness) told the court exactly what has been referred to in my judgment, which is in conflict with what the accused told the court. Though Mr Scheepers provided us with his notes pertaining to Thello's evidence, he however missed some points regarding Thello's evidence. (See attached notes from Mr Scheepers)." (Own emphasis)

- [5] Mr Scheepers' notes in respect of Thello's evidence are as follows (verbatim):

"Known accused and complainant known them for years 2006? Yes we met Tshepo's girl, the complainant.

He, Tshepo Mpase and me (Tello) got to complainant's house parked car and she come. She got in the back. Then drove off. Tshepo (accused) dropped me and Mpase at my/our/her Mpase home. Nothing wrong with complainant willing to come along.

Do not know how relationship between accused and complainant started. Do not remember when confirms that accused and him and his girl/Mpase picked complainant up from her home. Mpase did not testify." (Own emphasis)

- [6] On the facts of this case I am of the view that the inaudible portions or missing areas of the evidence complained of are not material. What made it easier was the fact that even without Thello's evidence-in-chief and

cross-examination, the transcribed record of the proceedings, together with the appellant's attorney's cryptic notes during the trial as quoted above, was sufficient to enable the appeal of the appellant to be properly adjudicated.

[7] The facts of this case are briefly the following. According to the complainant the appellant came to her parental home in Reddersburg in the company of his friends, Thello and Mpasi, on 07 October 2006 and picked her up in his car. Mpasi and Thello alighted at Thello's home. The appellant drove to a secluded spot some 25 km outside the township on the De Wetsdorp road. He made sexual advances at her which she repulsed. He struck her several times with open hands and forced her into submission. He forced himself upon her and penetrated her sexually. She did not consent. When the appellant picked her up she was under the impression that he just wanted to talk to her.

[8] The complainant testified further that the penetration was painful, as a result she was injured on her private parts. The complainant was examined the following day by a medical practitioner. The medical

evidence establishes that the complainant sustained fresh injuries to her neck and her temple and her genitals and the medical practitioner concluded that the latter injuries were consistent with forced penetration.

[9] The complainant stated that after the incident the appellant dropped her off at her parental home. She says she was distressed and crying. Her brother testified and confirmed the report to him and the fact that his sister was still crying the following morning.

[10] In his defence the appellant testified that he fell in love with the complainant five months before they had the consensual sexual intercourse that led to his arrest. At that stage he had a live-in-lover. He feared that the lover could see him with the complainant and therefore used Thello as a go-between. He admits that when he fetched the complainant on 07 October 2006 he was accompanied by Thello and Mpasi.

[11] The evidence must be viewed in the context of the following:

11.1 The complainant had no reason to have believed that the appellant would force himself upon her. As she testified she “was under the

impression that the accused was only going to talk to me and thereafter he will take me back home”;

- 11.2 When Thello and Mpasi alighted the complainant became apprehensive about the whole situation as she realised that the appellant was driving further on and ignored her enquiry on where he was taking her;
- 11.3 The submission by the defence that complainant's parents or at least her mother assaulted her when she came home late is mere speculation and does, in any event, not tally with the events as they were related convincingly by the complainant. The appellant himself admitted that the complainant sustained the noted injuries but ascribed them to the lack of space in the back seat of the car. This still does not explain the neck and temple injuries.
- 11.4 If the complainant had been dating one Khuze prior to this incident and was evidently sexually active since September 2006 it is highly unlikely that she would have been distressed by another consensual sexual encounter.
- 11.5 Complainant's brother corroborated her that she was crying in the morning. She then made a report about the rape to him and even told him who the perpetrator was. The report was clearly not

extracted from the complainant through menaces contrary to what Mr Nkhahle, strenuously, insinuated;

11.6 Complainant denied that she had a love relationship with the appellant;

11.7 The discrepancy in complainant's evidence and her mother's as regards whether she was reprimanded or chastised on the night in question does not detract from the fact that on the facts and on the appellant's own admission the complainant sustained the injuries when they were together.

[12] The appellant's version is highly improbable in the light of the corroboration of the complainant's evidence by *alliunde* evidence. Thello, the appellant's confidante and go-between, who was called by the court in terms of s186 of the Criminal Procedure Act, 51 of 1977, was not aware of when and how the alleged relationship between the appellant and complainant started. What he knew was what he apparently gathered from the appellant on the Wednesday prior to the day of the incident. This is contrary to what the appellant said in his evidence-in-chief and during cross-examination viz that Thello was aware of the long standing love relationship between the two five months prior to this incident.

[13] On a conspectus of all the evidence I am of the view that none of the submissions and arguments on behalf of the appellant showed that the trial court acted irregularly or misdirected itself in any manner or in any material respect with regard to the conviction which would entitle this Court to interfere with its decision. As **Greenberg JA** stated in **R v Dhlumayo** 1948 (2) SACR 677 (AD) at 705-706:

- “3. The trial Judge has advantages-which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.
4. Consequently the appellate court is very reluctant to upset the findings of the trial Judge.
5. The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal court in as good a position as he was.
6. Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial.

7. Sometimes, however, the appellate court may be in as good a position as the trial Judge to draw inferences, where they are either drawn from admitted facts or from the facts as found by him.
8. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.”

See too **S v Haelebe and Others** 1997 (2) SACR (SCA) at 645 e-f.

In my view the conviction on rape is in order and the appeal ought not to succeed. The appellant has not appealed against his sentence.

[14] **I make the following order:**

ORDER:

1. **The appeal on conviction is dismissed.**
2. **The conviction and sentence imposed on 21 May 2009 are confirmed.**

B. C. MOCUMIE, J

I concur.

B. J. MTHEMBU, AJ

On behalf of the appellant: Mr. R. J. Nkhahle
 Instructed by:
 Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the State: Adv. M. A. Lencoe
 Instructed by:
 The Director: Public Prosecutions
BLOEMFONTEIN