

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 5/2006

In the matter between:-

THE STATE

versus

SOLLY LUMKILE MASISO

HEARD ON: 7 MAY 2007

JUDGMENT BY: RAMPAL, J

DELIVERED ON: 10 JULY 2008

[1] The accused was tried in the Bloemfontein Regional Court.

His trial started on 10 May 2004. He was convicted on 26 September 2005 on a charge of rape. He was then committed for sentence by the high court seeing that the victim was a girl below the age of 16 years at the time of the incident.

[2] The charge against the accused was that he assaulted and raped Sele Kane Alina Letoane, a 15 year old girl in

Bloemfontein on Sunday 14 December 2003.

Notwithstanding his plea of not guilty, he was found guilty.

[3] The matter has a long history. It must be told. On 26 September 2005 Mr. J.H.J. Greyvenstein, the trial magistrate, committed the accused in terms of section 52(1) (b) Criminal Law Amendment Act No. 105/1997 for sentence by the high court.

[4] On 5 May 2006 the accused appeared in this court before Kruger J who had certain reservations about the conviction. The one query he raised related to the issue of sexual penetration. The other query concerned the medical evidence. Because of these queries he postponed the case in order to request the magistrate to provide supplementary reasons in support of the conviction.

[5] On 19 June 2006 the magistrate signed a five page document containing his supplementary reasons. The magistrate timeously responded to the request of Kruger J. The record indicated that the supplementary reasons were

filed on 23 June 2006, some five weeks and three days before the date of the postponement, viz 4 August 2006.

[6] On 4 August 2006 the accused appeared in this court for the second time. Regrettably he appeared before a different judge, C.J. Musi J. I am not certain of what transpired on that day, because a tape of those proceedings was not transcribed – not that it was necessary. Therefore, whether C.J. Musi J was aware of the magistrate's supplementary reasons, already filed or not, I cannot say. He also postponed the case in order to send another request to the magistrate for supplementary reasons, but for a different reason from those which had prompted Kruger J to postpone the case. The query of C.J. Musi J was about the warning or otherwise of the minor victim to speak the truth. His query was therefore procedural and not substantive.

[7] On 27 September 2006 the accused again appeared in this court. On this third occasion, he appeared before Ebrahim J. A transcript of those proceedings is available. By then the magistrate had not yet responded to the request by C.J. Musi J. This was common cause. On behalf of the State

appeared Ms Claassens and on behalf of the accused, Mr. Vorster. Mr. Vorster, instead of Ms Claassens, addressed the court first. Although this was unusual, it does not matter anymore. The crux of the defence was that the conviction by the regional court should not be confirmed by the high court on account of certain procedural and substantive discrepancies. The procedural challenge concerned the alleged improper swearing in of the victim. The substantive attack pertained to various issues on the merits. Counsel for the State did not support the conviction, thereby aligning herself with the submissions made by the defence.

[8] Having heard the argument by the prosecution and the defence Ebrahim J directed that the proceedings of 27 September 2006 be transcribed and that a copy thereof be forwarded to the trial magistrate for comment. She then remanded the case to 13 December 2006. The accused was remanded in custody.

[9] On 11 October 2006 the lawyers approached Ebrahim J, in chambers, in connection with bail. By agreement between the parties the accused was then released on R500,00 bail.

The accused was reminded and warned to appear on 13 December 2006.

[10] On 13 December 2006 the accused again appeared in this court. On this fourth occasion the case served before me. There was still no response from the trial magistrate as regards the request of C.J. Musi J. Similarly there was still no response from the trial magistrate as regards the request of Ebrahim J. I then remanded the case to 18 January 2007. Thursday 18 January 2007 fell during the recess. I sacrificed one day of my holiday in order to finalise the case and to prevent the further tossing of the accused from pillar to post.

[11] On 11 January 2007 Ms Bernice Claassens paid the trial magistrate a visit in connection with the aforesaid second request (C.J. Musi J) and third request (Ebrahim J) for the supplementary reasons. The purpose of her visit was to fast track the process.

[12] On 18 January 2007 the accused again appeared. This was his fifth appearance in this court and his second before me. Still there were no reasons from the trial magistrate in

respect of the aforesaid requests by my colleagues. I decided to cling to the case. I postponed it to 7 May 2007 because I was due to leave for Johannesburg for a three months stint in the Labour Court at Braamfontein.

[13] On 4 May 2007 the trial magistrate signed another statement containing his reasons in response to the two requests. These further supplementary reasons were apparently delivered to Ms B. Claassens of the office of the Director of Public Prosecutions on the same day.

[14] On 7 May 2007 the accused appeared in this court for the sixth time. Once again he appeared before me as previously arranged. It was about three weeks after my return from the Labour Court via Harrismith where I was deployed for the usual Circuit Court duty. I received a copy of the magistrate further supplement on Monday 7 May 2007, just before the commencement of the hearing. The further supplement consisted of six type-written pages. The original supplement consisted of five type-written pages. Having read both in conjunction with the submissions made by the legal representative, I came to the conclusion that the conviction

could not be upheld. Then and there I set the conviction aside and set the accused free. The reasons for that order are set out in this judgment.

[15] I made the foregoing order just over a year since the accused first appeared in this court before Kruger J on 5 May 2006. The order of 7 May 2007 signalled his final appearance after sixth agonising and inconclusive appearances. It must be borne in mind that he was facing a potential sentence of life imprisonment because the victim was a minor girl child. Nothing could be more agonising to a convicted person. Such agony did not simply go away when he was released on bail on 11 October 2006, approximately thirteen months after his conviction in the regional court and five months after his first appearance in the high court.

[16] The first request in terms of section 52(3)(b) Criminal Law Amendment Act, No. 105 of 1997, for the magistrate supplementary reasons, was made on 5 May 2006 by Kruger J. The magistrate's supplementary reasons in terms of the section were furnished on 23 June 2006. Obviously the magistrate had filed the first supplement in good time. Had

the accused again appeared before the same judge, namely Kruger J, the chances are that his case would probably have been finalised on 4 August 2006. But it was not to be. Enough about the first request for now.

[17] What follows was a deplorable state of affairs. On 4 August 2006 the case was allocated to a different judge. Quite often this is occasioned by some unavoidable distributive logistics relating to the caseload. The second judge, C.J. Musi J, sent the second request for the magistrate's supplementary reasons. The second request made no reference to the first request or the first supplement. The second request was purported to be made in terms of the same section, 52(3)(b), the same section in terms of which the first request was made. There was no immediate response by the trial magistrate to the second request.

[18] The deplorable state of affairs continued and worsened on 27 September 2006. On that day the accused appeared before the third judge. Although there was still no second supplement, the first supplement was already available and had been available for a long time (since 23 June 2006).

The matter was thoroughly argued on the strength of the available material pertaining to the substantive issues. The issues raised in the first request and answered in the first supplement were not adequately covered if they were at all addressed. The argument traversed a wide spectrum of substantive issues far beyond the narrow confines of the first request. After all this, the case was still not disposed of. In my view, it should have. This will become evident later.

[19] The third judge, Ebrahim J, instead of giving a ruling, upholding or setting aside the conviction, sent another request for magistrate's supplementary reasons. The request was not specific. It took the form of a transcript of the entire proceedings of 27 September 2006. Hers became the third request in a series. It too was, apparently, purported to be made in terms of section 52(3)(b) as were the first and the second requests. Again there was no immediate response from the trial magistrate to the third request.

[20] Then I became involved as the fourth judge and learned about the two outstanding requests. I decided to wait for the

response of the trial magistrate. On 10 January 2007 the meeting took place between the trial magistrate and counsel for the State, as I have already said. The purpose of the meeting was to expedite the process.

[21] The combined response of the trial magistrate in respect of the second and the third requests was compiled and completed on 4 May 2007. It was a year since the accused first appeared in this Court; nine months since the second request and over six months since the third request. In his second supplement, the trial magistrate explained the inordinate delay. Under the general remarks he explains:

“1. Op Donderdag 11 Januarie 2007 het ek vir die eerste keer bewus geword van verdere versoeke deur die agbare regters toe Adv Bernice Claassens, van die DOV se kantore my in kamers kom sien het. ‘n Volledige transkripsie van die verrigtinge van die Hooggeregshof in saaknommer 05/2006 soos op 27 September 2006 is toe aan my oorhandig. Alhoewel ek meegedeel is dat die verrigtinge die dag deur die agbare regter Ebrahim hanteer is, blyk dit nerens uit die notule nie.

2. Uit die notule blyk dit dat daar voorheen navrae was oor die behoorlike inswering al dan nie van 'n getuie. Die navraag is nooit deur my ontvang nie.
3. Ek het reeds op 19 Junie 2006 my antwoorde op die aanvanklike navrae van regter Krüger, aan die Hooggeregshof versend en was van mening dat dit die aangeleentheid gefinaliseer het, vanuit my perspektief.
4. Op Vrydag 8 Desember 2006 het die waarnemende streekhof president, mnr AJ Pienaar 'n faks aan my getoon met die datum van ontvangs synde 7 Desember 2006. Daar was twee aangehegte briewe wat navrae van ene Reinette van Zyl aan beide myself en me Gela bevat het met betrekking tot sake wat op 13 Desember 2006 sou voorkom. Ongelukkig was daar op die dokument slegs 'n verwysing na S v G D Lekhele & 1. Ek het geen idee gehad na watter saak verwys word nie. Later het dit geblyk dat die Lekhele-saak, 'n saak van me Gela was. Ten spyte van verskeie oproepe die dag aan die Hooggeregshof se kantoor kom ek nie me Van Zyl opspoor nie. Ek het die posissie aan mnr Pienaar verduidelik en dieselfde dag met verlof vertrek.

5. Later het dit geblyk dat die betrokke saak deel van die navrae gevorm het. Ek het tot op hede nog nie die tweede stel navrae ontvang nie.
6. Op Donderdag 11 Januarie 2006, soos hierbo beskryf, was adv Claassens in my kantoor en het sy verder beloof dat sy haar afskrif van die aanvanklike verrigtinge aan my beskikbaar sou stel ten einde te bepaal of ek van die aspekte kan beatwoord wat uit die verrigtinge van 27 September 2006 voortvloei. Die reëling wat sy met my getref het was dat die DOV se bode die notule na my kantoor sou bring.
7. Ek het die notule eers op Dinsdag 16 Januarie om 11:35 ontvang. Klaarblyklik het die bode dit goedgevind om die notule by 'n ander kantoor aftelever, waar die persoon dit nie nodig gevind het om die dokument na my kantoor te bring nie. Ongelukkig is die administrasie van die kantoor deesdae glad nie na wense nie.
8. Die saak moes weer uitgestel word. Die keer tot 7 Mei 2007. Ek het geen probleem met die verskaffing van redes nie en verkies eerder om bykomende redes te verskaf as dat 'n skuldige persoon onskuldig bevind word.”

[22] I find the magistrate's explanation quite satisfactory and acceptable. Perusal of the record shows that all the three requests were addressed to Mr. A. J. Pienaar instead of Mr. J.H.J. Greyvenstein. Perhaps this was a matter of protocol. However, it seems to me that the three secretaries of my colleagues namely: Ms M. Pieterse (Kruger J); Ms. Secwalo (C J Musi J) and Ms. R. van Zyl (Ebrahim J) – were misled by the record of the proceedings in the regional court which wrongly created the impression that Mr. A.J. Pienaar was the trial magistrate. See formal cover sheets in respect of volume 1 and volume 2. Certainly this error also contributed towards the delay.

[23] Section 52(3)(b) Act No. 105 of 1997 reads as follows:

“The High Court shall, after considering the record of the proceedings in the regional court, sentence the accused as contemplated in section 51 (1) or (2), as the case may be, and the judgment of the regional court shall stand for this purpose and be sufficient for the High Court to pass such sentence: Provided that if the judge is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he or she shall,

without sentencing the accused, obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused.”

[24] The purpose of the section is to enable a judge who, for one reason or another, is doubtful about the correctness of the conviction of the accused he is called upon to sentence, first to invite the trial magistrate to give supplementary reasons, if any, why the conviction should be upheld and not set aside. It seems to me that the section envisages one request. It refers to a statement of reasons by the magistrate and not statements. However, it does not expressly restrict or prohibit a second or further request. Be that as it may I am of the view that a second query should not readily be sent, unless sending it out is absolutely imperative to prevent an injustice.

[26] Such a scenario will occur, for instance, where the case cannot be resolved on the basis of the magistrate’s supplementary reasons with regard to the first request. In a case where an appropriate, fair and just ruling, as regards the conviction, can be given one way or the other on the

strength of the evidence and the judgment as amplified by the magistrate's supplementary reasons, a second query must not be sent. This is one such case.

[27] It is undesirable to have the regional court magistrate endlessly bombarded with a series of requests. They too are just as busy as we are. To them time is just as important as it is to us. I hasten to say that my conservative comments in connection with the construction of the section are *obiter dicta* because it was never an issue in the instant case. I am prompted to comment about it because the further requests made in terms of the section, particularly the third request, elicited a great deal of unhappiness from the trial magistrate. I have sympathy with some of the remarks he made. However, certain remarks he made concerning Ebrahim J and the two lawyers, Ms Claassens and Mr. Vorster, were unfortunate. He became too personal and too sensitive. The procedure created by section 52(3)(b) should not be used the way it was used in this case.

[28] In the first place I turn now to the second query – that is the query relating to the swearing in of the victim. The trial

magistrate conceded that, *ex facie* the transcribed record, it would appear that the victim was not properly sworn in. But he correctly pointed out that certain mechanical break-ups occurred as a result of which the swearing of the complainant was not recorded. He was of the opinion that the correct procedure for the swearing in of the complainant was followed as it was indeed followed throughout the trial in respect of all the other witnesses. He recalled a case where the stenographer inadvertently neglected to activate the computer immediately. I believe that, as judges, we must take a practical view of such matters, especially where, as in this case, the matter was not seriously and earnestly put in issue by the defence. All sorts of things can happen down there which later may tend to give a distorted reflection of what was in truth an accurate picture of what transpired. In the circumstances I am inclined to accept the reasonable explanation given by the trial magistrate. Therefore, I find that there was no procedural irregularity. The victim was properly admonished to speak the truth.

[29] In the second place, I proceed to examine the merits. The version of the prosecution was narrated by the following

witnesses: Selethane Alina Letoane, the victim, born 7 October 1988; Adri Krieger, the examining doctor; Sello Lucas Jantjie, the ex-schoolmate of the accused; Sarah Mutsinyane Moheketsane, the victim's neighbour; Yvonne Moreki aka Nkele, the victim's friend. I do not deem it necessary to do a critical analysis and evaluation of the various testimonies of all the witnesses.

- [30] In the first query, reservations were expressed as to whether the evidence established, beyond reasonable doubt, the sexual penetration of the victim per vagina by the accused. In her evidence in chief the victim testified:

“Wat gebeur toe? – Hy het my broek en my damesbroekie uitgetref en hy het dit op die lig gegooi. Hy het my bobene oopgeruk en sy privaat gedeelte in my privaat gedeelte ingedruk.

Voor hierdie dag het jy al met iemand anders ooit gemeenskap gehad? – Nee.

Toe hy nou sy privaatdeel in sy (sic) privaatdeel indruk kon jy voel of het hy vir jou vaginaal gepenetreer of anaal gepenetreer? – Ek het dit gevoel hy het in my vagina gepenetreer.

Het jy seergekry? – Ja, ek het seer gevoel, ek het pyne gevoel.

Is dit moontlik dat jy 'n fout kan maak dat hy nie by jou vagina sy privaatdeel ingedruk het nie maar wel by jou anus sy privaatdeel ingedruk het, is dit moontlik? – Nee, hy het dit nie in my anus geopenetreer nie maar in my vagina.”

[31] The examining general practitioner, Dr. Adri Krieger, was asked by the prosecution to say whether, according to her physical examination, the victim was penetrated through the anus of the vagina. Her resounding answer was that it was highly possible that the victim was anally and not vaginally penetrated. During her cross-examination by the defence, the doctor again re-affirmed her opinion. But the accused denied that he penetrated the victim either vaginally or anally in Bloemfontein on 14 December 2003.

[32] The victim's version was that the accused had vaginally penetrated her. The doctor doubted her version. The doctor, however, conceded very late in her testimony in response to the defence attorney's question following the clarity questions asked by the magistrate that it was possible the victim was vaginally and anally penetrated. However

possible, the scenario of the vaginal penetration was, it was still an unlikely scenario in this case, according to the doctor. Therefore, the doctor's belated concession in no way nullified her earlier firm answer that it was highly possible, not just possible, that the victim was anally penetrated. The presence of physical injuries in the victim's anus coupled with the absence of physical injuries in the victim's vagina are objective facts which tend to give more credence to the doctor's evidence than the victim's. Moreover, the victim's own testimony that, she endured pains as a result of the penetration, strongly suggests that such pains, more probable than not, had their origin where the physical injuries were localised, in other words, in the anus.

[33] The trial magistrate implicitly accepted that the penetration was not vaginal. He commented as follows:

"In 'n proses van gemeenskap hou is dit so dat daar baie maklik op verskillende plekke gepenetreer kan word deur 'n man sonder dat die klaagster noodwendig en elke geval deeglik bewus is van waar die penetrasie plaasvind. Interessant genoeg het sy gesê dit was pynlik gewees en as mens kyk na

die beserings wat aangetoon is deur die dokter in haar getuienis **blyk dit duidelik dat die penetrasie per anum vir haar pynlik moet wees.**"

- [34] It is apposite to quote verbatim the following passage where the trial magistrate correctly made the following finding as regards the tension between the version of the victim *vis-a-vis* that of the doctor.

"Ook die onderskeid wat sy vir ons hier getref het tussen anale en vaginale penetrasie is duidelik uitgelig. Ek is van mening dat mens haar weergawe as 'n deskundige sonder meer kan aanvaar."

- [35] The version of the doctor was preferred to that of the victim. The victim's version was therefore implicitly not accepted, not because she was untruthful, but because she could have been mistaken. There being no vaginal penetration, there could have been no rape committed. Accordingly the accused was entitled to have been acquitted. At the time of the incident on 14 December 2003 forced anal penetration of a female by a male was not criminalised as rape as it is today. On the facts, at worse for the accused, he could have

been convicted of attempted rape or indecent assault. I may add that the conviction was attacked by the defence. Above this, the conviction was also not supported by the prosecution.

[36] However, I did not set the conviction aside merely because counsels were agreed it could not be upheld. I decided the case according to established principles of our law. I was convinced that, on the facts and the law, the verdict should have been different. I deem it unnecessary to deal with the various other points raised and argued before Ebrahim J and later before me. I decided to confine myself to the critical aspects, as were raised in the first request of Kruger J and answered in the first supplement by the trial magistrate. The issue of penetration was so decisive that it rendered the two subsequent queries absolutely unwarranted.

[37] It is so that the accused had boasted to the prosecution witness, S.L. Jantjie, about his sexual escape with the victim. Of course, the early admission outside court, prior to his arrest, had to be preferred to his late denial in court. It follows, therefore, that the version of the accused was

correctly rejected by the trial magistrate as a false account of what really in the particular bedroom. But it does not necessarily follow from this that, because the accused admitted the sexual act and boasted about it, he had, in truth and in reality, vaginally penetrated the victim.

[38] If it is accepted, and I believe it should, that the victim was mistaken as to precisely where she was penetrated, it must equally and logically also be accepted that the accused was also mistaken about the point of penetration. He believed, as did the victim, that he vaginally penetrated the victim whereas in fact it was not so. According to Dr. Krieger, such a mistake is not uncommon because the two bodily female apertures are dangerously close to each other. The partition is approximately just 2 cm wide. His outside court admission certainly made him a liar but not a rapist. Since there was doubt as regards a fundamental element of the crime, the accused was entitled to the benefit of such doubt.

[39] On page 5 of the magistrate's first supplement dated 19 June 2006, he drew an inference. He concluded:

“Die anale penetrasie word bewys mbv dr Krieger se getuienis en op grond van omstandigheidsgetuienis. Die enigste redelike afleiding is immers dat beskuldigde die klaagster sowel vaginaal as anaal gepenetreer het. Die feit dat die klaagster nie die onderskeid kon tref nie is myns insiens verstaanbaar, veral as die dokter se getuienis deeglik verreken word. Ek is van mening dat Dr Krieger met betrekking tot die ondersoek van verkrachtingslagoffers een van die mees ervare dokters in die land is. Haar weergawe word ook nie in geskil geplaas nie.”

- [40] The evidence established beyond reasonable doubt that the accused molested the victim and that his criminal conduct was blemished with sexual connotations. However, I am in respectful disagreement with the learned trial magistrate inferential reasoning. The inference drawn does not exclude every other reasonable inference. **S v BLOM** 1939 AD 188. On the facts, that the accused could as well anally have penetrated the victim is another reasonable inference which cannot be ignored and excluded. I can find no compelling reasons to justify its exclusion. Seeing that this other inference cannot justifiably be eliminated as speculative conjecture, it is impermissible to attempt to resolve the legal problem at hand by resorting to the judicial tool of inferential

reasoning. We have here two competing inferences. Therefore, the inference drawn was not legitimate to be drawn.

[41] In the circumstances I have come to the conclusion that the verdict that the accused was guilty of raping the aforesaid minor child in Bloemfontein on 14 December 2003 was not in accordance with justice. I would therefore set it aside.

[42] Accordingly I make the following order:

42.1 The conviction is set aside.

42.2 The verdict of guilty is substituted with one of not guilty.

M.H. RAMPAL, J

On behalf of the accused: Attorney J. Vorster
Instructed by:
Legal Aid Board
BLOEMFONTEIN

On behalf of the respondent: Adv. B. Claassens
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN