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IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Appeal no: KAP 91/06
On roll : 26/02/ 2007
Date delivered: 2/03/ 2007

In the appeal of :

TEBOGO ALBERT DAMANE

APPELLANT

and

THE STATE

RESPONDENT

Coram: Lacock J et Makhafola A J

JUDGMENT

MAKHAFOLA A J:

1. The appellant was arraigned before the Regional Court of the Northern Cape sitting in Kimberley charged with attempted rape of a 14 year old complainant on 11 June 2005 in a small dark toilet situated in the premises of the complainant's home.
2. The appellant pleaded not guilty. His counsel who represented him throughout the trial gave the following plea explanation without making formal admissions.

Vide: Record: Page 5: Lines 5-7

The plea explanation on record reads as follows:

“die beskuldigde sal kom getuig dat hy inderdaad betrokke dag die 11de van Junie

2005 inderdaad by die klaagster se huis gewees het, waar sy gaan drink het, die klagster se huis is 'n sjebeen. Hy sal getuig dat hy een bier gedrink het en later huis toe gegaan het dat sy by die huis kom was hy aangeval deur die klaagster se moeder, deur met 'n bottel op die agterkop te slaan, sowel as gesteeek op die regterskouer, voor op die regterskouer en dat sy geen kennis dra van enige verkragting nie”.

Vide: Record: Page 4: Lines 19-23

Record: Page 5: Lines 1-4

3. The appellant was convicted of attempted rape and sentenced to five (05) years imprisonment in terms of section 276 (1) (i) of Act 51 of 1977. He now appeals against his conviction only.
4. The crux of the appeal is how the attempted rape took place and the identity of the appellant which are challenged as having not been proved beyond a reasonable doubt by state for the conviction of the appellant.

COMMON CAUSE FACTORS

The following facts are not in dispute.

- 1) The complainant's home operates as a shebeen where beers are sold;
- 2) The appellant goes to drink there at least once a week;
- 3) On 11 June 2005 the appellant was on the premises where he bought and drank beer;
- 4) Whilst so drinking his beer on 11 June 2005 the appellant was seated alone away from the rest of the other group which was seated around the fire.
5. I do not intend to repeat the evidence by both the state and the defence as it is embodied in the record. It will suffice that I deal with those portions which are relevant to the appeal.

CASE FOR THE STATE:

6. In summary, the state called two witnesses who are sisters namely: the complainant and her older sister L.. In the main the complainant's evidence as spelt out in the record is that the appellant attempted to rape her in a small dark toilet at the complainant's home premises with a cloth stuffed into her mouth and as a result she was unable to scream. She testified further that on that day of the incident but prior to the attempted rape she had seen the appellant drinking his beer seated alone away from the other group of drinkers who were seated next to a fire. She also described the clothes which the appellant was wearing on the day in question.

7. L. as the person who had sold a beer to the appellant on the day in question, also testified about the clothes the appellant was wearing. When she met the complainant at the toilet she was crying and she related to her the whole episode inside the toilet. L. confirmed having been told by the complainant what she alleged the appellant had done to her.

CASE FOR THE APPELLANT

8. The appellant testified in his own defence and denied having seen the complainant on 11 June 2005. he testified that he bought a bottle of beer from L.. He was seated alone apart from the other group of people who were seated at the fire. He denied having gone to the toilet at all. He conceded to have been wearing the clothes described by the state witnesses except that he was wearing khakhi pants and not a pair of jeans. After he had finished drinking he returned the empty bottle of beer and glass to L. and left the premises.

IDENTITY:

9. The focal point of this appeal pivots on the question of identity. I now turn to deal with it. The testimony relating to a person's identity has been accepted by our courts as direct or circumstantial. The courts have warned upon the dangers of relying upon the identification of a single witness.

Vide: R v T 1958(2) S A 676(A) @681
S v Mlati 1984(4) S A 629 (A) @ 633 A-C

10. In *casu*, both state witnesses have seen the appellant a few times prior to the alleged incident. The appellant has also seen them prior to the incident.

Vide: Record: Page 20: Lines 15-18 (by complainant)
Record: Page 44: Lines 22-23 (by L.)
Record: Page 45: Lines 1-7 (by L.)
 Record: Page 45: Lines 18-20 (by L.)
 Record: Page 49: Lines 19-20 (by L.)
R v Dladla 1962 (1) S A 307 (A) @310

11. The state witnesses tendered direct evidence of identity of having seen the appellant seated under the shelter alone and apart from those who sat at the fire.

Vide: Record: Page 8: Lines 7-11 (by complainant)
 Record: Page 45: Lines 18-20 (by L.)
Record: Page 46: Lines 1-6 (by L.)

12. The appellant on his own version confirms having been seated alone and away from the group at the fire drinking his beer. He says "*Ek het daar buite gesit daar was ook mense wat daar om the vuur gesit het maar ek het net so 'n bietjie agter hulle gesit en die bier gedrink.*"

Vide: Record: Page 72: Lines 5-7

CORROBORATION

13. The trial court has found that the complainant's evidence on the presence of the appellant at her home premises and how he was dressed and seated at the time he drank his beer was corroborated by L.. What was done to her as related to L. and later in Court was also told to the court by L. as corroboration. The trial court was further satisfied about the evidence as to the identity of the appellant.
14. If we take into account that there is a rule against self-corroboration then it can be accepted that corroboration is independent evidence that goes to confirm the testimony of a witness. Our law and practice does not require that a child be corroborated either in criminal or, *a fortiori*, in civil cases.

Vide: R v Manda 1951(3) S A 158 (A)

Woji v Sanlam Insurance Co LTD 1981(1) S A 1020 (A) @ 1027 H -28 A

15. In *casu*, the trial court was not concerned with a trial where a very young child was involved. I am also mindful that substantial confirmation and cautionary rule is usually required where very young children are involved.

Vide: R v Bell 1929 CPD 478

R v J 1958(3) S A 699 (SR)

COURT AQUO

16. There is no indication in the record that the trial court has omitted to consider or misconstrued some relevant facts before it came to the conclusion to find the appellant guilty. After all "*no judgment can ever be perfect and all embracing*".
Vide: R v Dhlumayo and Another 1948 (2) S A 677 (AD) @ page 702, 706
S v Pillay 1977(4) S A 531 [AD] @ 535 A-B

EVALUATION

17. The complainant fared fairly well under cross-examination without any material discrepancies with her evidence – in – chief. From the record, keeping in mind that the trial court was dealing with a 14 year old female, the manner in which evidence was tendered was not surprising. In the circumstances her manner of testifying in chief and under cross-examination was satisfactory.
18. L.'s evidence cannot escape criticism. She is 16 years old and is doing grade 10 at school. She was testifying at times without certainty especially when she was confronted by the defence about the appellant answering when she knocked at the toilet. She also contradicted the complainant about the exact words allegedly uttered by the appellant inside the toilet. But the said contradictions are not material to the

extent of vitiating the guilty finding by the trial court.

19. The appellant's evidence on the other hand was short. Except for admitting his presence at the complainant's home he had denied and challenged any evidence by the state that implicated him. After all was done and said, the trial court accepted the state case and the corroboration of the state witnesses and concluded that the appellant was lying.
20. His defence fell short to the overwhelming state evidence against him.
21. Gleaned from the record it is clear that when the alleged attempt to rape occurred, only the complainant and the appellant were inside the dark small toilet. This evidence borders on the single witness principle which is catered for by the Act.

Vide: Section 208 of Act 51 of 1977.

ARGUMENTS:

22. Amongst other aspects, the appellant's counsel put up a vigorous argument relating to the complainant's ability to identify the appellant inside the small dark toilet. He also attacked the fact that instead of the complainant clutching her pants she should have attempted to remove the cloth in her mouth as expected because that was life threatening. But he had difficulties when confronted with the fact, from the court, that there was no evidence to suggest that the cloth in her mouth posed a threat to her life.

Vide: Rex v Ndhlovu (1945, AD 369 @ 386).

Where it is stated that "*the jury should not speculate on possible existence of matters upon which there is no evidence or the existence of which cannot reasonably be inferred from the evidence.*"

23. On the other hand the respondent stuck to its position as contained in its heads of argument that identity was proved.

In the circumstances I am of the view that the conviction is correct and should not be interfered with.

I conclude by proposing that the appeal should be dismissed.

MAKHAFOLA K
Acting Judge of the High Court
Northern Cape Division

I agree and it is so ordered.

LACOCK H
Judge of the High Court
Northern Cape Division

On behalf of the Appellant : Advocate V Mayisela

Instructed by : Legal Aid Board, Kimberley

On behalf of the Respondent: Advocate Louw

Instructed by : Office of the D P P, Kimberley.