

Case No. 35/89 E du P

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ISAAC LEKOLOANE

Appellant

and

THE STATE

Respondent

Coram: E M GROSSKOPF JA, NICHOLAS et NIENABER AJJA.

Heard:

19 March 1990

Delivered:

29 March 1990.

JUDGMENT

NICHOLAS AJA:

The appellant, a 30-year old man, was charged in the Regional Court in Johannesburg with raping a 13-year old girl named D.H.. He was convicted and sentenced to imprisonment for 6 years. An appeal to the Witwatersrand Local Division was unsuccessful. Leave having been granted on a petition to the Chief Justice, he now appeals to this court against the conviction and sentence.

At his trial the appellant (to whom I shall refer as "the accused") was represented by counsel. He pleaded not guilty, but admitted that on the day in question he had sexual intercourse with D.: he said that this was with her consent. He admitted that she was 13 years old, but said that she had told him that she was 17.

The scene of the events which gave rise to the charge was the room of D.'s mother, A.H., in the servant's quarters at the latter's place of employment in

Lower Houghton Johannesburg. A.'s husband (D.'s father or stepfather - it was not clear which) also occupied the room. The time was the evening of 5 August 1987. Present in the room were D., A., and the accused, who was a friend of A.'s and was a frequent visitor.

In summary the evidence of D. was this: A. left the room to go to her employer's kitchen, leaving D. and the accused in the room. D. was sitting on a chair, reading a book, and the accused was also sitting in a chair. The accused then went to the door and bolted it.

Approaching D., he caught hold of her by the neck and squeezed it. She tried to scream and he put his hand over her mouth. She said that she was a very sensitive girl and when she screams she usually faints. She did faint. She did not know what happened thereafter, because when she became conscious again she was in hospital. She was bleeding from her private parts, and was taken to a doctor and was given treatment and told to go and report at the police station.

She had never had intercourse before and she did not give the accused permission to have intercourse with her.

A.H. said that while she was in her employer's kitchen she heard screaming three times: she could not identify the person responsible for the first and second screams but the third scream she recognised as D.'s. She went to her room, but could not get into it. She gained access by breaking a window above the door and climbing through it. Inside she found the accused putting on his shoes; on the floor were D.'s panties and red blood; D. was on the bed, covered half in a blanket and unconscious. There was blood on her upper legs and she was bleeding profusely from her private parts. She asked the accused what he had done to the child and he replied that A. had little respect for him. The accused was dressed in a windbreaker and jeans, and trousers which were splattered with blood and the zip of which was open. She went outside with D. and obtained a lift to the hospital where she left

D.. Her husband arrived only when she was in the street thumbing a lift.

Dr Gillian Keast is a medical doctor. On 6 August 1984 she examined D. who had with her a pair of green panties which were stained with blood. D. told her that she had spent the previous night in the Hillbrow Hospital; she had had no previous sex experience; and she had not begun menstruation. On examination the doctor found that there were no bruises, abrasions or wounds on her body; that the vestibule (the entrance to her vagina) was red and tender; the hymen showed old tears (which did not necessarily mean that she had previously had intercourse); the vagina accepted one finger; the perineum showed a 1,5 cm ragged laceration which extended into the vestibule; and the examination was very painful to D.. Her remarks were "Signs of recent sexual interference".

Under

cross-examination Dr Keast said that obviously a lot of force would have to be applied to get this sort of laceration,

which was unlikely to have occurred "with normal consenting intercourse". it was possible, though unlikely, that this was the second time D. had had intercourse.

In his evidence the accused said that he first visited the premises concerned in January 1984 when A. Hlalele started selling liquor there. Every night he used to go and have his supper there, and his washing was also done there. He first saw D. at the premises in February - she stayed there from then on. He and D. were lovers, from February "until up to date." He slept with her once only before 5 August 1984. On the evening of that day, he

said -

"...D.'s mother left for the main house. D.'s father was not in the room so I said to D., look, let us have intercourse for about 5 minutes and she agreed. After we had intercourse, your worship, I sat on a chair and then D.'s step-father knocked at the door. I opened the door and he asked what we were doing and I did not say anything. He then lifted D.'s dress and saw . that she did not have her pantie on. He then went out to tell D.'s mother. Then Dolly's mother came to

the room, scolded me and said I had raped

D...."

In finding the accused guilty, the magistrate said that he bore in mind the cautionary rules relating to the evidence of the complainant in a sexual matter, to the evidence of a very young child, and to the evidence of a single witness. Viewing the matter in the light of the probabilities, he had no doubt whatsoever "that the evidence of D. and her mother has to be accepted as being true beyond reasonable doubt and that the evidence of the accused has to be rejected as being false beyond reasonable doubt."

It was argued by appellant's counsel that the magistrate only paid lip-service to the cautionary rules and that he did not subject D.'s evidence to the close critical analysis which it required.

There are, it is plain, features in D.'s evidence and that of her mother which render that evidence subject to criticism. Some of them may be mentioned.

D.'s proclivity to faint when she screams is

certainly unusual, and it is unfortunate that nobody thought to ask Dr Keast whether such a tendency is known to medical science. Her mother said that "this was my first time to see her unconscious", but she did find her unconscious when she came into the room.

Then there is the matter of D.'s screams. D. said that she tried to scream, but that this was aborted by the accused placing his hand over her mouth. Her mother said that she had heard three screams separated by intervals of 20 minutes and it was only the third that she definitely identified as emanating from D.. This formed a basis for a defence argument that D.'s evidence that the accused attacked her shortly after her mother went to the kitchen, could not be reconciled with this evidence. That is true but it does not reflect on D.'s credibility, because on the accused's evidence there was no room for any screams, and on the accused's own story there was no great delay after A.'s departure before they had intercourse.

The accused said that it was the father who first entered the room. A. said that she was the first to enter; her husband was not there at that stage. It was ground for criticism of the State case that the father was not called as a witness. At the same time, there is one circumstance in the favour of A.'s version. She said that when she entered the room, she found the accused putting on his shoes. The accused said in his evidence that "before having intercourse I removed only my shoes."

D. said that in the hospital, "My tummy was aching and blue ... in colour, discoloured and I was bleeding from my private parts." Dr Keast said D. had no bruises.

D.'s evidence as to her scholastic activities appeared to be inconsistent. She said that when she came back to Johannesburg from Bophutatswana in May "I was staying with my grandmother in Hillbrow and attending school." A little later she said, "I was attending school and staying in Soweto sometimes and coming by train to town

to see my mother."

She said again "I am a correspondence student with Damelin College."

The fact that there are such criticisms is not in itself sufficient to carry the appellant to success in the appeal. The issue is a narrow one: is it a reasonable possibility on the evidence as a whole that D., contrary to her denial, may have agreed to have intercourse with the appellant? To that narrow question none of the criticisms of D.'s evidence are directly relevant. They have a bearing only to the extent that they may reflect on her general credibility as a witness. In a case such as this, where the only issue is consent, the accused's account of the circumstances may be of prime importance. This does not mean that there is any onus on the accused to prove consent. The onus is on the State throughout. But where the accused gives an account which cannot reasonably possibly be true, that may be sufficient, taken together with the complainant's

denial, to negative consent. Cf. R v. Bhardu 1945 AD 813 at 822-3.

Fundamental to the accused's account is that he and D. had a long-standing love affair; otherwise it would strain credulity beyond breaking point to suggest that a 13-year old schoolgirl would consent to intercourse for 5 minutes in her mother's room when her mother (and according to the accused her father) was a short distance away and might return at any moment. It was put to D. in cross-examination that the accused met her in February 1984, when he "formed a relationship" with her, which persisted until August; that this was not the first time that he had sexual intercourse with her- he first slept with her in May; that they were boyfriend and girlfriend over the whole of the period (D.'s evidence was that she went back home to the Mefikeng district where she stayed between February and May, and that when she returned to Johannesburg she stayed with her grandmother in Hillbrow and visited and stayed with her

mother only occasionally. But that is by the way.) "We were lovers," he said, "as from February up until date."

This improbable relationship between a man of 30 ("I loved her very much," he said, "but I had other girlfriends") and a school-girl of 13 was, on the accused's account of it, a hollow affair. They could have seen one another only under the eyes of D.'s parents: he did not suggest that they had any extra-mural contact. There was apparently no opportunity for a relationship to burgeon and blossom. Until they had intercourse the only intimacy between them was that "she also did my washing." (When this was put to D., she indignantly repudiated it, seemingly with justice: "...that is totally untrue. I did not do that. I attend school, your worship, and I cannot leave my school to do washing for a friend of my mother's...")

The accused said that before 5 August 1984 he did not get a chance to sleep with D. - "I only slept with her once and on the second occasion (i.e. 5 August 1984) we were

disturbed." His evidence given under cross-examination on the date of the previous intercourse was confused. It had been put to D. by defence counsel that the accused first slept with her in May. She denied it.

He said now:

"It was on 19 August, on Saturday night ... I cannot remember which month it was .. A month before my arrest [this was on 6 August] .. 4 months before my arrest ... It was 4 months on the day of my arrest since the day of my arrest since that occasion your worship."

The doctor's evidence was that it was unlikely that the laceration which occurred on 5 August would have occurred if D. had had intercourse before that. The accused's accounts of post-coital events were inconsistent and contradictory. It was put to D. in cross-examination that -

"(the accused) says your step-father came into the room and found you naked under a blanket and him haif undressed."

In his evidence-in-chief he said that after they had had

intercourse, he sat on a chair and that D.'s step-father knocked on the door which the accused opened. The father "lifted D.'s dress and saw that she had not her pantie on." He said that when the mother got into the room, D. was on the bed, she had a shirt on, and she was covered with a blanket. He said that when they had intercourse, D. took off her slacks and pantie and kept the shirt on the whole time. As for himself he only removed his shoes and opened the fly of his trousers. He could give no explanation why, if that was to be his modus operandi, D. should have removed her slacks and panties. When pressed on the point, he was evasive. He said variously:

" .. it was already late at night and we were just going to have intercourse quickly while her parents were not present and I was to leave ... Your worship, with us blacks ... the mother and father are not supposed to know that I and D. have an affair and they are not told... I thought D.'s step-father was going to stop us I have no other reply."

The most telling point against the accused's story

of intercourse with consent, and which he could not explain away, was D.'s injury. Its infliction must have caused excruciating pain if she was conscious. Dr Keast said that it was the sort of laceration you get in childbirth. There resulted a profuse flow of blood. Yet it was something that the accused did not touch on until he was cross-examined. Even at that stage he said that the father lifted D.'s dress and saw that she did not have her panties on - he did not mention blood. Asked by the prosecutor to account for D.'s injuries, he said:

"(T)his happened when D. was about to menstruate ... It was not my first time to have intercourse with her. I know nothing about a laceration which she sustained ... I did not use any force."

It was put to him that he did use force and that is why that laceration was there. His reply was curious and rambling:

"Your worship, but she could have been injured if it was rape, she could have received injuries and bruises and maybe a knife would have been used if it was rape."

It was also submitted that the magistrate went

beyond acceptable limits in questioning the accused and that he inhibited proper cross-examination of State witnesses. I do not think that this submission is well-founded. It is true that there appear from the record signs of irritation on the part of the magistrate with defence counsel and with the accused while the latter was giving evidence, but he did not in my opinion exceed the bounds of propriety.

Regarding the evidence as a whole, and considering the cumulative effect of the points mentioned above, the accused's story of intercourse with consent is false beyond a reasonable doubt. That being so, the onus resting on the State was duly discharged, and the accused was properly convicted.

The appellant also appeals against the sentence. It was argued that the magistrate over-emphasized the interests of the community and that the sentence was excessive and created a sense of shock. It is true that the sentence was a heavy one, but I do not think it was unduly

so. In the circumstances in which it was committed the crime called for severity. The accused raped a 13-year old girl under her mother's roof, and thereby abused the privileges of a guest and the trust of a friend. It was argued that apparently D. suffered no permanent damages, and that on the following day she appeared normal to the doctor. That may be so, but it does not mitigate the seriousness of an offence to argue in effect that it might have been worse. The appeal is dismissed.

H C NICHOLAS

E M GROSSKOPF JA

NIENABER AJA Concur