IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case No: CA& 239/17

In the matter between:

SIPHOSETHU BOTLANI **First Appellant**

SICELO JACOBS **Second Appellant**

and

THE STATE **Respondent**

JUDGMENT

TOKOTA J:

[1] The appellants stood trial in the Regional Court, Port Elizabeth, on two charges of;

Count (1) Kidnapping, it being alleged that on or upon 20 April 2013 at or near Govan Mbeki in the Regional division of Eastern Cape the appellants did unlawfully and intentionally deprive the complainant, one Z. B., of her freedom of movements by threatening her with knives and pulling her to the bushes and to the school yard; and

Count (2) Rape as defined in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with the provisions of s.51 (1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended; it being alleged that on or about 20 April 2013 and at or near Govan Mbeki in the regional division of the Eastern Cape each had committed an act of sexual penetration with the complainant by inserting their penises into the private parts of the complainant without her consent;

[2] They all pleaded not guilty, but after hearing evidence the Regional Magistrate found them guilty as charged. All three accused were each sentenced to three (3) years imprisonment in respect of count 1

(kidnapping) and accused nos. 1 and 2 were each sentenced to fifteen (15) years imprisonment in respect of count 2 (rape) and accused no.3 was sentenced to eighteen (18) years imprisonment in respect of count 2.All sentences were ordered to run concurrently. Accused no.3 successfully appealed against both conviction and sentence. This appeal concerns accused nos.1 and 2 only. I will henceforth refer to them as they were referred to in the Magistrate's Court. With leave of the Magistrate this appeal is against both conviction and sentence.

[3] The State called four witnesses in support of the charges. Their versions are summarised as follows:

Z. B., hereinafter referred to as the complainant, testified that on the night of 20 April 2013 and it was after 22:00 she was on her way to Dalindyebo Street, Govan Mbeki village. She was in the company of her three friends. They were accompanying one of their friends who was visiting her boyfriend. On their way she observed a young man who was following them. This young man called her and she ignored him. This was accused no. 3. They proceeded to the home of her boyfriend but could not find him. They proceeded to one of her friends' boyfriend and left her there.

[4] Accused no.3 kept on following them until they were at a dark corner. There he pulled her and put a knife on her neck and instructed her to go with him. The other ladies ran away. Accused 3 directed her to proceed towards the bushes.

[5] On their arrival in the bushes she was instructed to undress herself. She undressed her pantyhose and accused 3 instructed her to bend and she complied. He pulled down his pants and inserted his penis into her vagina and had sex with her three times. After he finished with her he said they should go to his friends. They proceeded towards the direction of the hall and at or near the corner of a shop they met accused no's 1 and 2.

[6] She knew accused no. 1 as he was a friend of her boyfriend. Accused no.1 and her boyfriend went to initiation school together. Accused no.1 asked if accused no.3 was her new boyfriend. She replied that they should leave her alone so that she could go home. Accused no.1 replied and said that they were going to sleep with her. At that juncture they were still standing at the corner of the shop.

[7] Accused no.1 suggested that they should go to accused no.2's home to get a "bottle kop". The "bottle kop" was fetched and accused no. 1 suggested that they should go to Tyhilulwazi High school. They proceeded to this school. All the time accused no. 3 was holding her with a knife pointed at her neck. Accused no's 1 and 2 jumped over the fence and accused no. 3 threw her over the fence. They proceeded to the classes at the back of the school. There were lights coming from inside the classes.

[8] Accused no. 3 brought mandrax and they smoked the drugs. Accused no. 1 took out a firearm and pointed it at the complainant instructing her to take off her clothes. Accused no. 2 had a firearm as well. Accused no.1 instructed her to bend and he inserted his penis into her vagina and had sexual intercourse with her. He finished after 30 to 40 minutes having ejaculated inside her vagina. Accused no. 2 also raped her in the same way as accused no.1. No condoms were used. After accused no. 2 finished accused no. 3 also instructed her to put down her coat and lie down. He inserted his penis into her vagina and had sex with her. They took turns and each had sex with her four times.

[9] They released her at about 7 o'clock in the morning the following day. From there she went to report the incident to her friend one N. G.. N. called the police. When the police arrived they took her to the police station. She was accompanied by one S. M. and her mother. From the police station they went to hospital where she was examined by a doctor. Her vagina was painful.

[10] In cross-examination it transpired that the presence of firearms was not recorded in the police statement. It was put to her that she walked to the school voluntarily and that she climbed over the fence voluntarily. It was put to her that when she made a statement to the police she said accused nos.1 and 2 told her to lean against the wall but when she gave evidence she said they said she should bend. She struggled to explain why she did not seek assistance when she got scared as accused no. 3 was following them. It was put to her that she had an opportunity to get inside the house where one of her friends, N., had gone inside her boyfriend's home. She stated that she did not get inside to seek help because they had already made up their minds that they were going home.

[11] She went on to say that she bled and saw the blood in hospital. She could not explain why this blood was not seen by the doctor who examined her. She said that there was even blood on her panty but the doctor did not examine her clothing. She did not report the incident to her mother because she was scared of her as she had previously reprimanded her for staying out during the night.

[12] N. G. was the next witness. She testified that the complainant reported to her that she had been taken to a bush and was raped there. Thereafter they proceeded to a school where she was further raped by the three accused. She phoned the police. On their arrival the police took her to the police station.

[13] Under cross-examination she conceded that she had come to Court to give evidence in favour of the complainant. She conceded that her evidence could not be relied on because she was prejudiced. The following is recorded:

"*You and the complainant are friends from young already?*

Yes

And is she your best friend?

Yes

So obviously you would agree with me that when you come and sit here you are going to give evidence in her favour?

Yes

That means your evidence before the Court cannot be reliable because you are already prejudiced by your relationship with the victim?

Yes....

We cannot actually rely on your evidence?

No comment. I have no comment."

She further stated that because the complainant was scared of her strict mother they discussed and decide to make up a story for her. This was of course changed under re-examination.

[14] The next witness was S. M.. She was 16 years of age at the time she testified. My brother Lowe J dealt with the value of her evidence in the appeal involving accused no.3. He expressed the view that in the light of her age when she gave evidence, her evidence should have been preceded by an enquiry as to an understanding or ability to discern the difference between truth and falsehood. He concluded that since this witness was simply sworn in without the enquiry her evidence should be ignored.

[15] As will be shown below I respectfully differ with the Learned Judge. For this reason I summarise her evidence hereunder.

She testified that on the night in question she was in company of the complainant together with N. Peter and Siphokazi Peter. They were on their way to buy drinks for the complainant at Eseyileni tavern. At that tavern they bought beer and drank it but the complainant did not drink it.

[16] From Eseyileni tavern they went to another tavern called Isiqalo. It was there that they noticed accused no.3 standing on the tarmac. From there he followed them coming from a group of other men. They proceeded to the home of the complainant's boyfriend. Accused no.3 followed them. They did not find the complainant's boyfriend. They proceeded to the home of N.'s boyfriend. When they got there they stood by the gate and N. suggested that they should get inside and sleep there. The complainant refused.

[17] Accused no.3 suggested that they should go with him as he was going to accompany them home. They walked along the road and the

complainant was walking with accused no.3 behind them. As they were proceeding just around a certain corner accused no.3 grabbed the complainant. They waited for her. They were a distance of about 10 metres away. Although it was dark they saw a knife being placed on her neck. They disappeared. She did not see where they went to. They ran back to Eseyileni tavern and found complainant's cousin. They, together with him, looked for the complainant but could not find her.

[18] Under cross-examination she could not remember when accused no.3 started following them. The complainant had uttered words to the effect that she knew him. Although they were afraid the complainant said they should not be afraid because she knew the man. Whilst the complainant was walking with accused no.3 behind they were engaged in a conversation.

[19] I deem it expedient to deal immediately with the reasons why I am of the view that this witness' evidence cannot be ignored. Children are competent witnesses if, in the opinion of the Court, they can understand the import of telling the truth. They are competent to give evidence under oath. This all depends on the opinion of the presiding officer as to whether they can understand the nature and the religious sanction of an

oath.[1] In terms of s.162 of the Criminal Procedure Act 51 of 1977 (the CPA) no person shall be examined as a witness in criminal proceedings unless he is under oath. In terms of s.164 "*any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth*."

[20] It is correct that it is the duty of the presiding officer to enquire whether the child understands the meaning and import of an oath.

However in **S v B 2003 (1) SACR 52 (SCA) (2003 (1) SA 552; [2002] 4 AllSA 451)** it was stated:

"[15] *Dit is duidelik dat art 164 'n bevinding vereis dat 'n persoon weens onkunde voortspruitende uit jeugdigheid, gebrekkige opvoeding of ander oorsaak nie die aard en betekenis van die eed of die bevestiging begryp nie. Soos in die geval van 'n aantal vroeëre uitsprake, het die Hof a quo beslis dat die feit dat 'n bevinding vereis word, noodwendig inhou dat 'n ondersoek die bevinding moet voorafgaan (sien S v Mashava (supra op 228g - h); S v Vumazonke 2000 (1) SASV 619 (K) op 622f - g). Na my*

[1]**See DT Zeffertt & AP Paizes The South African Law of Evidence (2 ed) p.671.**

mening is dit 'n te enge uitleg van die artikel. Die artikel vereis nie uitdruklik dat so 'n ondersoek gehou word nie en 'n ondersoek is nie in alle omstandighede nodig ten einde so 'n bevinding te maak nie. Dit kan byvoorbeeld gebeur dat, wanneer gepoog word om die eed op te lê of om 'n bevestiging te verkry, dit aan die lig kom dat die betrokkepersoon nie die aard en betekenis van die eed of die bevestiging verstaan nie. Die blote jeugdigheid van 'n kind kan so 'n bevinding regverdig. Na my mening word niks meer vereis as dat die voorsittende regterlike amptenaar 'n oordeel moet vel dat 'n getuie weens onkunde voortspruitende uit jeugdigheid, gebrekkige opvoeding of ander oorsaak nie die aard of betekenis van die eed of bevestiging begryp nie. Hoewel verkieslik, word geen formele genotuleerde bevinding vereis nie (sien S v Stefaans 1999 (1) SASV 182 (K) op 185i)."[2]

(*It is clear that s 164 requires a finding that a person does not understand the nature and import of the oath or the affirmation due to ignorance arising from youth, defective education or other cause. The finding by the Court a quo that the fact that a finding was required necessarily implied that an investigation had to precede the finding was too narrow an interpretation of the section. The section does not expressly require that an investigation be held and an investigation is not required in all circumstances in order to make such a finding. For*

[2]**See also S v Williams 2010 (1) SACR 493 (ECG) para.6; DPP, KZN v Mekka 2003 (2) SACR 1 (SCA) para.7**

example, it can happen that when an attempt is made to administer the oath or to obtain the affirmation it comes to light that the person involved does not understand the nature and import of the oath or the affirmation. The mere youthfulness of a child can justify such a finding. Nothing is required more than that the presiding judicial officer has to form an opinion that the witness does not understand the nature and import of the oath or the affirmation due to ignorance arising from youth, defective education or other cause. Although preferred, a formally noted finding is not required) (translation).

[21] Lowe J referred to a full Bench case of *Zaniwa v S* CA 402/2013. I was unable to get access to this case.

In my view even if I am wrong in my approach, to take into account of the evidence of this witness will not bring about prejudice to the accused which would render the trial as unfair. Furthermore, there is no fixed age limit at which children become competent witnesses. The enquiry is whether or not the child is old enough to give evidence. The investigation will follow if the presiding officer is not satisfied that the child understands the nature and import of the religious sanction of the oath. In my opinion a child of 16 years who even drink liquor in shebeens is old enough to be a competent witness. Taking an oath

without prior investigation would not necessarily disqualify her in the absence of an opinion that she does not appreciate the nature and import of an oath. In this regard I respectfully differ with my brother Lowe J.

[22] The next witness was Phumla Mhlaba, the doctor who examined the complainant on 21 April 2013. The thrust of her evidence was that the gynaecological examination revealed nothing abnormal from the complainant. There were no signs of physical assault or any bleeding. There was no evidence of forced vaginal penetration or genital injury. However she could not exclude the possibility of rape. Her evidence was not supportive of the complainant's evidence.

[23] Both accused gave evidence after their application for acquittal in terms of section 174 of the CPA failed.

Accused no.1's evidence was effectively a denial of the rape. He stated that when accused no.3 arrived with the complainant he left the complainant with accused no.2 and went away with accused no.3. His evidence was suspect. He gave a different version when he was applying for bail. Somewhere he lied. The less is said about it the better.

[24] Accused no.2 also gave a different version to that which was put to the complainant as well as that which was given in the application for bail. He changed his defence and said that he had sexual intercourse with the complainant with her consent. It was never put to the complainant that she had a consensual intercourse with accused no.2. Instead it was put to her that accused nos.1 and 2 got the impression that she was walking with her boyfriend, accused no. 3. His evidence also left much more to be desired. He must have lied somewhere too.

[25] I find the following aspects of the complainant's evidence to be serious that they cannot be said to be of minor or immaterial nature.

She said she did not know accused no.3 and was seeing him for the first time that night. M. said complainant knew accused no. 3. She was even walking behind them fully engaged in conversation. She refused to sleep at a friend's place because she was not scared of accused no.3. This version is at odds with that of the complainant.

[26] N. G. conceded that they discussed the issue of the complainant having not slept at home that night and decided to make up a story.

Although she had a problem as to who accompanied the complainant to the police station this aspect of the evidence is not material.

[27] The evidence of S. M. was also not only unhelpful but it contradicted that of the complainant in material respects. The complainant denied that she knew accused no.3. M. said that she told them that she knew him. The complainant said she was scared of accused no.3. M. said she encouraged them to go with him as she was not scared of him. Further M. said they were walking behind engaged in conversation. Complainant gave the impression that at no stage did she walk behind with accused 3 engaged in conversation.

[28] The evidence of doctor Mhlaba contradicts the evidence of the complainant in material respects. Complainant testified that she had blood which the doctor should have seen in her panty. She also bled from her vagina. The doctor saw no signs of injury whatsoever. She observed no signs of forced penetration in her vagina. The condition of the complainant was normal. If the complainant was raped in the manner she described it is not farfetched to imagine that she would have been traumatised by the event.

[29] Having dealt with the evidence of the State I am also of the view that the accused were not candid when they gave evidence. I find that they also lied. However, it is trite law that State bears the onus to prove the guilt of the accused beyond reasonable doubt. This onus does not shift if the accused's evidence is unreliable. The fact that the accused might have lied is of no moment if the State has failed to prove its case against him. Section 35(3)(h) of the Constitution provides that every accused has a right to a fair trial which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings.

[30] The learned Magistrate found the State Witnesses' evidence to be credible. He correctly pointed out the defects of the complainant's evidence but found that some were immaterial and that her evidence was corroborated by other witnesses. He concluded that the complainant's evidence did not appear to be a fabrication at all. The learned Magistrate found as immaterial the fact that the complainant and S. M. gave contradictory evidence about the complainant's acquaintance with accused no.3 as his identity was not in dispute. With respect I do not agree. This is material as it goes to show that there is a possibility that kidnapping was a fabrication. This tends to show that complainant's

refusal to sleep at her friend's boyfriend was because she knew accused no.3 and was not scared of him as she claimed. This negates the allegation that she walked with accused no.3 involuntarily.

[31] The cumulative effect of the evidence, including that of the State, casts doubt as to the veracity thereof. In ***S v Van der Meyden*** **1999 (1) SACR 447 (W) at 449h - 450b**Nugent J, as he then was, said the following:

'It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is "completely acceptable and unshaken". The passage seems to suggest that the evidence is to be separated into compartments, and the "defence case" examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence. . . .

The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he

might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

[32] The evidence of the complainant taken together with that of N. G. and M. raises suspicion of concoction. It was fraught with exaggeration and improbabilities. The concessions made by N. about making up a story to cover up the complainant cannot be ignored. The fact that the doctor did not find anything consistent with complainant's story tells it all. There is no way that a doctor of the experience such the one who gave evidence would not have observed the blood on the clothing of the complainant if there was any. In my view the learned Magistrate erred in relying on the evidence of the State taken in its totality.

[33] Ms Obermeyer who appeared for the State submitted in her heads of argument that the fact that the complainant suffered no

gynaecological injuries is of no significance. This submission overlooks the fact that the doctor expressed no opinion that her findings were consistent with the complainant's account of how she had been repeatedly raped. The doctor merely said that the possibility of rape could not be excluded. Furthermore the complainant was thoroughly cross-examined on the topic of bleeding. She failed to explain where the bleeding was coming from.

[34] Ms Obermeyer was constrained to concede that there were serious problems in the State's case. She submitted, however, that the approach should be to evaluate the evidence in its totality. This approach is of course correct. In my view all the evidence taken in its totality points to one direction, namely, that the State failed to prove its case against the appellants.

[35] Although the evidence of the appellants was not satisfactory to be reasonably possible true the fact remains, it is the duty of the prosecution to prove its case beyond reasonable doubt. It is immaterial if the evidence of the accused is rejected as being false.

[36] Notably, and quite properly, the State did not apply for conviction. The prosecutor expressly stated that he was not asking for conviction in view of the evidence of the complainant. He submitted that the complainant even lied.

[37] It is true that once the accused pleads not guilty the prosecutor has no power to say that he should be acquitted. In that event the accused expects the Court to determine the issues raised and the Court takes charge of the case. But care should be exercised not to underestimate the prosecutor's concession in that he may have information to which the Court is not privy, which militates against a finding of guilt of the accused or that such finding may result in a failure of justice.

[38] Bearing in mind that a prosecutor is bound by certain professional rules of conduct the Court should carefully weigh his submissions especially if they tend to favour the accused. A prosecutor stands in a special position in relation to the Court. It is not the paramount duty of a prosecutor to secure a conviction but his duty is to assist the Court in

ascertaining the truth with a view to dispense justice.[3]The Constitutional Court in **Carmichele v Minister of Safety & Security (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC)** quoted with approval a passage which appears in the United Nations Guidelines on the Role of Prosecutors which stated, inter alia:

> *'In the performance of their duties, prosecutors shall:*
>
> *(a) . . .*
>
> *(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect..."*

It has been said that '*(i)t cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty*

[3]S v Jija 1991 (2) SA 52 (E) at 67J-68A

than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."[4]

[39] In the circumstances I am of the view that the convictions cannot stand.

In the result the following order is made;

1. The appeal should succeed.
2. The convictions and sentences are set aside.

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B RTOKOTA

JUDGE OF THE HIGH COURT

I agree

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[4]Smyth v Ushewokunze 1998 (3) SA 1125 (ZS)

J ROBERSON

JUDGE OF THE HIGH COURT

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Date heard	:	28 March 2018
Judgment delivered	:	29 March 2018