

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: A149/2014

Date heard: 02 September 2014

Date of judgment: 11 September 2014

In the matter between:

CLIFF CHAUKE

Appellant

and

THE STATE

Respondent

JUDGMENT

A.M.L. PHATUDI J:

[1] The appellant together with one Thomas Danger Nkuna were legally represented when charged with one count of rape at Giyani Regional Court.

[2] Both pleaded not guilty to the offence. They tendered their bare denial pleas. Thomas Danger Nkuna died in the process of trial proceedings. The trial proceeded only against the appellant.

[3] The appellant was thus convicted as charged and sentenced to imprisonment for life. The trial court refused the appellant's application for leave to appeal. Leave was granted on both conviction and sentence on having petitioned this court.

[4] The appellant challenges the conviction on the basis that:

4.1 The complainant's evidence warrants application of cautionary rule in that the

(a) complainant was a single witness and

(b) a child of seven (7) years of age at the time of the occurrence of the incident

4.2 the identification of the appellant as the perpetrator is questionable and

4.3 the evidence and conduct of both the complainant's mother and the appellant's ex-wife/girlfriend are not credible.

[5] It is common cause that the complainant was penetrated as evident from the uncontested J88 that was handed up as exhibit A. The state's case and judgment rested exclusively on the circumstantial evidence extracted from the testimonies of the complainant and the appellant's ex-wife.

[6] The complainant testified in chief and related on how she sat alone in the appellant's father's incomplete house with no roof at 19h00 on the day of the incident. She testified that her sister came to phone. She alleged to have been dragged by the appellant through the gate into the toilet. She under cross-examination stated for the first time that the appellant dragged her and caused her to jump through the window. It is again under cross-examination where she places on record that the appellant raped her 3 times.

[7] When questioned further of not having said this crucial information in chief, this is what transpired in court:

Q: And what made you to remember the two incidents that you related to this court?

A: Yes

Q: ...what made [you] to remember the two incidents when [you] testified?

A: My mother was questioning me yesterday...

The defence counsel proceeded and asked the complainant:

Q: Did she ask you what did you tell this court?

A: Yes

Q: And did she tell you how to come today and respond to the questions?

A: ...(indistinct)...

Q: When you say ...(indistinct)...you are saying that she told you, is that so N[...]?

A: Yes

This aspect was never rectified under re-examination.

[8] The magistrate applied cautionary rule but failed to address the said discrepancies, more particularly of what the complainant has been told what to say in court by the mother.

[10] The other issue tipping the scale in favour of the appellant is his identification.

[11] The complainant testified that the appellant used a cell phone torch to find her at the incomplete house with no roof. It was dark and the perpetrator would not have seen her but for the cell phone light the perpetrator used to illuminate at her. In questioning her, the trial court went to the extent of stating the following:

全he testified that she encountered the accused on one occasion which would have been at night and where she admits that she did not see him really.¹ Still, the state failed to rectify the discrepancies on identification in reexamination.

[12] The trial court further stated in the judgment that 奏here is an element of identity which needs to be discussed and in my view poses some issues which needs to be dealt with • .²The trial court failed to deal with the appellant's identity in its final analysis. Doubt existed in the mind of the trial court on whether the appellant was properly identified by the complainant.

[13] Evaluating the complainant's evidence with regard to the appellant's identity, there is doubt if the complainant saw the appellant. The doubt was also in the magistrate's mind. In my view, the identity of the appellant is questionable. Considering the evidence tendered I am of the view that the state failed to prove the appellant's guilt beyond reasonable doubt.

I would thus make the following order.

Order:

1. The appeal against conviction is upheld.

2. The trial court's order is set aside and replaced with the following:

“The accused is found not guilty”

3. The accused must be released.

A.M.L. Phatudi

Judge of The High Court

I agree.

D. S. Fourie

Judge of the High Court

On Behalf of the Appellant: Pretoria Justice Centre

206 Church Street 2nd Floor FNB Building Pretoria

Adv. Madima

On Behalf of the Respondent: Director of Public Prosecutions

Church Square Pretoria

Adv. A. Coetzee

[footnote1](#)