THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
Case No: 104/14

In the matter between:

EBRAHIEM TOFIE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Tofie v The State* (104/2014) [2014] ZASCA 159 (1 October 2014)

Coram: **Lewis JA and Mathopo and Gorven AJJA**

Heard: 11 September 2014
Delivered: 1 October 2014

Summary: Evidence ─ adequacy of proof ─ rape of 15 year old girl ─ evidence of complainant in sexual matters ─ complainant's evidence riddled with inherent improbabilities and not corroborated by other witnesses ─ discrepancies affecting her reliability and credibility. Conviction overturned.

ORDER

On appeal from: Western Cape High Court, Cape Town (Erasmus and Gangen JJ sitting as court of appeal):

The appeal is upheld and convictions and sentences are set aside and replaced with the following:

'The accused is found not guilty and discharged on both counts.'

JUDGMENT

Mathopo AJA (Lewis JA and Gorven AJA concurring)

[1] The appellant was convicted by the Regional Court Wynberg of two counts of rape of a 15 year old female person (Ms H) by penetrating her vaginally and anally. He was sentenced to 10 years' imprisonment on each count. The trial court ordered the sentences not to run concurrently and therefore imposed an effective sentence of 20 years' imprisonment. Aggrieved by the convictions and sentences the appellant appealed to the Western Cape High Court, which dismissed the appeal and increased the sentences to life imprisonment. The high court granted him leave to appeal against the sentence only. Leave to appeal against conviction and sentence was granted by this court.

[2] Briefly the facts are as follows: Ms H's evidence was that on 8 January 2010 at or around 23h00, she was walking her boyfriend D[…] L[…] (L[…]) home along Hoosen Park. They were coming from a party. They met the appellant who was known to her as he was a friend of her father. The appellant asked them for a cigarette lighter which they did not have. He then followed them, produced a knife and raised his voice in a threatening manner and instructed L[…] to go home. When L[…] protested the appellant threatened to stab him. The complainant then instructed L[…] to go home and proceeded walking with the appellant. Along the way the appellant put a hand around her neck as if they were a couple. The complainant told the appellant that she was going to sleep at her uncle's place in Grassy Park.

[3] Along the way she passed a group of Rastas at a party. When they reached Parkwood and Grassy Park the appellant put a knife against her neck, threw her on the ground and pulled off her panties, tore her skirt and shirt then unzipped his trousers. She screamed loudly but the appellant closed her mouth while holding a knife against her throat. He then inserted his penis into her vagina. According to Ms H the appellant penetrated her for a long period of time. She estimated this to be about 90 minutes. The appellant then turned her around, made her lie on her stomach and half penetrated her anally. As a result, the complainant bled from her vagina and anus.

[4] The complainant then managed to free herself and ran towards the house nearby with the appellant in hot pursuit. Mr Walid Ismail (Ismail) came out of the house and rescued her. The appellant then left. Ismail contacted the complainant's family. Her father and sister arrived and she was taken to the police station where she wrote a statement. I will deal

with the significance of the statement later in the judgment. She was thereafter taken to the doctor who examined her at about 05h00 in the morning. She told the doctor during the examination that she had been a virgin.

[5] In her statement to the police dated 9 January 2010, the complainant stated that she had been with her female friend R[…] at a shop in Bluebird Lane when the appellant accosted her and took her by force. She did not disclose that she had been at a party with her boyfriend (L[…]). She later deposed to an affidavit on 21 January 2010 where she stated that she had been with her boyfriend. When asked why she gave different versions she said she was scared to tell the truth because her parents did not give her permission to go to the party. It was clear that the statements contradicted each other and her evidence in court. When asked to explain the discrepancies she admitted to lying. When pressed further she said she lied because her father and sister were present when she wrote the first statement. In her second statement she admitted that she had sexual intercourse with L[…] once and this was at her boyfriend's friend's house. This piece of evidence was in stark contradiction to the evidence of the boyfriend who testified that they had sexual intercourse three times that afternoon at the complainant's friend's house. Another disconcerting aspect of her evidence is that she told the doctor that she was a virgin. This was clearly untrue because she had sexual intercourse with her boyfriend that afternoon. She explained that she lied to the doctor because she thought the doctor would tell her mother.

[6] Dr J D G de la Cruz examined her at 05h00 in the morning and he noted in the medical report known as Form J88 that the complainant was neat and tidy and that he did not observe any bleeding either vaginally or

anally. She had not bathed at that stage. This contradicted her evidence that the appellant tore her skirt and shirt during the incident. She told the doctor that she was penetrated vaginally and anally. However she was not sure whether the appellant ejaculated or not. On examination of the vagina the doctor found no bleeding or tears. There was a little bit of erosion and some discharge in the posterior area of the cervix. The doctor said that on gynaecological examination of the vagina the redness and erosion could have been caused by the sexual intercourse with her boyfriend earlier.

[7] The doctor's evidence was not particularly helpful. He conceded that he was uncertain whether anal penetration took place or not. When asked by the court, he said the redness on the anus could be attributed to other facts. Later when pressed further, he stated that after inserting a sampling brush he found the discharge. When asked to explain how it came about as people normally do not have a discharge in the anus he said it was likely that there was penetration and the discharge was caused by the ejaculation. During cross-examination, he conceded that the redness as well as the fact that there were no fresh tears could be attributable to the fact that the complainant had sexual intercourse earlier in the day with her boyfriend.

[8] Ismail also testified that he heard screams and when he came out to investigate he saw the complainant standing with the appellant. The complainant screamed and said 'Uncle hy rape me'. He then noticed the appellant fastening his trousers and running away. In cross-examination he changed his version and said the complainant uttered the words 'Hy wil my rape'. What Ismail in fact said when questioned by the court was:

'HOF: U het eers gesê sy het gesê "Uncle, hy rape me" en toe later u gesê "Uncle, hy wil my rape" ─ Ja kan u onthou dat dit nie was hy rape my nie, maar hy wil my rape? ─ wil my rape ─ Ja'

[9] In his defence the appellant admitted that he knew the complainant very well and was friends with her father. He said that he met the complainant on the night in question but denied threatening L[…] with a knife. According to his evidence the complainant asked him to accompany her to her uncle's place in Grassy Park. Along the way he bought her cigarettes and some items from the garage. It was his evidence that the complainant threw herself down and asked him to have sex with her. He refused and this made the complainant angry. He then told the complainant to insert his penis in her vagina. At that stage his penis was out of his trousers as he had just finished urinating. When the complainant touched his penis to insert it in her vagina, he then told her to stop. She then took off her panties, lifted her skirt and said that she was going to urinate in the bushes. The complainant then started screaming and shouting that the appellant had raped her and ran towards the houses.

[10] Initially he denied that he instructed his counsel that he had penetrated her twice. Later he said the sexual intercourse was consensual. When asked to explain the discrepancies he could not give a reasonable explanation save for stating that he wanted the case to be finalised.

[11] The trial court and the court below were satisfied that the discrepancies in the complainant's evidence were not material and described the evidence as understandable and acceptable in the circumstances. After applying the cautionary rules both courts were satisfied that she had told the truth when testifying.

[12] The appeal is based on three grounds: Firstly, that the trial court and high court erred in accepting that the complainant's evidence satisfied the requirements of the cautionary rule, and that the State proved its case against the appellant beyond reasonable doubt. Secondly, that on the evidence, the appellant's conduct constituted two counts of rape. Thirdly, that the high court committed an irregularity when it increased the sentences.

[13] In this court it was submitted that the complainant was a single witness and that her evidence, especially because she was 15 years old, required that it be approached with caution. It was contended that because of the contradictions in her statements and evidence, both courts had erred in accepting her evidence as reliable and credible. The fact, it was argued, that the appellant's evidence was also contradictory and improbable, does not necessarily warrant a conclusion that the evidence of the complainant was reliable and true.

[14] As regards the finding that there were two counts of rape it was contended that this was a single prolonged act of intercourse with no interruption.

[15] The State, on the other hand, submitted that the fact that the complainant admitted to lying in certain parts of the evidence does not necessarily mean that her evidence should be rejected as a whole. Counsel contended that evaluating her evidence as a whole, she was a credible and reliable witness who told the truth. In support of his arguments, counsel relied on the evidence of L[…] and Ismail as sufficient corroboration of the complainant's evidence. I do not agree. The complainant contradicted the evidence of Ismail, L[…] and De la

Cruz. And the evidence of Ismail did not corroborate that of the complainant in relation to the manner in which he saw them. He said that they had been standing facing each other. In fact Ismail contradicted himself in cross-examination. In *S v Gentle*[1] the remarks of Cloete JA are apposite when dealing with corroboration:

'It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, *on the issues in dispute* (cf *R v W* 1949 (3) SA 772 (A) at 778-9). If the evidence of the complainant differs in significant detail from the evidence of other State witnesses, the Court must critically examine the differences with a view to establishing whether the complainant's evidence is reliable. But the fact that the complainant's evidence accords with the evidence of other State witnesses on issues not in dispute does not provide corroboration.'

The submission that the complainant was shaken and terrified is unconvincing. It is only when Ismail intervened that the complainant cried rape. The complainant was afforded an opportunity to come clean when she made the second statement but elected not to do so.

[16] The complainant was a single witness with regard to the rapes. It is trite that when dealing with the evidence of a single witness such evidence must be approached with the necessary caution. Before a court can convict, it must be satisfied that such evidence is clear and satisfactory in all material respects. See *S v Jackson*.[2] It was necessary to have approached her evidence with the caution referred to in *S v Sauls*.[3] The trial court and the high court paid lip service to that approach. There is no corroboration in the complainant's evidence that the appellant penetrated her vaginally. The medical evidence is also unclear and uncertain. In his findings De la Cruz did not find any discharge on

[1] *S v Gentle* 2005 (1) SACR 420 (SCA) para 18.
[2] *S v Jackson* 1998 (1) SACR 470.
[3] *S v Sauls & others* 1981 (3) SA 172 (A) at 180E.

vaginal examination. His evidence did not take the State's case any further. In addition his concession that penetration or ejaculation was not the only possible cause of the discharge did not help the State's case.

[17] It is clear from the judgments of both the courts below that they, in spite of material discrepancies in the complainants evidence, wrongly held that it was true and reliable. I find it untenable that both the trial court and the high court found the complainant's evidence credible and reliable in all material respects notwithstanding the glaring contradictions if not blatant lies, in her evidence.

[18] I accept that the appellant was also an unsatisfactory witness. He admitted to sexual intercourse with the complainant, later changed his version and disavowed what his counsel put to the witnesses. His version that the complainant asked for sex out of the blue and attempted to pull his penis out of his trousers is plainly preposterous. While the falsity of the appellant's evidence, and the fact that he did not seriously contradict the complainant's evidence on that score, are factors to be taken into account when weighing the evidence, it cannot be elevated beyond its due.

[19] It is trite that there is no obligation upon an accused to prove his innocence. The State bears the onus of proving the commission of an offence. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is not plausible. As pointed out in many judgments it is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true, but whether one believes him is not the test. It is and remains the State's duty and not the appellant's to discharge the onus and it should not be

reversed. The proper test was formulated by Nugent J in *S v Van der Meyden*[4] as follows:

'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 mine, 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 might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[20] Against this backdrop it is necessary to examine the complainant's evidence. In my view the complainant's account of how she was physically overcome by the appellant was inconsistent and unconvincing. On the face of it, the complainant's evidence appeared to be improbable. One moment she was uncomfortably walking with the appellant, the next moment she seemed happy to walk with him along the veld late at night. Sight must not be lost of her evidence that he had just threatened her and her boyfriend with a knife. Such a change in attitude would indeed be improbable in a person who was initially threatened. But the complainant was not. She was happy to continue walking with the appellant. Even when they passed the group of Rastas she did not ask them for help. This makes her evidence improbable.

[21] The following aspects of her evidence illustrates her unreliability and affect the probative value of her evidence. In her first statement to the police dated 9 January 2010 she stated that the appellant accosted her at the shop in Bluebird Lane while waiting for her friend Ronell who had

[4] *S v Van der Meyden* 1999 (1) SACR 449j-450b.

gone home to fetch her jersey. In her second statement dated 21 January 2010 she stated that she was with L[…] at Hoosen Park. She admitted to sexual intercourse with L[…] only once. This contradicted his (L[…]) evidence that it happened three times at a different place to the one suggested by the complainant. It is noteworthy that she failed inexplicably to seek assistance from the Rastas whom they passed shortly before the appellant raped her. Her explanation that she was scared of the appellant is unconvincing. The fact that she did not resist when the appellant put his arm around her as if they were a couple casts serious doubt on her credibility. In her statement and evidence in court she testified that the appellant tore her skirt and shirt when he raped her. This evidence is contradicted by the doctor who found her clothing to be neat and tidy when he examined her at 05h00 in the morning. She told the doctor that she was a virgin. In court she said she was bleeding from her vagina and anus. However, no such evidence was found on examination by the doctor. Finally, Ismail stated that when he came out of the house in response to the screams he noticed the complainant and the appellant standing, facing each other, and yet she reported that she had just been raped. As pointed out correctly by counsel for the appellant none of the state witnesses corroborated her. In fact L[…], Ismail and De la Cruz made her evidence open to doubt.

[22] The unreliability of the evidence as to rape is such that the State has not proved its case beyond reasonable doubt and the appellant must be acquitted.

[23] I therefore make the following order:

1 The appeal is upheld and the convictions and sentences are set aside and replaced with the following:

‘The accused is found not guilty and discharged on both counts.’

R S Mathopo

Acting Judge of Appeal

Appearances

For the Appellant:	M Calitz
	Instructed by:
	Legal Aid South Africa, Cape Town
	Legal Aid Board, Bloemfontein
For the Respondent:	M O Julius with him M D September
	Instructed by:
	Director of Public Prosecutions, Cape Town
	Director of Public Prosecutions, Bloemfontein