Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

CASE NO: SS 302/2003

In the matter between

THE STATE

versus

MONDE GEORGE WONIWE

JUDGMENT DELIVERED ON 13 APRIL 2004

MOOSA, J:

1. The accused was charged in the Regional Court, Wynberg on two counts of rape. It was alleged that the accused, during December 2000 and again during January 2001, did unlawfully and intentionally have sexual intercourse with Nibeka Mpololo, a female person, 13 years of age, without her consent. The accused pleaded not guilty to both counts. He stated in his defence that he had no knowledge of these charges.

2. After the State and the defence led evidence, the accused was convicted by the presiding officer on the two counts of rape. Because the complainant was under the age of 16 years, the proceedings were stopped in the Regional Court and the matter was referred, in terms of Section 52 of the General Law Amendment Act, No 105 of 1997 ("The Act"), to this court for purpose of sentence.

3. When the matter came before this court, Adv **Osborne**, for the accused, challenged the conviction of the accused on the two counts of rape. Such challenge was based on the ground that the proceedings were not in accordance with justice.

4. Adv **Osborne** submitted that the presiding officer failed to observe and apply the cautionary rule; the complainant failed to affirmatively identify the accused; there was uncertainty in the evidence of the complainant as to the number of sexual acts committed by the accused; the State failed to prove absence of consent in respect of each sexual act; the evidence of the mother was unreliable and finally the State failed to prove its case against accused beyond reasonable doubt.

5. The attack on the conviction by the defence is based both on technical irregularities and on the factual merits of the case. As both such grounds have to be measured against the concept "not in accordance with justice" as contemplated in Section 51(1) and (2) of the Act, the court will first deal with the meaning of such concept. It has been held, in **S v Mbambo** 1992 (2) SACR WLD 421 that:

> *"The enquiry as to whether the proceedings are 'not in accordance with justice' must be along the same lines as the enquiry as to whether there has been a 'failure of justice'."*

I am in agreement with this particular approach. A similar approach to such inquiry is whether the accused had an unfair trial.

6. A fundamental principal of our law is that an accused person is entitled to a fair trial. This common law principle has been entrenched in Section 35(3) of our Constitution. An irregularity *per se* does not necessarily result in an unfair trial. The test is whether the verdict has been tainted by such irregularity resulting in actual and substantial prejudice to the accused and accordingly "not in accordance with justice", or "a failure of justice" or an "unfair trial".

7. **Holmes, JA** in **S v Moodie** 1961 (4) SA 752 (A) at 758 F-G said the following with regard to irregularities in a trial:

> *"The general rule in regard to irregularities is that the Court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial court would inevitably have convicted if there had been no irregularity."*

(See also **Hlantlalala & Others v Dyantyi N O & Another** (1999) 4 All SA (A) 472 para 9 at 476a-c.)

8. Before applying the legal principles to the facts in this matter, the court will analyse the evidence. It is common cause that the accused had a love affair with the complainant's mother. He from time to time slept over at the residence

of the complainant's mother where complainant also resided. It is also common cause that on 11 January 2001 the complainant was examined by the district surgeon and the findings of the doctor were that no physical injuries were found on general examination, but the gynaecological findings were compatible with forcible penetration by a penis or other blunt object. It was also common cause that the complainant was 13 years old at the time of the alleged offences.

9. The complainant testified that the accused had, after the mother left for work in the morning, got into her bed and had sexual intercourse with her. This occurred on three occasions. The mother confirmed that on the 3 January 2001 the complainant reported to her that the accused got into her bed after the mother left for work and had sex with her. The mother testified that she did not react immediately to such report but responded only when the train conductor had pointed out that the complainant was walking abnormally. The accused who testified in his defence denied the allegations of the complainant. He claimed that there was a conspiracy between the complainant's mother and the complainant to falsely incriminate him on the charges. The mother testified further that when she confronted the accused with the complainant's allegations, he admitted them and asked for forgiveness. This testimony was

never challenged by the defence.

10. Because of the conclusion that I have reached and which will become apparent later, it is unnecessary for me to make a formal finding whether the verdicts on the two charges of rape would have been tainted by the irregularities raised by the defence. It is common cause that the accused had the opportunity to commit the offences. This has been conceded by the defence. Adv **Osborne** submitted that the State failed to prove beyond reasonable doubt that the accused was the perpetrator of the offences. The facts which are common cause, the uncontroverted evidence and the admission made by the accused to the complainant's mother, lead the court to the inevitable conclusion that it was the accused who had sexual intercourse with the complainant.

11. The real question that arises and which requires an answer, is whether or not the complainant had consented to such sexual intercourse. The onus is on the State to prove that no consent was given by the complainant. There is no direct evidence to that effect. Adv **Tarantal** for the State referred the court to the evidence of the complainant, that the accused grabbed her hand before removing her panty and having intercourse with her. The fact that the accused held her hand does not necessarily mean the absence of consent. That

is not the only reasonable conclusion the court can draw from the circumstances.

12. There are a number of factors thatw negates the absence of consent and the court is going to refer to them briefly. Firstly, the district surgeon found no physical injuries on general examination. His findings that the tears to the hymen were compatible with forcible penetration is not inconsistent with consensual intercourse. Secondly the complainant did not complain to the mother immediately after the first incident. According to complainant the complaint was made after the fourth incident. She said that she did not tell her mother earlier of the incidents, because the accused threatened her. This threat could also have referred to the fact that she should not tell her mother of the consensual intercourse and not necessarily rape.

13. Thirdly, the mother did not react immediately but only reacted after the train conductor pointed out that something was wrong with the complainant. According to the mother, it was only on Wednesday, 3 January 2001 when she took the complainant with her to work that the complainant confessed. The mother testified that she appeared to be normal when she confessed but later conceded that she had wept. The mother testified that initially the complainant

was reluctant to speak about the matter. Fourthly, the complainant was also concerned about the accused that he was not working and could not provide for his family. She testified that she pleaded with her mother to give him money so that he could seek work in the Eastern Cape. It appears that the complainant displayed a particular feeling for the accused.

14. Taking all the circumstances into consideration with regard to count one, I am not satisfied that the State has proved beyond reasonable doubt that there was no consensual sexual intercourse. In the circumstances the conviction on count 1 was not in accordance with justice. In my view the conviction on count 1 ought to be set aside and substituted with a verdict of contravening Section 14(1)(a) of the Sexual Offences Act, No 23 of 1957. In other words the accused ought to have been found guilty for having unlawful sexual intercourse with a girl under the age of 16 years. All the elements of this offence has been established.

15. I now turn to count 2. This offence, according to the charge sheet, occurred in and during January 2001. There is no direct evidence on this count. According to the evidence of the complainant the accused had sexual intercourse with her on three occasions. These appear to have taken place during December 2000

which is covered by count 1. As far as count 2 is concerned, my reading of the record is that she assumed that it would have taken place on 3 January 2001, if the mother had left her at home and not taken her with to work.

16. In her evidence on page 7 of the record she says, and I quote:

> *"Ja Edelagbare ek het my moeder gesê en dit is na die vierde keer, toe ek na die – dit was nou as my moeder weer die persoon weer agter gelos het op daardie betrokke dag, sal dit die vierde keer wees…"*

She says further in her evidence that he did not succeed on the fourth occasion because she accompanied her mother to her work. She said on page 13 of the record, and I quote:

> "*Die laaste keer het hy dit nie reggekry nie. Ek het daar gesit in die kamer en my ma was besig om uit te gaan en ek het besef hy gaan weer die vuil dinge aan my doen en ek het toe daar besluit om saam met my ma te gaan."*

17. I am of the view that the State has failed to prove sexual intercourse or even attempted sexual intercourse in respect of count 2. The conviction of the accused in respect of count 2 is not in accordance with justice and the

conviction should be set aside.

18. This court, having concluded that the convictions on both counts are not in accordance with justice as required by Section 52(3)(b) of the Act, is obliged to obtain from the officer who presided at the trial a statement setting forth his or her reasons for convicting the accused. The relevant portion of Section 52(3)(b) reads as follows:

> *"…provided that if the judge is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he or she* ***shall*** (my emphasis)*, without sentencing the accused, obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused."*

This provision appears to be peremptory.

19. It is common cause that the presiding offer has in the interim passed away. It would therefore be impossible to comply with this statutory requirement. In my view it could not have been the intention of the legislature to preclude this court from exercising its powers under Section 52(3)(e) of the Act where the court is unable to obtain such statement from the presiding officer, due to death,

insanity, ill-health, act of God, state's enemies or other valid reasons.

20. I must add, however, that the presiding officer in convicting the accused, gave comprehensive reasons in his judgment. It has been my experience that cases where presiding officers give comprehensive reasons and are asked to give reasons for their findings, they mostly respond by saying they have nothing further to add to their judgment. It is only in cases where they are asked to respond to specific questions, that they, as a rule, reply to such questions.

21. It is well established that, in accordance with the golden rule of interpretation, statutes should be construed so as to avoid absurdities, anomalies or unreasonable results. To interpret the provision in question literally and give it its literal meaning would, in my view, not only lead to absurd, anomalous and unreasonable results, but would hamper the administration of justice. **Wessels, ACJ** in **Ex parte the Minister of Justice: In re Rex v Jacobson & Levy** 1931 AD 466 at 477 observed the following:

> "W*hether a statute deals with civil matters only or with criminal matters the same rule applies that if the language of the statute is not clear and would be nugatory if taken literally, but the object and the intention are clear, then the statute must not be reduced*

to a nullity merely because the language used is somewhat obscure."

(See also **Rex (Respondent) v Patel and Another (Appellants)** 1944 AD 379 at 388**; Rex v Hargovan and Another** 1948 (1) SA 764 (A) at 769-770.)

22. The legal maxim "*lex non cogit ad impossibilia*", i.e. "the law does not compel the performance of what is impossible" is firmly entrenched in our law. It applies to both civil and criminal matters and is as much applicable to the problem with which we are faced in this case. In **Gassner NO vs Minister of Law and Order and Others** 1995 (1) SA 322 (C) at 325 **Van Zyl, J** found that the legal maxim excused the non-production of a document which was a statutory requirement. In **The Master v Gray, NO** 1958 (3) SA 524 (C) at 528, the court invoked the legal maxim authorising the Master to register or otherwise act upon a copy of a will where there has been proof that the original is lost or destroyed notwithstanding the fact that the relevant legislation required the original. The court held that to insist on the production of the original document would "frustrate the intention of the legislature". In **Montsisi v Minister van Polisie** 1984 (1) SA 619 (A) at 636A-H, **Rabie, CJ**, came to the conclusion that this maxim is not restricted to the law of contract but, that as in English law, extends to other branches of the civil as well as the criminal law

and quoted with approval, HALLSBURY on the position in the English law:

> "T*he performance of a statutory obligation is excused if it is rendered impossible by the operation of a subsequently enacted statute."*

The principles enunciated in these cases are as much applicable to the facts of the case under consideration.

23. I therefore conclude that with the proper construction of Section 52(3)(b) of the Act and with the application of the legal maxim "*lex non cogit ad impossibilia*", this court is excused from obtaining a statement of reasons as required by the said Section of the Act. To insist upon its compliance would frustrate the object and the intention of the legislature.

24. In the premises I proceed to act pursuant to the powers bestowed upon me in terms of Section 52(3)(e) of the Act. In terms of Section 52(3)(e)(iii), I alter the conviction on count 1 to a conviction on a competent verdict of contravening Section 14(1)(a) of the Sexual Offences Act, No 23 of 1957, in that, the accused had sexual intercourse with a girl under the age of 16 years. In terms of Section 52(3)(e)(iv), I set aside the conviction in respect of count 2.

……..

……

E MOOSA