IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A58/2011

DATE: 15 APRIL 2011

In the matter between:

MONGEZI NTSIZI Appellant

and

THE STATE Respondent

J U D G M E N T

BOZALEK, J:

The appellant in this matter was convicted in the Regional Court, sitting in Wynberg, on one count of contravening section 3 of the Criminal Law (Sexual Offences & Related Matters) Amendment Act 32 of 2006, by appellant penetrating the vagina of the 10 year old complainant with his penis in or about December 2008 in Guguletu.

The appellant pleaded not guilty and was legally represented throughout the trial. Following his conviction he was

sentenced on 12 February 2010 to 15 years imprisonment. The magistrate found that although the appellant qualified for a sentence of life imprisonment in terms of the provisions of sections 51 and 52 of the Criminal Law Amendment Act 105 of 1997, read with Part I of Schedule 2, there were substantial and compelling circumstances which permitted the court to impose a lesser sentence. With the leave of the magistrate, the appellant now appeals against both conviction and sentence.

State's Case:

The state's case comprised the evidence of the complainant, the doctor who had conducted a medical examination of the complainant after the alleged rape and that of a Mr Madoda Jiyila, who received the first report from the complainant about the alleged rape. In short the complainant's evidence was that the appellant, who was a neighbour to the property on which she lived, sent her on an errand to buy a cigarette for him. When she returned and entered his dwelling he locked the door, removed her skirt and panties, placed her on the bed and then, climbing on top of her, inserted his penis into her vagina.

The appellant then threatened her not to tell anyone about the incident. The complainant dressed herself, left the dwelling and reported the incident to the owner of the property, Mr

Jiyila. He then reported the matter to her grandmother who in turn reported it to the complainant's mother. The appellant was then confronted with the allegations and arrested.

Dr Nkuninziza testified that he examined the complainant on the same day and found that the frenulum of her clitoris was reddish and tender and that there were also red and tender areas in her paraurethal folds, the labia majora and labia minora. The hymen was marginal and intact and showed no signs of injury, nor was there any evidence of any swellings, tears, clefts or bruising.

When the appellant testified, he denied any rape or sexual activity with the complainant. According to him the complainant had arrived at his dwelling that morning and asked for a 50 cent piece. When he told her that he did not have this and could only offer her two five cent pieces the complainant left. The next he knew of this matter was when he was confronted later that day with allegations that he had raped the child.

Grounds of Appeal:

On appeal it was contended on behalf of the appellant that the magistrate had erred in accepting the complainant as a credible and reliable witness, particularly in the light of the

contradictions between her account of the incident and her first report to Jiyila and, furthermore, in placing too much store in equivocal medical evidence. It was further contended that the magistrate had erred in rejecting the appellant's version as not reasonably possibly true and, in particular, in holding against him his attempt to furnish a motive for the complainant falsely accusing him of rape.

Analysis:

There are indeed marked discrepancies between the complainant's account of the rape and her first report to Jiyila. According to her, she reported to him that she had been raped by the appellant. Jiyila's evidence was consistent that the complainant thought, "vermoed", that the appellant had wanted to rape her. Her evidence went further, namely that he asked her whether the appellant had undressed her or hit her and her reply was that he had done neither of these things. In fact he had done nothing but she thought that he wanted to rape her. She then added that she wanted Jiyila to tell her grandmother of the incident because she was scared of her.

The prosecutor then challenged the witness over his use of the word "vermoed", to which he replied that the complainant had told him that she was not raped. The magistrate dealt with these major discrepancies in her judgment by ascribing them

to the fact that the medical evidence revealed that there had not been full intercourse and also that it was not clear whether the complainant understood the term "rape".

In my view these reasons do not adequately account for the substantial discrepancies between the complainant's account of the incident and her first report thereof. The complainant was a single witness to the alleged rape and as such a conviction required that her evidence be satisfactory in all material respects. In the light of the discrepancies described above I fail to see how her evidence could ever measure up to this standard.

A further area of difficulty lies in the area of the medical evidence, coupled with the complainant's description of the alleged rape. She testified simply that the appellant had inserted his penis into her vagina and then removed it. Dr Nkuninziza concluded that, on examination, the complainant's vulva and vestibule were inflamed, but that the hymen was intact. This was consistent with "tangential force with a blunt object to her vulva".

Unfortunately the witness was not asked to explain what he met by tangential force, but it is significant that the ordinary dictionary meaning of the word suggests anything but

penetration. Furthermore, the doctor testified that the inflammation that he found could be caused by other factors, amongst them infection or other inflammations which are non-infectious in nature. When he was asked if he had checked for such inflammations, his answer was somewhat equivocal, namely that the injuries were not consistent with a form of infection, but more consistent with a form of direct trauma. To this he added, when questioned concerning the fact that the complainant's hymen was still intact, that his assessment was that:

> "... if a penis were inserted, but not penetrate into the vagina (sic), but ...(indistinct) I look at a possible scenario of a blunt movement of a penis not entering into the vagina, but rubbing on to the vulva, on to the inner aspect of the vulva, that would be quite consistent yes."

It need hardly be said that this scenario of the penis not entering the vagina is wholly at odds with the state's case of rape.

The charge which the appellant faced was one of rape under section 3 of the Act, which involves unlawfully and intentionally committing an act of sexual penetration. Sexual

penetration is defined in the Act as any act which causes penetration:

> "to any extent whatsoever by -
>
> (a) The genital organs of one person into or beyond the genital organs ... of another person."

Although I accept that, both in terms of the definition and the pre-existing common law relating to rape, the slightest penetration of a female's vagina by the man's penis amounts to rape (see R x V 1960 (1) SALR 117 (T)), on a conspectus of the evidence as a whole I consider that there must be reasonable doubt as to whether a penetration of the complainant's vagina was proved.

As far as the evidence of the appellant is concerned it is fair to say that he was not shaken in cross-examination. The magistrate rejected his version, having had regard to the probabilities and to the fact that the complainant had, it is common cause, been in the appellant's dwelling, had made a complaint of a sexual nature immediately thereafter and the existence of what the magistrate's described as fresh injuries which were not caused by inflammation but rather by friction in the form of a blunt object within the vagina.

What this reasoning overlooks, however, is the inconsistencies between the complainant's evidence and her first report of the incident, as well as the ambiguities in the medical evidence to which I have already referred. The magistrate concluded by dismissing what she referred to as the motive offered by the appellant for a false complaint on the part of the complainant. She found that it was improbable that the complainant had accused the appellant of rape simply because he had not given her the 50 cents which she sought.

As was pointed out on behalf of the appellant, he merely raised this as a possible explanation and what amounted to speculation on his part, should not have been held against him. See in this regard S v Ipeleng 1993 (2) SACR 185 (T) at 189c-I, where the point was made that it is dangerous to convict an accused person on the basis that he cannot advance any reasons why the state witnesses would falsely implicate him. Mohamed, J, as he then was, stated in similar vein that:

> "In the present case, it is entirely unhelpful to speculate on what prompted the complainant to give the evidence they did."

It seems quite likely that some form of untoward sexual incident or assault occurred between the appellant and the complainant on the day in question. However, when one has regard to the totality of the evidence and the shortcomings which I have set out, I consider that the state has failed to prove beyond a reasonable doubt the guilt of the appellant on the charge of rape through the commission of an act of sexual penetration or even an attempt to do so in terms of section 3 of Act 32 of 2007.

In this regard I note that the appellant was not charged in the alternative with any lesser offence such as sexual assault in terms of section 5 of the Act. That might be a shortcoming in the *pro-forma* charge sheet to which the state should give attention. In the result I would uphold the appeal and set aside the appellant's conviction and sentence.

HENNEY, AJ: I agree.

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HENNEY, AJ

BOZALEK, J: It is so ordered.

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BOZALEK, J

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