IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A57/2011

DATE: 13 MAY 2011

In the matter between:

TOLAKELE KEWANA Appellant

and

THE STATE Respondent

J U D G M E N T

WEINKOVE, AJ:

On 15 June 2010, the appellant was convicted of raping his 11 year old daughter and on 21 June 2010, he was sentenced to imprisonment for a total of 25 years. His application for leave to appeal was only granted in respect of sentence and subsequently a petition was filed pursuant whereto this court per Baartman, J and Binns-Ward, J granted leave in respect of the conviction also.

The evidence of the complainant was that her father had raped

her on two occasions, once in June 2007 when the family lived in Bellville and again during 2008 when the family lived in Philippi. The complainant previously lived in the Eastern Cape with her grandmother. Her parents were either divorced or separated. During December 2006 she visited her father in Cape Town for a holiday. Her father at that stage had married the witness Vatiswa, but Vatiswa left him in 2008 after an argument. Complainant wanted to live with her father and this was agreed to.

According to the complainant she was raped on the first occasion by her father when she awoke and found herself on top of him with her pyjama pants and panties removed and the appellant was inserting his penis into her vagina. On the second occasion she described a similar occurrence when the parties were living in Philippi and she was sleeping in a separate room, on this occasion she awoke when the appellant allegedly climbed into her bed with her.

On the first occasion she and her father were sharing a bed and her brother was sleeping on a foam mattress next to the bed. The house consisted of only one room, which served as a kitchen and a bathroom and a bedroom for the appellant, the complainant and her teenage brother. The appellant denied raping his daughter on any occasion. He said her accusations

could be motivated by the fear of his having to send her back to the Eastern Cape, because he, the appellant, was out of work and could not keep the family any longer. In fact at the time of the trial, the teenage son had been sent back to the Eastern Cape.

The magistrate, in her judgment, came to the conclusion that the complainant had made a favourable impression on her and that she testified confidently and coherently and had given a logical sequence of events. She found the complainant to be honest and "took the court into her confidence", by explaining that she did not know how she slept through the whole incident of her being undressed and lifted on top of her father before she only awoke when he was inserting his penis into her vagina. The court also found that the complainant gave satisfactory answers and "stuck to the version of events".

In assessing the evidence of the appellant, the court had regard to the provisions of section 208 of the Criminal Procedure Act and quoted the cautionary rule in S v Sauls & Others 1981 (3) SA 172 AD, where the court said that the duty of the trial court was to weigh the evidence of the witness and consider the merits and demerits in order to determine whether the truth has been told. The court also considered S v Radebe 1991 (2) SACR 1626 where the court said that the court *a quo*

should not consider the accused's evidence in a vacuum, but weigh it up in the scale.

The magistrate also took into account S v Jackson 1998 (1) SACR 470, where the principle is repeated that the version of the accused need only be reasonably possibly true. This principle is repeated in Shackville v S 2001 (4) SA 279, where the Supreme Court of Appeal reaffirmed the principle that the court does not have to be convinced that every detail of the evidence of the accused is true, it is sufficient if his version is reasonably possibly true in substance. Furthermore, there is no burden of proof on the accused to prove he is innocent.

What the magistrate failed to take into account is that in assessing the credibility of a witness, it is not sufficient to merely have regard to issues such as (a) whether the witness made a favourable impression or not, (b) the manner in which the witness testified, (e) the coherence and logical sequence of the events testified to and (d) the appearance of honesty. What the court must also look at, is the probabilities of the version given by the witnesses, including the complainant.

If these probabilities are taken into account, the court would have observed that the complainant's version is highly improbable. She, for example, claims to have been raped in a

one roomed house while her teenage brother was sleeping next to the bed on a foam mattress. It is unlikely that the appellant would have attempted this act in this confined space when any cry or shout would have woken his son. Secondly, it is highly unlikely that the appellant would have managed to remove the complainant's pyjama pants and her panties and have been able to lift her up and place her between his legs while he lay on his back and that she would only wake up when he allegedly placed his penis into her vagina. This story does not bear the ring of truth. Thirdly, there is no acceptable explanation as to why the complainant only testified concerning two occasions when she was allegedly raped, when she had told the police there were many occasions when her father had raped her.

When challenged about her failure to mention these other incidents, she could not give any acceptable explanation. Furthermore, the probabilities favour the appellant's concern about allowing his 11 year old daughter to attend night services and/or late night vigils when regard is had to the inconsistency of her school results and her father's general objection to her going out at night. It is also sinister that the complainant moved in with the witness, Sis Najemaka, this is the very person about whom the appellant objected. She is unemployed and is an active member of the church. She is the

same person who accompanied the complainant to the police to report the rapes.

Finally, it is strange that the complainant would on one hand profess to love her father, but on the other hand express the opinion that he should be punished with a long term of imprisonment. In the circumstances it seems to me that the appellant's testimony was wrongfully rejected by the magistrate. Her only reason for rejecting his evidence, is set out in page 150, where she says:

> "After consideration of the totality of the evidence as discussed, the court is satisfied that the version of the accused cannot reasonably possibly be true and that it must be rejected as false."

In effect the magistrate rejected the accused's evidence, because the complainant made a favourable impression upon her and she ignored the probabilities of the complaint made by the complainant. There were no respects in which the appellant's evidence was demonstrably false or inaccurate. In the result I would set aside the appellant's conviction and sentence.

WEINKOVE, AJ

ERASMUS, J: I agree. It is ordered that the appeal succeeds. The conviction and sentence is set aside. The registrar is to immediately notify the prison authorities of the outcome of this appeal. It is further ordered that in terms of this judgment, the release of the appellant is ordered with immediate effect, unless he is held on another legal warrant. It is so ordered.

ERASMUS, J