IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A704/2010

DATE: 10 JUNE 2011

In the matter between:

XOLISA PIKOKO Appellant

and

THE STATE Respondent

JUDGMENT

BLIGNAULT. J:

On 3 March 2010, appellant was convicted in the Regional Court at Wynberg on a charge that on 4 May 2009 he raped A P, then nine years old. On 23 April he was sentenced to a period of 18 years imprisonment. With leave of the court a *quo,* appellant appeals against his conviction and sentence.

Ms A P, the complainant, testified that appellant was the brother of aunt's husband. At the time of the incident she stayed with her father and mother, but that night she slept with her aunt. She slept in one room with her cousin on one bed and appellant on the other bed. Her aunt slept in another room with her husband and a young child. Appellant came to her bed and pulled off her panties. He undressed himself and put his penis in her vagina. He made movements on top of her. When he had finished, she sat on a sofa for a while and then returned to bed, when appellant told her to do so. She fell asleep.

Early the next morning, she told her aunt, Nothemba, what had happened. A few days later her aunt told her mother. Her mother called the police and she was later taken to a clinic. Under cross-examination the complainant testified that appellant raped her a second time. According to her, he woke her up, took off her panties and put his penis in her vagina. After that she continued sleeping. The next night she went to sleep with her mother.

Ms Nomthandazo Ncokwe is the complainant's aunt. On the morning after the night in question, the complainant told her that appellant had raped her. She and her sister looked at her vagina to see whether there were any signs that she had been raped. (They did not find any signs, but the magistrate mistakenly said in his judgment that they had fact found signs of a rape). She decided not to tell the complainant's mother immediately, because her mother was pregnant, but on the Sunday she told her what had happened.

Themba Petshe is the complainant's mother. She confirmed that Ms Ncokwe, her sister, told her on the Sunday that appellant had raped the complainant. She reported the matter to the police.

Ms Faziela Bartlett, is a nursing sister working for the Department of Health at the D F Jooste Hospital. On 15 May 2009, she examined the complainant, this was about 12 days after the incident. She did not find any vaginal injuries or scars during the gynaecological examination. She noted that the complainant had a large vagina for her age. I may add that she also noted that she had an annular hymen, but that seems to be irrelevant. As to the question of the large vagina, she said that her findings were not inconsistent with the absence of vaginal injuries. Under cross-examination she said that on her findings, she could not exclude a sexual assault. I will return later to Ms Bartlett's evidence.

Appellant testified that he was 37 years old. He stayed with his parents until 2007 when he moved to the complainant's house. He stayed there until she chased him away. He denied that he had sexually assaulted the complainant as had been alleged by her.

The magistrate summarised the evidence in the matter and then dealt with the impressions created by the witness. The complainant, he said, made a positive impression. Despite her young age, she testified in a meaningful, logical and chronological manner. She had a good recall of the events and she was able to provide considerable detail. The magistrate mentioned two contradictions in the evidence, but he held that these were not material. The first was that she testified under cross-examination that appellant raped her twice. The magistrate said that this contradiction was understandable as she was but nine years old and that it was a stressful experience for her. The second contradiction was that she told her aunt that appellant had kissed her

on her mouth and her breasts. This did not form part of the complainant's own evidence.

The magistrate also mentioned that appellant testified that he could only walk with crutches. This was contradicted by the aunt's evidence that it was possible for him to walk without crutches if he could support himself by holding on to furniture in the house. (The magistrate appeared to have attached some significance to this evidence, but in my view completely neutral). The magistrate then said the following:

> "Dit is duidelik uit die getuienis van suster Bartlett dat hierdie klaagster inderdaad verkrag is. Die abnormale groot vaginale opening is "n waarborg vir die betroubaarheid van die klaagster se getuienis in daardie opsig. Daar is geen twyfel in die hof se gemoed nie en die hof aanvaar dat suster Bartlett se getuienis dat die klaagster inderdaad dan verkrag is."

The magistrate then mentioned the surrounding circumstances, the report made by the complainant and the fact that there was no reason for the complainant to falsely implicate appellant as reasons when she rendered her version reliable. In this discussion, the magistrate again mentioned what he regarded as Ms Bartlett's finding that the complainant had been raped. Thus he says:

> "Dit is duidelik ook dat hier nie Yi gefabriseerde of Vi opgemaakte weergawe is nie, gesien in die lig van die getuienis van suster Bartlett.

Hierdie voorval is dus nie Yi figment van die verbeelding van die klaagster nie, sy is inderdaad verkrag."

Then a little lower down on the same page:

"As daar niks gebeur het nie soos die beskuldigde gese het, waarom sal suster Bartlett vind dat die vaginale opening inderdaad so groot is?"

And then also two lines lower down:

"'n Waarborg van die betroubaarheid van haar getuienis kan gevind word in die mediese getuienis."

The magistrate gave a full judgment on sentence and sentenced appellant to 18 years imprisonment. It is apparent that the magistrate's finding that Sister Bartlett's evidence to the effect that appellant raped the complainant, played a vital role in his reasoning. This finding, however, as I will show, is simply not justified.

There are two concepts in Ms Bartlett's evidence which appear to have given rise to confusion. The first is her note on the J88 form and confirmed in her evidence, that the complainant had an annular hymen. Unfortunately her explanation of what this is, was not properly reported. On the face of the

record, her meaning and significance of this concept are not clear, but in the context of the evidence and the judgment, this seems to have been a perfectly neutral factor in regard to the question whether any of the medical findings proved or disproved that appellant raped the complainant.

A second concept which gave rise to confusion is the statement by Sister Bartlett that the complainant had a large vaginal opening for her age. The significance of this concept was also not properly explained. In the evidence in chief led by the prosecutor, there was no particular significance attached to this evidence. On the face of it, it was simply mentioned as a anatomical fact. The only point that the prosecutor appeared to want to establish is that the absence of visible injuries at the time of the examination was not inconsistent with an alleged penetration which took place 12 days earlier.

Some of Ms Bartlett's answers under cross-examination are difficult to reconcile with her evidence and might have given rise to further confusion. The general thrust of her evidence, however, is relatively clear. As put at the end of the cross-examination, she agreed that on her findings she could not exclude penetration. The fact that on her findings she could not exclude penetration, however, is logically and practically something totally different from stating that the vaginal opening in fact proved that penetration took place. On the one hand the absence of the exclusion simply means that it is possible, and on the evidence she cannot exclude it. The fact that a finding proves vaginal penetration is something very different, because in that case it is evidence supporting or proving a particular fact.

In the magistrate's summary of her evidence, he made certain clear remarks

about this evidence. It appears though that the magistrate concluded that the large vaginal opening can be regarded as positive proof that vaginal penetration took place. The magistrate's understanding of Ms Bartlett's evidence, therefore, was that, presumably as a result of the penetration and the object which penetrated the vaginal opening, it was widened as a result of that act and such widening, or enlargement, was still visible after 12 days.

Upon a proper construction of this evidence and bearing in mind that the onus of proof, of course, is on the state, it seems to me that one cannot attach more significance to this enlarged vagina, other than it is simply an anatomical fact which is perfectly neutral as between proof that penetration took place or, conversely, proof that penetration did not take place.

I conclude, therefore, that the magistrate misdirected himself in regard to the meaning, weight and effect of Ms Bartlett's evidence. Her evidence, on analysis, is neutral as regards to the question of penetration, it does not contribute to or corroborate the state's case. At best one can say it is not inconsistent with the state's case. The magistrate's approach, therefore, was materially flawed.

The magistrate approached the totality of the evidence, including that of Ms Bartlett. He came to a particular opinion and conclusion and it would be impossible for us to try and exclude Ms Bartlett's evidence from the balance of the evidence.

In the result I am of the view that there is not sufficient evidence to have justified the conviction of appellant. I am accordingly of the view that the appeal should succeed and that appellant's conviction and sentence should

be set aside.

DLODLO. J: I agree.

DLODLO, J

BLIGNAULT. J: It is then so ordered.

BLIGNAULT, J