G.P.-S.4706—1950-1—6,000.

17.9.1959.

U.D.J. 445.

113/59

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Cape of Good Hope DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN KRIMINELE SAAK.

NIBH. NDHLOVU

Appellant.

versus

THE QUEEN

Respondent.

Appellant's Attorney *Prokureur van Appellant*	*Respondent's Attorney* *Prokureur van Respondent*
H.C.J. Henning	
Appellant's Advocate *Advokaat van Appellant*	*Respondent's Advocate* H C J. Hofer *Advokaat van Respondent*

Set down for hearing on: Thursday, 19th November 1959
Op die rol geplaas vir verhoor op:—

Coram: Schreiner, A. de Beer et Jf A. et van Wyk A.J.A.

C.A.V.

Coram: Schreiner, A. de Beer et van Wyk.

The appeal is dismissed.

27.11.59

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

TEMBA NDHLOVU Appellant

and

R E G I N A Respondent

Coram: Schreiner, de Beer, Van Wyk ~~Ramsbottom~~, JJ.A.

Heard: 19th November, 1959. Delivered: 27-11-59

J U D G M E N T

SCHREINER J.A. :- The appellant was convicted of rape by a jury and was sentenced by the presiding judge, JAMES J., to three years imprisonment and four strokes.

The complainant, a native girl to whose age I shall make further reference, testified to having been assaulted and raped by the appellant soon after 5 o'clock on the morning of the 21st January 1959 close to a cemetery near Cato Manor, Durban. She said she was on her way to start work at a factory. It is unnecessary to recount all the details of her evidence. She said that the appellant, whom she knows as a neighbour, came up from behind her and accosted her. He slapped her face and aimed fist blows at her head, which she warded

off/.....

off with her hands; he then brought her to submission by threatening her with a knife. A witness, Madhlala, said that he saw the complainant being molested by a man near the cemetery and that fist blows were aimed at her head which she warded off with her hands; she cried out and ran away. It is subject for criticism of this witness that he did nothing to help the complainant - he said that he did not take the matter seriously. A watchman who first drew Madhlala's attention to what was happening was not called as a witness. There was police evidence that at about 6 a.m. on that day the complainant laid a charge against the appellant at Cato Manor police station, to which, according to her, she had gone by bus immediately after the assault.

The appellant, a man apparently some 35 to 40 years old, gave evidence in which he said that he had frequently had external connection with the complainant and that on this very morning, not very far from the spot where she said that she was raped, they had similarly had connection by consent. She had wanted money, he said, and because he did not give her any she went off threatening to do something that would part him from the woman with whom he was living. When, later that day, he learned that the police were looking for him, he voluntarily went to the police station. The appellant contradicted himself as to whether he had previously given the com-

plainant/.....

-plainant money. He first denied it and then said that he had done so. He also said that he had given her cakes. In this he was supported by a defence witness, Philip, aged 13, who is related to the appellant. Philip said that he was present when the appellant gave the complainant cakes and two shillings. Thereafter, he said, ~~that~~ the complainant told him that she and the appellant were lovers.

The assistant district surgeon examined the complainant at midday on the day of the alleged assault. He said that he found no injuries outside the genital area. The hymen showed old healed partial tears and there was some bruising of it which could have been caused by a male sexual organ. It was, however, improbable that an adult penis penetrating the hymen would not have ruptured it further. The doctor said that the complainant told him that she had had intercourse with a boy three times before; in her evidence she said that in fact she had had such intercourse twice and that she had told the doctor that it had happened once. A swab and smears were taken and sent for examination but revealed no spermatozoa. The doctor gave evidence that the complainant's age might be more or less than 14 but was probably 14 to 15 and not more.

The police evidence was to the effect

that/.....

that there was no visible disturbance of the ground or the grass at the place where the rape was said to have been committed. When she arrived at the police station the complainant's clothes were wet from rain, the shoulders being the wettest.

On the application of the appellant, the learned judge made a special entry under section 364 of Act 56 of 1955, on which the appellant now appeals to this Court. The terms of the special entry are as follows :-

"That the proceedings were irregular inasmuch as the learned judge misdirected the jury in his summing up in the following respects:

1.In failing adequately or at all to instruct the jury of the danger inherent in placing reliance upon the uncorroborated evidence of the complainant because she was a child.

2.In instructing the jury that the charge laid by the complainant was corroboration of the complainant's story.

3.While instructing the jury that the medical evidence was consistent with the complainant's story,failing to instruct the jury as to the fact of the consistency of the medical evidence with the evidence given by the accused.

4.In observing without qualification that the evidence of MUNTONGEZWA MADHLALA was corroborative of the complainant's story, when it was in fact corroborative only of her account of an assault by some person and not of an assault by the accused.

5.In failing adequately to warn the jury of the danger of accepting,where there was no corroboration of the fact,that the person accused by the complainant was in fact her assailant. "

Misdirections or other defects in

a/.....

a summing up may singly or together constitute an irregularity entitling an accused person to succeed on appeal unless the proviso to section 369(1) of Act 56 of 1955 applies. The question when such misdirections and defects amount to an irregularity has been discussed from time to time in this Court. It is for present purposes sufficient to refer to the general remarks in Rex v. Rautenbach (1949(1) S.A. 135 at pages 141 and 142) and to the repetition in Regina v. Piek (1958(2) S.A.491 at page 498) of the statement that the question whether any particular defect in a summing up amounts to an irregularity is frequently one of degree.

I shall deal with each of the grounds of complaint against the summing up in turn and shall then consider their effect when taken together.

In regard to the complaint that JAMES J. failed to warn the jury of the danger of relying on the evidence of the complainant because of her youth the learned judge reports as follows:-

"As far as the complainant is concerned the Prosecutor endeavoured to establish that she was under the age of 16, but in address he conceded that the evidence left the issue in doubt and that she might well be over 16 years of age. She was not by any standards a young child and the circumstances of the case revealed that it was very unlikely that she had been improperly influenced by parents or elders to tell a false story.

I accordingly did not give the jury any special warning about the danger of accepting her evidence on the grounds of her youth."

The subject was discussed in Rex v. Manda (1951 (3) S.A. 158 at pages 162 and 163). It is clearly impossible to lay down any hard and fast rule as to when a judicial warning to the jury is called for on account of the youth of the witness. In the present case the learned judge's impression of the maturity of the complainant receives support from a perusal of the record of her evidence, which indicates independence of outlook and a well developed intelligence. She was apparently able to work in a factory and to make her own way to her place of employment. Her decision to report to the police also shows that she could think for herself.

In my view the failure to warn the jury in regard to the complainant's youthfulness did not constitute an irregularity.

The second ground for the special entry is that the learned judge told the jury that the charge laid by the complainant was corroboration of her story. What JAMES J. said was "and then, again, apparently she was at the "police station just after six laying a charge - and that "again is corroborative of her story." The learned judge had just mentioned the evidence of Madhlala which was clearly corroboration/.....

roboration of the complainant's story that she was assaulted by a man, although it did not go to prove the identity of her assailant. It is true that the evidence of a witness is not properly speaking corroborated by his previous statement to the same effect as his evidence, but in the case of sexual assaults complaints are admissible for certain purposes and subject to certain conditions. She said in her evidence that she had told a bus conductor on the way to the police station that she had been raped but the circumstances of this incident were not investigated. Strictly speaking complaints are admissible only to negative consent and to show the consistency of the complainant's conduct. But the line between proof of consistency and corroboration is not very easy to convey to a jury. Here all that was needed was a warning to be careful in such cases, and that the learned judge gave to the jury. In any event,if corroboration had been required, such was provided by Madhlala's evidence. In the circumstance the fact that JAMES J. used the word "corroboration" clearly did not constitute an irregularity.

The third ground for the special entry is that the learned judge failed to point out that the medical evidence was consistent not only with the complainant's evidence but also with that of the appellant. But JAMES J. was at that stage dealing with the complainant's story and in that connection it was important to refer to the medical evidence.

What the learned judge said was "so"(i.e.corroborative) "too is "the inspection by the doctor,which shows that what he saw is "consistent with what she says took place on that day." I do not think that "corroboration -ve" was the most appropriate word to use but the jury could not have been left in any doubt as to what was intended. And the learned judge went on at once to point out that if they were left in doubt as to which story was true they must acquit the appellant. There was here no irregularity and the third ground of special entry also fails.

The fourth ground was in effect that the learned judge, in stating that the evidence of Madhlala was corroborative of the complainant's story failed to point out that it provided no corroboration of the complainant's identification of the appellant as the raptor. But the evidence of Madhlala was undoubtedly corroboration, and important corroboration, of her story. It is true that her assailant might on Madhlala's evidence have been some-one other than the appellant. But a corroborating witness does not need to cover all the grounds in his evidence. In relation to the identification of an accused person with the crime there is not generally in the case of sexual assaults the same special danger of the wrong person being deliberately implicated that is referred to in the cases dealing with accomplices. There is usually, though not invariably, no more reason for a woman

deliberately/.....

deliberately to identify the wrong man in a sexual assault case than in any other case in which she complains that she has been injured in her person or property. The considerations ordinarily calling for special caution in the case of sexual offences ~~are differ-ent~~ ~~they~~ are referred to in Rex v. Rautenbach (supra) at page 143. The fourth ground of special entry thus also fails.

The fifth ground is related to the fourth. The point taken is that there was no adequate warning that the identity of the appellant by the complainant was not corroborated. But there were elements of probability that supported her identification of the appellant as her assailant. He admitted being in the near neighbourhood at the time and admitted to having connection with her at about that time. There was a very high degree of improbability that she would have had connection with him voluntarily and then after being raped by some other man would have gone off at once to the police to lay a charge, not against the raptor but against the appellant. His evidence that she was in a mood to concoct a charge against him can carry little weight against the natural impulse to bring the charge home to the true culprit. The medical evidence made it unlikely that more than one person had had connection with the complainant - unless, as is improbable, both refrained

from/.....

from full entry. The appellant says that he so refrained and if there was a rape this factor in the light of the medical evidence supports the view that he was the raptor.

The criticism that the learned judge gave no adequate warning was not as such a proper grcund for special entry, for it is not an irregularity to fail to ~~pxinxx~~ put all the points in an accused person's favour as fully or as strongly to the jury as should have been done, or on the other hand to stress the points against him more than should have been done. Only if the summing up goes so far ~~xx~~ in those directions as to amount to a miscarriage of justice would there be an irregularity. (see Rex v. Laubscher, 1926 A.D.276 at page 284).

I have dealt with the several grounds of special entry and have found that none of them establishes an irregularity. If one has regard to the summing up as a whole it is clear that it cannot be said to have been unfair or irregular. Grounds for criticism in minor respects there may be - that applies to many summings up. But in general the learned judge put the case with eminent fairness before the jury. It should be remarked that there were features in the Crown case which might easily have raised a reasonable doubt in the minds of the jury but the responsibility was theirs and they were satisfied

of/.....

of the appellant's guilt. The correctness of their verdict is not in issue.

The appeal on the special entries is dismissed.

26.11.54

De Beer, J.A.
van Wyk
~~Ramsbottom~~, A.J.A. } Concur.

he was arrested, that I was one of his witnesses.

Well, he came out on bail, didn't he? --- No, he didn't.

COUNSEL ADDRESSES COURT.

JUDGE ADDRESSES THE JURY:

JAMES, J: Gentlemen of the Jury, the accused in this case has been charged with and tried for the crime of rape. Now rape, in law, is committed by a man who has unlawful carnal knowledge of a female without her consent. Now, the Crown, to succeed in a case of this kind, must establish beyond reasonable doubt the fact of the unlawful carnal knowledge and the fact that it was without her consent. One does not consider highly imaginative doubts - things that really are not in the evidence - but you consider all the evidence in this case, and if, when you look at it with your feet on the ground, from a commonsense point of view, you are still left with a reasonable doubt, then the Crown has not made its case.

Now, my job in this business of Jury trials is to tell you what the law is. Your function is to come to a conclusion on the facts, apply them to the law, and decide whether the case has been proved against the accused person. Of course, I will comment from time to time on the evidence. But, if you don't agree with my comments, you are perfectly entitled to disagree with them and, indeed, you must disagree with them, because you are the triers of fact.

As far as the law is concerned, the two first points I want to make are that

(1) for there to be rape, you have not got to have complete penetration. If there is some penetration by a male organ of the female body then that is rape.

(2) If one talks about consent, that does not necessarily mean that the woman has got to be bruised and battered and

/fight

fight for her honour, because rape is committed if unlawful carnal intercourse occurs, without her consent. If a man intimidates a woman and frightens her because he is bigger than she is, or because he has a knife, she is not giving a free mind to that - and that is rape. It might be that one does not take such a serious view of the rape, but it is rape if a woman is compelled to do it by any means - by force, or by threat of force - that is just as much a rape as if the woman fought and screamed, and was bruised and battered.

Now, dealing with the evidence, I deal first with the girl. You saw her. One has to look at the complainant's evidence in these cases with particular care. At the back of one's mind one always wonders if the girl says it is rape because she was not paid, or because she has a grudge against somebody, or because she has been caught in the act. But you have just got to look at that girl and form your own conclusion as to whether she is telling substantially the truth.

Her basic story was that she was walking along there, when this man came up to her and more or less drove her into the cemetery, and that she did her best to escape, but that he eventually forced her out to a place where he eventually raped her. Now it is important that the man Madhlala saw this girl being chivvied along the road by a man, and that is corroborative evidence of her story. And then, again, apparently she was at the police station just after six, laying a charge - and that again is corroborative of her story - so too is the inspection by the doctor, which shows that what he saw is consistent with what she says took place on that day But you cannot just say that you believe her story and that is therefore the end of the matter, because

/you

you have got to weigh her story against that of the accused. One or other of their stories cannot be true. If you are satisfied that the accused's story is true, that is the end of the matter, but if after considering that story you are left in doubt as to where the truth lies, then the case against the accused has not been proved. As far as the accused is concerned, again it depends on the impression he made on you. But it is curious that he said first of all that he only went with this young girl because he had not got a woman of his own, and then later he said that he had got a girl. It seems to me that he is not particularly truthful. And then we have this curious fact that he says he actually had intercourse with that girl on that particular morning with consent. Then by some remarkable coincidence very shortly afterwards some other man finds this girl on the road and rapes her. And she, having been taken unwillingly by that other man, goes to a police station and blames the accused. What woman would do that? Another matter: the accused suggests that this girl laid a charge against him because he did not give her some money. If that were so, is it not much more probable that she would say that she was raped at the very spot where the accused says intercourse took place? There they were hidden away from prying eyes, by the still, far earlier in the night. But now, if it was somebody else, why should she blame the accused?

As far as this boy Phillip is concerned, again he is a small child - he is thirteen. It seems to me that he was not entirely truthful because, when he started, he was asked, "Didn't you make a statement that you knew the accused well by sight?" and he says no, he didn't know the accused well by sight. And then it appears that he was actually living in the accused's kraal for a long time. Can one

/really

really, looking at him, say he was telling the truth? Isn't it possible that he had been put up to this story because of his association with the accused?

You have got to look at all the evidence; weigh it up and, if you feel that the Crown has established its case beyond reasonable doubt, then you must find the accused guilty, but if, on consideration of his story, you have a doubt about the truth of the Crown case, then you have to find him not guilty.

I ask you now to retire, but I must tell you that any decisions that you may make must be either unanimous or by eight to one, or seven to two; six to three or five to four are not sufficient and, if you can only arrive at a decision by these majorities, the accused may have to be re-tried.

(Jury retires to consider the verdict).

REGISTRAR: Are you agreed upon your verdict? --- We are.

Do you find the prisoner at the bar guilty or not guilty? --- Guilty.

And so say how many of you? --- Seven to two.

BY THE JUDGE: I propose to pass sentence on this man to-morrow.

(Court adjourns until tomorrow).

S E N T E N C E: 27th May, 1959:

JAMES, J: In passing sentence upon you, I take into consideration the fact that you have no previous convictions and that you have been six months in gaol, awaiting trial. I also bear in mind the fact that you did the girl no serious physical harm. At the same time, you waylaid a girl early in the morning, when she was on her way to work, and you had absolutely no right to do that. It is the duty of the Court to ensure that women should be allowed to walk freely and safely in the public roads. The sentence I pass upon you is three years imprisonment, with compulsory labour, and a whipping of four strokes.

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IN THE SUPREME COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION.

IN THE MATTER OF

TEMBA NDHLOVU Applicant.

: and :

REGINA Respondent.

AND IN THE MATTER of an Application for a special entry in terms of Section 364 of Act No.56 of 1955.

A F F I D A V I T.

I, the abovenamed TEMBA NDHLOVU, presently of the Durban Gaol, do make oath and say :-

1.

On the 26th May, 1959, I was convicted of rape by the Honourable Mr. Justice James and a jury in the Durban and Coast Local Division of the Supreme Court, and was sentenced to three years imprisonment with hard labour and four strokes.

2.

I hereby respectfully apply for a special entry to be made upon the record of the case on the ground that the proceedings were irregular inasmuch as the learned Judge misdirected the jury in his summing up in the following respects :-