THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 71/13

Not Reportable

In the matter between:

TSHEPO BOSIELO	**FIRST APPELLANT**
ATANG BOSIELO	**SECOND APPELLANT**
THULAGANYO MOTLHAMME	**THIRD APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation:	*Tshepo Bosielo v The State* (71/13) [2013] ZASCA 133 (27 September 2013)
Coram:	**Lewis, Maya, Majiedt, Petse and Saldulker JJA**
Heard:	**6 September 2013**
Reasons furnished:	**27 September 2013**

Summary: Evidence ─ adequacy of proof that rape occurred ─ onus on State to prove beyond reasonable doubt that complainant's evidence credible and that the one accused's version that it was with her consent false beyond reasonable doubt.

ORDER

On appeal from: North West High Court, Mahikeng (Hendricks, Landman and Gura JJ sitting as court of appeal):

1 The first two appellants' appeals against convictions on charges of rape are upheld.

2 The third appellant's appeal against conviction on a charge of rape is upheld, but he is convicted, in terms of s 268 of the Criminal Procedure Act 51 of 1977, of the offence of contravening s 14(1)*(a)* of the Sexual Offences Act 23 of 1957. The sentence imposed by the high court is set aside and is replaced with:

'The second accused, Thulaganyo Motlhamme, is sentenced to six years' imprisonment, effective from 20 March 2007.'

3 The three appellants are all to be released from custody immediately.

REASONS FOR JUDGMENT

Petse JA (Lewis, Maya, Majiedt and Saldulker JJA concurring):

[1] This appeal was heard on 6 September 2013. At the conclusion of the hearing, and after deliberation, the court upheld the appeal against the convictions which were then set aside. But in so far as the third appellant is concerned, his conviction on a charge of rape was, in terms of s 268 of the Criminal Procedure Act 51 of 1977, substituted with a contravention of s 14(1)(a) of the Sexual Offences Act 23 of 1957.[1] The sentence imposed by the high court was substituted with one of six years' imprisonment antedated to 20 March 2007. The court also ordered the

[1]Since repealed by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

immediate release, from custody, of the appellants. It was also intimated that reasons for this court's order would be furnished later. These are the reasons.

[2] The appellants were convicted in the regional court Mogwase, North West on a charge of rape and robbery both read with s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the Act). Consequent upon their conviction they were referred to the North West High Court for confirmation of the conviction and for sentencing in terms of s 52 of the Act.

[3] Section 52[2] of the Act as it then applied required a regional court, when it has convicted an accused person of an offence for which life imprisonment is the prescribed sentence, to stop the proceedings and commit the accused for sentence to a high court having jurisdiction. The matter initially came before Gutta AJ who adjourned it to 19 February 2007, directing that the trial magistrate furnish the high court with his reasons for convicting the appellants.

[4] In due course the trial magistrate furnished his reasons for convicting the appellants and the matter served before Leeuw J who concluded that the appellants' convictions on the rape charge were supportable on the evidence but not in respect of the robbery count, save in relation to the third appellant only. She proceeded to consider the question whether or not substantial and compelling circumstances as intended in s 51(3)(a) of the Act existed. In the event she found that such circumstances existed and sentenced the appellants to 18 years' imprisonment on the charge of rape. In addition, the third appellant was sentenced to imprisonment for one year on the count of robbery which was ordered to run concurrently with the term of 18 years' imprisonment.

[5] The first two appellants were subsequently granted leave to appeal against their conviction to the Full Court which dismissed their appeal (per Hendricks J with

[2] Since repealed by s 52 of the Criminal Law (Sentencing) Amendment Act 38 of 2007.

Landman and Gura JJ concurring). On 28 February 2012 this court granted special leave for a further appeal against conviction, hence the present appeal.

[6] This case has an unusual feature in that the third appellant seemed to have accepted his fate after his abortive attempt to join in the first and second appellants' appeal before the Full Court. But when special leave was granted to the first two appellants by this court, the third appellant belatedly sought the leave of the high court to appeal against his conviction on both the count of rape and the count of robbery which was granted (per Leeuw JP) on 28 November 2012 directly to this court.

[7] Some time after the appeal of the first two appellants had been enrolled for hearing, the third appellant filed an application in terms of which he sought leave of this court to be joined as the third appellant in the case and to have his appeal determined together with that of the other two appellants. The foundation for that application was that in granting leave directly to this court, Leeuw JP had expressed the view that the interests of justice and considerations of convenience dictated that his appeal should be heard together with that of the first two appellants. Consequently, the third appellant's attorney said that he laboured under a misapprehension that the third appellant 'automatically became the third appellant in this appeal as [all three appellants] were co-accused in the same matter'.

[8] At the outset Mr Mokoka, who appeared on behalf of the third appellant, was invited to address us on the third appellant's request to be joined as an appellant, which was not opposed by the State. The third appellant's non-compliance with the rules of this court was condoned and application to have his appeal heard at the same time as the other two appellants was granted.

[9] I now turn to the merits of the appeal. In so far as the third appellant is concerned the central issue is whether or not the sexual intercourse between him

and the complainant, which it is common cause took place, was consensual, as asserted by the third appellant. As far as the first and second appellants are concerned the court must determine whether they engaged in non-consensual sexual intercourse with the complainant as alleged by her.

[10] It is necessary at this stage to set out the factual background. As already stated, the appellants were charged with rape and robbery. They pleaded not guilty to both counts and, in essence, put all the elements of the charges against them in issue. Whilst admitting, in their plea explanation, that at one stage they were with the complainant at Villa Park Tavern ─ which is a family business of the first appellant ─ all the appellants denied that they had raped the complainant. The third appellant admitted having engaged in consensual sexual intercourse with the complainant claiming that the latter had earlier accepted his 'love proposal'.

[11] The complainant gave evidence in relation to both charges. She testified that on 15 January 2006 at approximately 20h00 she had hitchhiked a lift from the appellants who were travelling in a Citi Golf motor vehicle driven by the second appellant. She was seated in the middle of the back seat between the first and third appellants. The second appellant asked her whether she had any money with her. She replied that she had R4. The third appellant then searched her and removed a R100 note from the back pocket of her pair of jeans. The second appellant then drove to a tavern and re-emerged from the tavern carrying four beers.

[12] From there they drove the motor vehicle to some bushes where the second appellant forcefully removed her pair of jeans and panties whilst the third appellant firmly held her down on the back seat. All three appellants then took turns to rape her. She said that she could not scream because the first appellant covered her mouth with his hand. After the appellants had finished raping her they drove away with her, with the third appellant now occupying the front passenger seat. This presented her with an opportunity to escape: she jumped out of the motor vehicle

whilst it was still in motion, albeit moving slowly. She suffered no injuries in the process.

[13] She thereafter sought refuge at the home of her boyfriend, Mr Umphile Masilo ─ where she spent the rest of the night ─ to whom she made a report about what she alleged had occurred to her. The next morning Umphile reported the incident to his mother and the latter then sought confirmation of the report from the complainant. Upon expressing a desire to lay a charge against the perpetrators to Umphile's mother, the latter gave her money to travel to the Mogwase police station where a report was made to the police. The police then took her to Moragong hospital where she was examined by a doctor who was in attendance. The doctor observed no abrasions, wounds or injuries on the complainant's body. But the gynaecological examination revealed the following abnormalities: small lacerations on the posterior forchette with bloodstains; a torn hymen; and blood in the vagina with small tears in the posterior vaginal wall. The doctor concluded that these injuries were consistent with forceful penetration. But he nonetheless could not exclude the possibility that they might have been caused by a big penis. Although on the complainant's version two of the perpetrators had not used condoms ─ on information furnished by the complainant ─ he could not recall seeing semen in the complainant's vagina.

[14] Umphile also testified on behalf of the State. He said that in the early hours of the morning and whilst he was asleep he heard a knock on the door. When he opened the door he discovered that it was the complainant. She was tearful and she spontaneously reported to him that she had been raped by persons unknown to her. He confirmed the substance of the complainant's evidence as to how it came about that she was with the persons who, she said, had raped her; the place where the incident occurred and how she escaped from them. In the morning he summoned his mother to 'come and hear what had happened to the complainant' who thereupon gave an account of the incident that she alleged had occurred. Ms Mabaruthi Monegi, the complainant's mother, testified concerning the complainant's age and that on the date of the incident the complainant was 15 years of age. Her evidence was not challenged.

[15] The three appellants also testified. The first appellant testified that he was with his co-appellants at a tavern when they later decided to go to a butchery in the vicinity. They remained at the butchery until 19h00. He later returned to the tavern whilst the third appellant took a different path saying that he was going to his girlfriend's home. Upon arriving at the tavern he found the second appellant. Later, the third appellant arrived together with the complainant and joined the second appellant whilst he was with one Warren and their mutual friends. After a while the second appellant left as he was due to attend school the next day. The third appellant approached the first appellant and, in the presence of the complainant, asked him for a place to sleep together with the complainant. He obliged. He went to the kitchen to prepare himself some food whilst the third appellant and the complainant retired to the bedroom that he had provided. Whilst he was still tidying up in the kitchen, the third appellant and the complainant emerged from the bedroom. Shortly thereafter they left whilst he remained in the kitchen. Later the third appellant returned alone. He denied the substance of the complainant's version and in particular that they had offered the complainant a lift in a Citi Golf motor vehicle, saying that none of them owned nor drove a Citi Golf on the night in question.

[16] The second appellant testified and also denied the substance of the complainant's evidence. In particular he denied that he had at any stage driven a Citi Golf motor vehicle in which the complainant was conveyed. He confirmed that the complainant arrived at the tavern together with the third appellant who bought a Redd's cider for the complainant. They sat together 'in an open area' with other friends. He said it was whilst they were engaged in a conversation amongst themselves that he came to know who the complainant was.

[17] The third appellant testified that on the day of the alleged incident he met the complainant between 19h30 and 20h00 at the T-junction of the road to Lotwane. After having exchanged pleasantries with her he told her that he was on his way to a tavern and suggested that she come with him. She agreed. On the way he 'proposed

love' to her and upon their arrival at the tavern, she accepted. The complainant gave him R10 to buy her a Redd's cider. He obliged. He then met with the second appellant who, upon being told for whom the cider was bought, joined them. They all drank together until they were later joined by one Ulifile. Ulifile then left. From there the three of them went to the first appellant who was by then in the kitchen. By arrangement with the first appellant, he and the complainant went to the former's bedroom where he and the complainant engaged in consensual sexual intercourse. After they had finished he accompanied her to what the complainant said was her parental home at Lotwane where they parted with each other at the gate to the premises. From there he returned to the first appellant's home where he spent the night. The third appellant also denied the substance of the complainant's evidence against him.

[18] Mr Warren Lefoka who was called as a witness by the appellants confirmed that the complainant ─ whom he said he had known since childhood ─ was at the tavern consuming liquor with the appellants together with Elliot and Ulifile. He testified that when he left the tavern at about 22h00, the complainant was still at the tavern. In cross-examination Lefoka stated that he knew the complainant to be the third appellant's girlfriend.

[19] The trial court found that the complainant's evidence was reliable. It went on to hold that the complainant's version was corroborated by Umphile. And as against that, it found that the versions of the appellants were in the main so improbable that to accept them would imply that the complainant had falsely implicated them. This, it concluded, was 'highly impossible' if regard was had to the fact that the complainant had, on their version, enjoyed their company in the tavern. Thus, it found that her conduct in 'suddenly turning against [the appellants] if indeed the complainant had enjoyed herself with the three [appellants] at the tavern' would be inexplicable.

[20] For present purposes it suffices to set out the reasoning of the Full Court in arriving at its conclusion to dismiss the appeal. Hendricks J said (para 7):

‘The versions of the two Appellants and Motlhamme are diametrically opposed to that of the complainant. On their version, the three of them were together as friends on the day of the incident. They were however not driving a Citi Golf motor vehicle but a bakkie owned by the parents of Appellant no 1. The complainant did not hitchhike a lift from them. Instead, Motlhamme met the complainant at the tavern of Accused 1’s parents. They conversed whereupon he proposed love to her. She accepted his proposal and he arranged with Appellant no 1 for a room where he and the complainant had some privacy.’

[21] Having outlined the evidence adduced at the trial Hendricks J then remarked as follows (para 9):

‘As a starting point, it is common cause between the complainant and the Appellants (and also Motlhamme) that they were not well known to each other. In fact, they only knew one another by sight, before the date of the incident and were not even acquaintances. Furthermore, it is common cause that all three of them were together on that particular day when they met the complainant, although under different circumstances and at a different place altogether.’

[22] And again (para 10):

‘Seeing that the versions of the complainant on the one hand and that of the Appellants and Motlhamme on the other hand are diametrically opposed to each other, the courts ***a quo*** (Regional and by implication also the High Court) looked at the probabilities to determine whether the State had succeeded in proving the guilt of the Appellants (and Motlhamme) beyond reasonable doubt. The trial court questioned itself in the process of determining the facts, amongst others as to why would the complainant, for no rhyme or reason, sketch a total different scenario of the events to that of the Appellants (and Motlhamme), not only with regard to the time and place where the incident occurred but also with regard to the fact that all three of them and not only Motlhamme, had sexual intercourse with her. Furthermore, it defies all logic that she would, for no apparent reason, implicate the two Appellants whom she not only did not know well, but also had no ill-feelings towards them and harboured no grudge against them.’

[23] Thus the learned judge concluded that it was highly improbable that the complainant who was 15 years of age when the incident occurred ‘would meet a stranger at night, accept his love proposal’, engage in ‘sexual intercourse with him,

get up and proceed to her boyfriend and report that she was raped, not only by [her] new boyfriend but also gang raped by this new boyfriend's two friends'. He went on to say that the trial court had properly evaluated the evidence 'holistically' in the light of the inherent probabilities and improbabilities and said that the 'strong' credibility findings in favour of the complainant reached by the trial court were unassailable.

[24] Before considering whether or not the grounds relied upon by both the Full Court and the trial court, as summarised above, can withstand close scrutiny, it is necessary to reiterate the proper approach to be adopted when analysing the version of an accused in a criminal trial. This court has time and again said that:

'[T]here is no obligation upon an accused person, where the State bears the onus, "to convince the court". If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true.'[3]

[25] As to the corroboration of the complainant's evidence by Umphile ─ as found by the trial court ─ it suffices to say that the nature of corroboration required for purposes of the cautionary rule is corroboration implicating the accused in the commission of the crime and not 'merely corroboration in a material respect or respects'. Thus in *S v Mhlabathi & another*[4] Potgieter JA said the following:

'It is clear from the authorities that if corroboration was required it had, for the purpose of the so-called cautionary rule, to be corroboration implicating the accused and not merely corroboration in a material respect or respects. (See *Ncanana's* case [*R v Ncanana* 1948 (4) SA 399 (AD)] at p 405; *R v Mpompotshe and Another* 1958 (4) SA 471 (AD) at p 476; *S v Avon Bottle Store (Pty) Ltd And Others* 1963 (2) SA 389 (AD) at p 392. I would like to emphasise that as was pointed out by Schreiner JA in *Ncanana's* case *supra* at p 405 it is not a rule of law or practice that requires the Court to find corroboration implicating the

[3] *S v V* 2000 (1) SACR 453 (SCA) at 455a-c; *S v Shackell* 2001 (2) SACR 185 (SCA) para 30.

[4] *S v Mhlabathi & another* 1968 (2) SA 48 (A) at 50G-51A. Compare *S v Jackson* 1998 (1) SACR 470 (SCA) at 476e-f where Olivier JA said: 'The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.'

accused, but what is required is that the Court should warn itself of the peculiar danger of convicting on the evidence of the accomplice and seek some safeguard reducing the risk of the wrong person being convicted, but such safeguard need not necessarily be corroboration. *Once, however, the Court decides that in order to be so satisfied it requires corroboration, it would be pointless to look for corroboration other than corroboration implicating the accused.*' (My emphasis.)

Although the aforegoing remarks were made in a different context they equally apply to a case such as the present where, as the trial court recognised, it was necessary to approach the complainant's evidence with caution because she was not only a single witness but also a child. (See also in this regard *R v W* 1949 (3) SA 772 (A) at 778-9 where it was said that corroboration meant other evidence which supports the evidence of the complainant and renders the evidence of the accused less probable on the issues in dispute.) The central issue in dispute in this case was whether all the appellants had had non-consensual sexual intercourse with the complainant.

[26] As to the trial court's credibility findings it must be said that they are not borne out by the evidence. Accordingly this court is at large to interfere despite the advantages that the trial court had of seeing and hearing the complainant.[5] To my mind there are several crucial aspects of the complainant's evidence that called for elucidation and which were not adequately probed. The failure to ventilate those aspects resulted in critical shortcomings in the State's case which negatively impacted on the reliability of the complainant's evidence. A few examples to demonstrate this point will suffice for present purposes.

[27] First, according to the complainant she met the appellants between 20h00 and 20h30 but ultimately arrived at Umphile's home at 02h00. No attempt was made to establish: (a) how long she had remained with the appellants; (b) how long it took her, once she had jumped out of the motor vehicle, to walk to Umphile's home (The time lapse mentioned above tends to support the third appellant's version of events rather than that of the complainant.); (c) why she remained in the motor vehicle whilst the second appellant went to a tavern to buy beers when she must have realised from the robbery incident that the appellants were up to no good; and (d)

[5] *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 689-690.

why at that stage she made no attempt to flee from the appellants or alert anyone who might have cared to listen to her pleas for help in her predicament. As to the latter, the only explanation she could proffer was that she was seated between the first and third appellants in the motor vehicle. There is, however, no evidence that she was prevented by either of them from alighting from the motor vehicle.

[28] Moreover, as to the rape itself, the complainant was a single witness whose testimony was required to be satisfactory in all material respects.[6] Consequently, given the nature and number of these shortcomings in the State's case the trial court should, in my view, have entertained doubt as to the appellants' guilt. This is particularly so if regard is had to the countervailing evidence of the appellants and their witness Lefoka. And, the fact that, on the complainant's version, the third appellant had used a condom whereas the other appellants had not, seems to me to be a telling factor against her. This is because: (a) on the version of the third appellant he used a condom on the complainant's suggestion; and (b) the doctor found no traces of semen in the complainant's vagina despite the two other appellants not having used condoms. The third appellant testified that the complainant, inter alia, told him that she had given birth the previous year which is how he came to know about that piece of her eventful past.

[29] The evidence of Lefoka does not appear to have been considered at all by the trial court. Thus the trial court erred in not doing so. As Nugent J said in *S v Van der Meyden* 1999 (2) SA 79 (W) at 82D-E:

'What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possible false or unreliable; but none of it may simply be ignored.'

This dictum was approved by this court in *S v Van Aswegen* 2001 (2) SACR 97 (SCA) at 101e. There is nothing inherently improbable in the versions of the appellants to warrant their rejection as false beyond reasonable doubt. On the

[6] *S v Sauls* 1981 (3) SA 172 (A) at 180.

contrary there are elements of consistency and coherence in the versions of the appellants. But the same cannot be said about the complainant's version.

[30] It remains to mention that the manner in which the trial was conducted underscores the need for everyone concerned, particularly in criminal cases of this kind, to be meticulous in the conduct of the trial. In this regard the remarks of Nugent JA in *S v Vilakazi*[7] are apposite. The learned judge of appeal said:

'The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important.'

[31] In the circumstances the conviction of rape in respect of all the appellants cannot stand. Their guilt was not established by the State. The third appellant, on his evidence and that of the complainant, was guilty of contravening s 14(1)*(a)* of the Sexual Offences Act in that the complainant was 15 years old at the time when intercourse took place.

[32] Following that conviction, it was necessary to impose a sentence appropriate to the substituted conviction. Taking cognisance of the objectives of punishment and the prevailing circumstances peculiar to this case, we were satisfied that a sentence of six years' imprisonment was appropriate.

[33] Having regard to the foregoing reasons, we were persuaded that the conviction of the appellants on the charge of rape was, on a conspectus of the evidence, unsustainable. Consequently the appeal against the conviction on that charge had to succeed hence the order referred to at the outset was issued.

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[7] *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 21.

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X M PETSE
JUDGE OF APPEAL

APPEARANCES:

For the First and Second Appellant:	N L Skibi Instructed by: Legal Aid South Africa, Mahikeng Legal Aid South Africa, Bloemfontein
For the Third Appellant:	G R M Mokoka Instructed by: K J Ketse Attorneys, Mmabatho Lovius Block Attorneys, Bloemfontein
For the Respondent:	A Mogoeng Instructed by: Director of Public Prosecutions, Mahikeng Director of Public Prosecutions, Bloemfontein