THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 423/11

In the matter between:

S **Appellant**

and

THE STATE **Respondent**

Neutral citation: *S v The State* (423/11) [2011] ZASCA 214 (29 November 2011)

Coram: Harms AP and Shongwe JA and Plasket AJA

Heard: 23 November 2011

Delivered: 29 November 2011

Summary: Criminal procedure – delay in appeal process – failure of Legal Aid Board to prosecute appeal – evidence – inadmissible opinion evidence on credibility – recall of witness – failure to recall resulting in failure of justice.

O R D E R

On appeal from: North West High Court, Mafikeng (Mokgoatleng J sitting as court of first instance):

The appeal is upheld and the conviction and sentence set aside.

J U D G M E N T

HARMS AP (SHONGWE JA AND PLASKET AJA concurring)

[1] The appellant was convicted in the regional court, Tlhabane, Rustenburg, on a charge of rape, the case being that he had raped his daughter, E, who was at the time 12 years of age. The magistrate, Ms Mokgohloa, acting under s 52 of the Criminal Law Amendment Act 105 of 1997, stopped the proceedings and referred them to the high court for sentencing. The Bophuthatswana High Court (per Mokgoatleng AJ) confirmed the conviction and sentenced the appellant to 15 years' imprisonment. The appeal is before us with the leave of this Court granted on petition.

[2] The appellant was originally arraigned on five counts. One count related to the alleged indecent assault on one of his other daughters, L, but since he was discharged it is unnecessary to deal with this count. The other three counts on which he was acquitted also concerned E: two related to indecent assault and the other to rape. The appellant's first appearance on trial was on 4 November 2002, and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which, in general terms, commenced on 16 December 2007 and repealed the mentioned s 52, does not affect this case.

[3] Before dealing with the merits of the case it is necessary to say something about the deplorable delays that have occurred in this matter. They put our criminal justice system to shame. The appellant was, after at least 18 court appearances,

convicted on 13 May 2004. The high court confirmed the conviction on 11 November 2004 and sentenced the appellant on the same date. Whether the application for leave to appeal was delayed by the appellant or by the Legal Aid Board is not known but it is known that leave to appeal was refused by the high court on 25 June 2007, two and a half years later. An application for leave to appeal was filed within a month in this Court but it could not be put before judges because the necessary parts of the record were not available. The Board, which was supposed to act in the interest of the appellant, only asked for those parts of the record on 4 November 2008, and they were filed on 11 February 2009. The petition was granted on 9 March 2009.

[4] The full record of the proceedings was supposed to be filed within three months. It was not. It was filed on 29 June 2011, more than two years late and in spite of the fact that the record had been provided by the registrar of the high court on 10 February 2011 and was transmitted to the local Justice Centre on 20 April 2011 for filing. In other words, it took the Board more than two months to transmit the record to the local Justice Centre and some two months for the latter to cross the road in Bloemfontein to file it with this Court.

[5] The appellant, in the meantime, languished in prison, probably wondering why the Constitution does not guarantee a right to an appeal without unreasonable delay and why the registrar and the Board did not take an active interest in his case. And although this Court, in granting leave to appeal on 9 March 2009, directed the attention of the Board to the fact that the application for leave to appeal should be directed to the high court and not to this Court, the Board simply did nothing until, we were told, August of this year.

[6] All counsel could offer was an apology without explanation to the Court, as if that were of any consolation to the appellant who has spent seven years in prison courtesy of the ineptitude of the Board.

[7] The problem with appeal records as set out above is not peculiar to the appellant. In another appeal, which was heard on the same day and was also a Board matter, the record was filed 30 months late (*Kruger v S* SCA case 506/11). The problem has also been exacerbated by the recently introduced s 316(10)(c) of

the Criminal Procedure Act 51 of 1977, which was adopted without consulting this Court. It requires that the record of the full proceedings must be placed before this Court before it may hear an application for leave to appeal, even if not required for deciding the application. Unless the accused can pay for the record and the attorney can pursue the matter, the experience in this Court is that registrars simply do not have the capacity to comply with the provision in good time. For would-be appellants out on bail, it is heaven sent; those who are not out on bail have to suffer in purgatory while the wheels of justice grind slowly, if at all. And petitions are piling up in the registrar's office, awaiting records from the high courts.

[8] I do not intend in considering the merits of the appeal to deal with the alleged indecent assaults in respect of which the appellant was discharged but it is unfortunately necessary to deal with all the rape allegations. The charge on count 2, the one on which the appellant was found guilty, alleged that the accused was guilty of rape 'in that upon or about during 2001 at or near Rustenburg' he had raped E, a female person of 12 years of age. The other rape count, count 5, simply stated that he was guilty of rape having raped the 13 year old E at or near Rustenburg, without even mentioning a year. In neither case was the address given. Both counts disregarded the clear provisions of s 84 of the Criminal Procedure Act.[1] Such lackadaisical approach to serious cases by the prosecution should not be countenanced. This is not a case where the prosecution did not have sufficient detail. I mention this for reasons that will become apparent.

[9] E testified against her father. She recounted three cases of rape. The first, she said, took place in Glenharvie when she was in Grade 4 and 12 years old (something must be wrong: she was either about 9 and in Grade 4 or 12 and in

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[1]Section 84: '(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.'

Grade 7). The second, she said, took place at their home in the Newcastle Flats in Lucas Street which one may surmise, if the record is read purposively, is in Rustenburg while she was in Grade 7 (which would, on the probabilities, have been during 2001). The third, according to her evidence, took place at their dwelling in Van Zyl Street, Rustenburg, when she was in Grade 8 (which was during 2002).

[10] It is not necessary to relate the detail of her evidence about the rapes. All three took place under similar circumstances: she would have been in bed; her mother would have been elsewhere; the appellant would have undressed her; she would have resisted; and he would have had intercourse with her.

[11] The tragedy of the case is that we are dealing with a dysfunctional family. The appellant was more often than not unemployed; he abused alcohol; they moved from place to place; and the children were on occasion sent to beg for food. One gains the impression that maybe because of this E and her sisters had some delinquent tendencies, like smoking at an early stage and running away – even from foster care. E, while living under the care of a certain Mrs Burnham, told her that some of her father's friends had molested her. (In evidence, E said it was an uncle.) She later told Mrs Burnham that her father had raped her once, when she was four years old. E also expressed a desire to live with the Burnhams who were, it would appear, fairly well off.

[12] The prosecution called an educational psychologist, Ms Haycock, who had interviewed E and had formed certain impressions about her. I am not sure that I know why she was called especially in the light of the judgment of Satchwell J in *Holtzhauzen v Roodt* 1997 (4) SA 766 (W). The gist of her evidence, as summarised by the magistrate, was that E was unwilling to cooperate or communicate; that she blamed herself for causing a rift in the family; that she was emotionally unstable and lacked confidence; and that she hated her father because he was always drunk.

[13] The prosecution also called Dr van Dyk who had examined E medically on 15 January 2003. Dr van Dyk had been informed by Ms Haycock and a social worker, who was not called, that E had been sexually molested 'since' Grade 4. She established that E had been subjected to sexual penetration.

[14] As a matter of fact, the information Ms Haycock had obtained from E was that she had been raped while she was in Grade 4. Her report does not contain any reference to other instances of rape. And E's statement to the police, dated 30 October 2001, recorded one instance of rape only. Since E was immediately removed from parental care, it is difficult to understand how the third rape could have occurred during 2002. It, probably, also took place during 2001 if it took place at all.

[15] The magistrate discharged the appellant on the first rape because the court had no jurisdiction since Glenharvie does not fall within its area of jurisdiction. What the magistrate (nor the prosecutor or counsel for the defence) did not realize was that the appellant had not been charged with a rape committed at Glenharvie. The magistrate also found the appellant not guilty of the most recent rape committed in Rustenburg (which is presumably what count 5 was all about) but nevertheless found him guilty of the rape in Lucas Street (count 2).

[16] The evidence relating to count 2 and 5 was identical, save for the difference in place and time. If the court could not have been satisfied on the evidence that the appellant was guilty on count 5, it also could not have been satisfied that he was guilty on count 2. They are indistinguishable. There is no explanation in the judgment for this inconsistency unless one assumes that the magistrate thought that count 5 related to the Glenharvie incident and that she had forgotten the evidence relating to the third occasion.

[17] The only issue in the case was whether the appellant had raped E – not whether she had been raped or sexually molested. Although the magistrate was aware of this, she relied on the evidence of Dr van Dyk and Ms Haycock in corroboration of the fact that the appellant was the culprit. Their evidence could in no way contribute to the determination of this issue.

[18] In the end the magistrate was confronted with conflicting versions: that of E and the denial of the appellant. The magistrate, without regard to any cautionary rule relating to a single witness and a child witness, approached the matter in this way.

She posed the question why would E lie. She did not pose the question whether the appellant's version could reasonably be true. In any event, she found the answer in Ms Haycock's evidence who had the temerity to testify that in her experience 50 per cent of cases of children who allege that they were abused are not genuine but that she had no doubt that the case of E was not one of them. Ms Haycock's self-professed ability to detect whether or not a child lies so impressed the magistrate that she concluded her judgment by stating although E was spoilt and given to lying, it must be accepted that she did not lie in this instance because, had E lied, Ms Haycock would have been able to pick it up, and since she did not, she (the magistrate) had to accept E's version.

[19] This approach is fatally flawed. Courts have to decide whether or not they believe witnesses. They cannot be led by opinion evidence on this point. The glib evidence was simply inadmissible opinion. It should suffice to refer again to *Holtzhauzen v Roodt* and to quote from another judgment by Satchwell J, namely *S v Engelbrecht* 2005 (2) SACR 41(W) at para 26, where the learned judge said this:

'Courts frequently turn to persons with expertise and skill for assistance. The relevant principles applicable to the admissibility of opinion evidence by experts, including psychologists and social workers, have been set out in numerous authorities. Firstly, the matter in respect of which the witness is called to give evidence should call for specialised skill and knowledge. Secondly, the witness must be a person with experience or skill to render him or her an expert in a particular subject. Thirdly, the guidance offered by the expert should be sufficiently relevant to the matter in issue to be determined by the Court. Fourth, the expertise of any witness should not be elevated to such heights that the Court's own capabilities and responsibilities are abrogated. Fifth, the opinion offered to the Court must be proved by admissible evidence, either facts within the personal knowledge of the expert or on the basis of facts proven by others. Sixth, the opinion of such a witness must not usurp the function of the Court.'

The evidence of Mrs Haycock did not satisfy requirements four, five or six.

[20] There is another complication in the manner in which the magistrate acted after conclusion of evidence and before judgment. The attorney who conducted the trial on behalf of the defence withdrew and another attorney came on record. He asked for the recall of state witnesses who had written to the accused that they wished to retract their testimony. The magistrate refused to do so because, she held,

the defence had the letter during the trial. It is clear from the record that the magistrate misunderstood the attorney. However, the real reason for the refusal was the finding that the appellant would not be prejudiced if the complainants were not recalled and possibly recanted. I fear that the logic escapes me. Whether the complainants would have been believed is another matter but if they were believed the appellant would have been found not guilty. A better instance of prejudice is difficult to imagine.

[21] Counsel for the State, in her heads of argument, submitted that the magistrate had erred and that it would be in the interests of justice to set aside the conviction and sentence and to remit the case for hearing further evidence. This implies an acceptance by the prosecution that a gross miscarriage of justice occurred. Before we can remit we must be satisfied that it would be fair to remit a case after more than seven years. It further presupposed that the conviction on the record could stand. As I have indicated, the reasoning of the magistrate was so flawed that the conviction cannot stand. This is not a case where this Court can by simply reading the record conclude that the State proved its case beyond reasonable doubt.

[22] It is in conclusion necessary to deal with the judgment in the high court because the learned acting judge thought otherwise. He dealt with the application to recall the complainants as follows. He thought that the application was under s 186 of the Criminal Procedure Act.[2] (It was in terms of s 167.)[3] He said that because E had made a sworn statement to the police, had reported the rape to others, and had given evidence, the application had no merit. (This amounts to prejudging an issue.) He also said that it was irregular for the defence to lead evidence from a State witness without having first discussed the matter with the State. (It might be unprofessional, but that is all. In any event, the application was not to lead evidence from a State witness but to have one recalled.) He then said that there was no

[2] Section 186: 'Court may subpoena witness.—The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.'

[3] Section 167: 'Court may examine witness or person in attendance.—The court may at any stage of criminal proceedings . . . recall and re-examine any person, including an accused, already examined at the proceedings, and the court shall examine, or recall and re-examine, the person concerned if his evidence appears to the court essential to the just decision of the case.'

prejudice because the matter had been fully ventilated in the trial court. (That misses the point.) He also thought that the letter was inadmissible because it was not under oath. (The letter would not be the evidence. The oral evidence would have been the evidence. The suggestion that a letter is inadmissible because it is not under oath is a novel proposition.)

[23] As to conviction, the learned acting judge relied on a single fact that was supposed to give the necessary safeguard for believing E's evidence. He said that the safeguard that E's evidence was true was to be found in her report to the police and her evidence (which differed from the report, as mentioned), and reports made to a social worker, teacher, psychiatrist and psychologist. It would appear that the learned acting judge did not read the record carefully because no social worker, teacher or psychiatrist testified. In any event, at that stage such evidence would have been inadmissible. It may now be admissible under s 58 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act but statutory admissibility alone does not decide weight. Self-corroboration, by its very nature, has little evidentiary weight; more so where statements are made during the criminal investigation and differ in content.

[24] The appeal is accordingly upheld and the conviction and sentence set aside.

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L T C Harms
Acting President

APPEARANCES:

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