JOKAN PIETERS -vs- THE STATE CA 99/96

1997/03/17

Strydom,J.P. et Gibson, J.

CRIMINAL LAW:

Rape - Identification - In cases where identification is in issue police should hold Identification parade - Method of confronting accused with witness not appropriate in circumstances.

CASE NO. CA 99/96

IN THE HIGH COURT OF NAMIBIA

In the matter between

JOHAN PIETERS **APPELLANT**

versus

THE STATE **RESPONDENT**

CORAM: STRYDOM, J.P. et GIBSON, J.

Heard on: 1997.03.17

Delivered on: 1997.03.17

JUDGMENT

STRYDOM, J.P.: The appellant was granted a Judge's Certificate to appeal against his conviction of rape in the Regional Court, Keetmanshoop. The ground of appeal stated by the Learned Judges who granted the certificate was whether the identity of the appellant was established beyond reasonable doubt.

Complainant testified that on 1st February, 1995 she and a friend were on their way,to Tseiblaagte. It was already dusk. A man chased them and succeeded in catching the complainant and then proceeded to rape her. How it came about that the complainant identified the appellant was described by her as follows. She said that at first she was shocked and could only give a description of the clothes of her attacker to the police. Then the police suggested to her a certain person whom she later on identified. She said

when this person, presumably the appellant, was brought to her she asked the policeman to tell the appellant to speak louder. He did not want to do so initially. Later when he spoke louder she identified him by his voice and his front teeth which were missing. She was asked by the prosecutor whether there was anything else except his teeth and voice from which she could identify the appellant and she replied no. In regard to his clothes the complainant said that the appellant at the time wore a light green shirt, black trousers and was barefoot.

The State also presented the evidence of two brothers Basson who, on the evening of the 1st of February, saw the appellant coming from the direction of the graveyard. He wore shorts and sandals and was bare chested. One of the brothers said to him:

> "Yes, Johan, why are you looking around. You just finished 8 years the other day. Why don't you just go and sleep?"

To this the appellant replied:

> "No, I just had a young girl. You will still hear about it."

The appellant also gave evidence and denied that he had raped the complainant. He furthermore denied that he was in Tseiblaagte on the night of the 1st of February. He also denied that he had similar clothes to those described by the complainant and called an aunt of his to support him. It was, however, clear that her contact with the appellant was

not such that she could exclude such a possibility. In this regard I must also refer to an incident where the brothers of the complainant, on her description of the clothes of the attacker, assaulted another person but in regard to whom she later said was not the person who had raped her.

Mr Naude, who appeared amicus curiae for the appellant raised various points. Inter alia he submitted that the State did not prove beyond reasonable doubt that the appellant was the person who had raped the complainant. He referred to the evidence and pointed out that in this instance the police, knowing of the difficulties involved, did not hold a proper identification parade.

Mr Haindobo, on behalf of the State, however submitted that the complainant had ample opportunity to observe the appellant and therefore was not mistaken in her identity. Her evidence is further supported by the two Basson brothers who saw the accused as he put it, i.e. counsel, at the place where the offence was committed. There is, however, no evidence as to where that place was.

The presiding officer must always treat evidence of identification where that is an issue, with caution because he must not only guard against the possibility that the evidence may be false but experience has also shown that the most honest witness may make mistakes when it comes to identification. For that reason it is necessary to test a witness' opportunity to observe as was set out in S v Mutetwa, 1972(3) SALR 766 (AD) at 76 A - 78 A. The task of

a Court is eased when the witness states that he or she knew the person from previous contact. Although in this instance the complainant testified that she saw the appellant on a previous occasion it is clear from her evidence that she did not recognise him because she knew his face. She recognised him because of his missing front teeth and his voice. Now, although voice identification can be as definitive as any-other identification, proper evidence to substantiate such identification must be tendered. As. in the case of identification in general the Court must be satisfied that there was sufficient opportunity to hear and to listen to the voice so identified and reasons should further be given what it was about the said voice that made it recognisable. In this regard see the discussion of this issue in Hoffmann & Zeffertt: The South African Law of Evidence, 4th ed., p. 618. In the present instance there is no such evidence, in fact there is not even evidence by the complainant that the person who attacked her spoke at all, except for one sentence. In regard to the missing teeth I agree with Mr Naude that, standing by itself, it does not count for much.

The evidence of the Basson brothers is significant because they could have provided the necessary support for complainant's evidence. The implication is that they must have seen the appellant more or less at or shortly after the time when the incident occurred and it was even suggested by Mr Haindobo that appellant was seen at or near the scene of the rape. There is, however, no such evidence as previously pointed out. However, against this background the description of these two witnesses of what clothes the

appellant was wearing is important. According to these witnesses the appellant was bare chested and had on shorts and sandals. According to complainant the person who attacked her wore black trousers with a light green shirt and had no shoes on. It is clear from the complainant's evidence that the meeting-up with her attacker was purely by chance. The man who attacked her came running from behind and there is no suggestion that she, i.e. the complainant, usually walked there at night or that the person was laying in wait for her. Unless one then accepts that it was the appellant who came prepared with other clothes which he changed after the attack there is no basis on which this difference, i.e. the difference between the description of the Basson brothers and that of the complainant, can be explained. There is, however, no evidence which would support such an inference and given the shaky evidence of the complainant concerning identification this aspect should have raised further doubt in the mind of the magistrate concerning the identity of the appellant as the man who attacked and raped the complainant. I accept that the appellant spoke the words which were testified to by the Basson brothers. It seems, however, that the reputation of the appellant as a rapist is well-known in his community. His answer in retort to a rather well-deserved but nasty remark may be no more than just that. Why the appellant would have gone to the length of changing his clothes to escape distraction and then to make such a damning admission seem to me to be wholly contradictory. It seems more to me that fate dealt the appellant a rather low blow in that his reputation and the fact that a young girl was raped on this

particular evening led to his arrest in this matter. The fact that the appellant obviously lied when he said that he did not talk to the Basson brothers on that particular evening does not really take the matter any further. The fact that the accused may lie in some respects does not mean that he's not to be believed in other respects. (See in this regard S v Stevnbera, 1983(3) SA 140 (AD)). With his reputation the appellant was soon picked up by the police and brought to the complainant. Appellant no doubt believed that he could bolster his case by removing himself as far from the scene of the crime as possible.

This is a case where, if the appellant was identified by the complainant at a properly-held identification parade, it would have strengthened her evidence and consequently that of the State. On the other hand if she could not then identify the appellant a lot of time and cost would have been saved. The police were perfectly aware that there were problems regarding identification but that notwithstanding they did not follow the correct procedures in holding a proper identification parade. (See in this regard the S v Madubidubi, 1958(1) SALR 276 at 277, a case in line referred to by Mr Naude).

In the circumstances I am not satisfied that the State proved the identity of the appellant beyond reasonable doubt. The appeal succeeds therefore and the conviction and sentence are set aside.

STRYDOM, JUDGE PRESIDENT

I agree

GIBSON, JUDGE

ON BEHALF OF THE APPELLANT:	MR NAUDe
Instructed by:	Weder, Kruger & Hartmann
ON BEHALF OF THE RESPONDENT:	ADV. HAINDOBO