IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 28/05/2008
Case No: A2258/2004

UNREPORTABLE

In the matter between:

S.N. NGWEBANE

And

THE STATE

JUDGMENT

RANCHOD AJ:

(1) The appellant was convicted on two counts of rape in the Regional Court on 24th May, 2000. He was sentenced to ten years imprisonment on each count. The rapes were committed on 11th December, 1999.

(2) On 14th May, 2004 the appellant was granted leave to appeal by the court *a quo*. The application was for leave to appeal against both conviction and sentence. However, at the hearing, the application in respect of sentence was withdrawn.

(3) The accused is on bail pending the determination of this appeal. The appellant sought leave to appeal against conviction on several grounds on the merits and one ground was on what the learned Magistrate referred to as a technical ground. On the technical ground it was

submitted that the complainant and her young sister to whom she first reported the rape were not properly admonished in terms of section 164 of the Criminal Procedure Act 51 of 1977. The court a quo granted leave on this last ground only.

(4) In his heads of arguments Counsel for appellant made submissions on both the so called technical ground and on the merits. The court will confine itself to the former ground only, as leave to appeal was granted only on that issue.

(5) The facts of the case briefly are that complainant alleged she and her boyfriend were walking on the night of 11 December, 1999 in a street in Kwa-Thema, Springs when they were accosted by a group of four men, including the appellant, who assaulted them. Her boyfriend fled but she was eventually taken to an open veld where she was raped by the appellant and one of the others in the group. Thereafter she was taken to a house where she was again raped several times by both men. While the men slept she escaped. She first reported the incidents to her then 13 year old sister W and thereafter to the police. She was also examined by a district surgeon, whose report was admitted by the defence during the trial.

(6) Appellant in his plea explanation admitted having sexual intercourse with complainant but alleged it was consensual.

(7) When complainant was called to give evidence for the State she testified that she was 15 years old. The following then transpired, according to the transcript of the proceedings in the lower court:

HOF: Weet en besef u wat dit beteken om die eed tee neem?

GETUIE: Nee

HOF: Goed dan sal die hof vir u waarsku dat u tans in die hof is. U word gewaarsku om die waarheid, die hele waarheid en niks anders as die waarheid te vertel nie en ook wat u self waargeneem het, nie wat ander mense vir u gesê het om te sê nie.

GETUIE: Ekverstaan.

HOF: Dankie. Die hof ag die getuie behoorlik gewaarsku.

(8) The following transpired when the complainant's sister W S was called as a state witness:

HOF: Hoe oud is u?

GETUIE: Edelagbare ek is 13 jaar oud.

HOF: Verstaan u wat dit beteken om die eed te neem in 'n hof, om te sweer?

GETUIE: Ja edelagbare.

HOF: Goed die hof, dit is vir die hof duidelik dat as gevolg van u

ouderdom dat u nie mooi die omvang van die eed verstaan nie. Die hof sal u dan net waarsku. U is tans in die hof, u moet hierso net die waarheid, niks anders as die waarheid aan die hof voorhou nie. Verstaan u?

GETUIE: Ja edelagbare.

HOF: U moet ook net vir die hof vertel wat u self waargeneem het, nie wat iemand u voorgesê het om die hof te vertel nie.

GETUIE: Ja.

(9) After the evidence-in-chief of the complainant was led by the State the matter was adjourned for three days for cross-examination by the defence. Before cross-examination commenced the following transpired:

HOF: Sal u haar net weer insweer asseblief?

N M S, v.o.e. (deur tolk)

HOF: U kan voortgaan met u kruisverhoor mev. Brummer.

(10) The Learned Magistrate was clearly under the erroneous impression that the complainant was previously sworn in rather than admonished and therefore proceeded to purportedly swear her in again.

(11) In essence, appellant's Counsel's argument is that the swearing-in of

complainant was an irregularity and the subsequent cross-examination did not comply with the provisions of the law as she ought to have been admonished.

(12) The matter had been adjourned for three days. Counsel did not provide any authority, nor was I able to find any, that where a matter is adjourned for a few days, a witness has to be sworn in or admonished again as the case may be. Where the Magistrate, albeit erroneously, had the complainant sworn in does not detract from the fact that she was admonished on the previous occasion. However, for the reasons that follow later, I need not decide the issue.

(13) A further submission by the appellant's Counsel was that when complainant was admonished the Magistrate did not warn her that if she told any untruths she would be punished. Section 164(1) of the Act provides:

> "Any person who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth, the whole truth and nothing but

the truth."

There is no requirement in this subsection that the judicial officer must go further as contended for by Counsel. The submission therefore has no merit.

(14) Finally, it was submitted that the Magistrate made no attempt to ascertain whether complainant and her sister could distinguish between truth and lies following the preliminary inquiry. The proviso to s 164(1) (*supra*) does not expressly state that an inquiry should be held. None of the cases referred to expressly dealt with the issue, nor was I able to find any. However, for a witness to be warned to tell the truth it is necessarily implied that he or she must understand what it means to speak the truth, otherwise the admonition would be meaningless. Therefore, an inquiry, in my view, should be held to determine whether a witness understands the difference between truth and lies before the admonition is given.

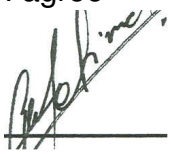
(15) Counsel for the State conceded there were merits in defence Counsel's submissions in this regard and submitted that the conviction should be set aside and the matter be referred to the court a quo for a trial de novo. That is, in my view the correct course to follow.

(16) The appeal on the limited ground us upheld. The conviction and

sentence are set aside and the matter is remitted to the court a quo for a trial de novo before a different Magistrate.

N RANCHOD
ACTING JUDGE OF THE HIGH COURT

I agree



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