MICHAEL NANGO v THE STATE

CASE NO. CA 171/2003

2005/06/08

Silungwe, J *et* Maritz, J.

LAW OF EVIDENCE

Evidence – identification – recollection – child witness – suggestion – danger of making subconscious substitution – cautionary rule

CASE NO. CA 171/2003

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MICHAEL NANGO

APPELLANT

versus

THE STATE

RESPONDENT

(HIGH COURT APPEAL JUDGMENT)

CORAM: MARITZ, J *et* SILUNGWE, J.

Heard on: 2004-07-22
Delivered on: 2005-06-08

JUDGMENT

MARITZ, J: The appellant was charged and convicted in the Regional Court of the crime of rape as defined in section 2 of the Combating of Rape Act, 2000 and sentenced to 12 years imprisonment. This appeal lies against conviction and sentence.

The Prosecution based its case primarily on the evidence of the 12-year old victim, CL. She testified that she and two other children had been left at home the evening of 3 March 2001 whilst her mother and other relatives attended a church service in town. When darkness fell, they had not yet returned. The children, including the complainant, locked the shack from the inside and went to bed. Some time later, the complainant was awakened by her sister and alerted to someone knocking at the door. The person forcibly pushed the door open and, once inside, lit a match. Shining the light cast by the flame of the matchstick on the complainant, he instructed her to remove her panty and threatened that he would kill her if she refused. She complied. He thereupon instructed her to lie down on her bed and, after he had opened the zip of his trousers, he raped her.

He then demanded that she should accompany him. He walked out of the house and threatened that if she would not follow, he would return and kill her. Once outside, he took her by the arm and walked towards the bush, dragging her along. It was about that time that the complainant became aware that her grandmother and another

relative were approaching the house. Her assailant threatened to stab her and threw her on the ground where he raped her a second time. Her ordeal only ended when two unknown men approached them. When her assailant got up and ran away, she started to scream and ran home where she immediately informed her grandmother of the rape.

Although the appellant did not admit that the complainant had been raped, he did not dispute the disturbing picture painted by the complainant's evidence. The only real issue between the prosecution and the appellant concerns the identity of the complainant's assailant. The complainant testified that it was the appellant who had raped her. The appellant denied it and testified that he had been together with Jan Boois and Elizabeth Keibes at his mother's house that evening. He went to bed after they had left at about 20h00. He was awakened by his mother only the next morning and informed that it was being alleged that he had raped someone the previous evening. He didn't believe the rumour to be true and continued sleeping until he was awakened by the police and arrested.

Mr Kasuto, appearing *amicus curiae* for the appellant, submits that the Regional Magistrate should have approached the complainant's evidence with caution and that her identification of the appellant

was not reliable. I pause here to record the Court's gratitude for the industry of Mr Kasuto in preparing and presenting extensive argument in support of the appeal. In the spirit of true advocacy he vigorously advanced the appellant's case without remuneration.

He reminded the Court, and correctly so, that the Magistrate should have been particularly cautious when she relied on the recollection of a twelve-year old child. In support of this contention, he quoted the following passage from Hoffmann and Zeffert, *The South African Law of Evidence*, (4th ed.) p. 614 which deals with a witness's "recollection" of an observed incident:

> "This depends, first, upon the strength of the witness's memory. Very young and very old people tend to forget more easily than others. Secondly, the nature of the original impression; for example whether it was accompanied by any unusual incident which made it likely that the witness's impression would be preserved. Striking features are more likely to be remembered than ordinary ones, and if the person in question was known to the witness, he will be able to preserve the short-hand recollection 'I saw X' better than he would remember X's individual features. The time-lag is of course important, and perhaps most crucial of all is the extent to which the witness's original impression had been overlaid by subsequent suggestion and imagination. If a witness is shown a person who is alleged to have been the criminal, he is very likely to make a subconscious substitution of that person's features for those which he actually observed. The more he sees of the accused, the more certain he will become that he is the person who he actually saw. The same process can happen if the witness is shown a photograph

> of the accused, or if it is suggested to him that the person whom he saw had certain features. It is because the possibility of suggestion seriously diminishes the value of identification evidence that the Courts have insisted upon the holding of identification parades subject to stringent precautions. In *R v Madubedube* a conviction was set aside because, instead of holding an identification parade, the police had simply taken the accused to the sole identifying witness and asked him whether he was the right man. Evidence of identification in such circumstances can have very little value. The same may be said of the usual question, 'Do you see the man in court?'. The witness would look very silly if he pointed to anywhere other than the dock."

Assessing the reliability of an identification made by a witness is not an easy matter. This was recognised in *S v Mthetwa*, 1972(3) SA 766 (A) at 768 A-C:

> "Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness, his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, built, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities..."

The complainant testified that she had seen the appellant that night for the first time. Initially, she only saw the appellant's face when he held the burning matchstick. Having woken up from her sleep only a few moments earlier, the opportunity she had to observe the appellant's face in the light of the burning matchstick would have been limited to a number of seconds at most. She was, however, in close proximity of the appellant and, although I accept that she must have been frightened by the unexpected intrusion - even more so by the demand for her to remove her panty and shocked by the events that followed - she noticed that the appellant had an injury on the right hand side of his face which was so severe that his mouth appeared to have been displaced slightly to the one side of his face. She thereafter spent some time in the immediate presence of the appellant and, although it was also dark outside the house with no artificial lighting in the immediate vicinity, there was a street light some distance away and she could also see by the light of the moon. It was light enough for her to see her surroundings and, one must accept, also to observe the features of her assailant. She was able to identify his complexion, his injuries and the nature and colour of the clothes he was wearing.

She testified that whilst she, her aunt and her grandmother were on their way to lay a charge at the police station later that night, they walked past the appellant. Referring to the appellant, her aunt

asked her whether it was him and she immediately confirmed it. This incident must have alerted the trial Magistrate to the possibility of suggestion, especially if regard is had to the age of the complainant. The reliability of the appellant's identification by her is, however, supported by the fact that she had given a description of the appellant's complexion, his injury and the distortion of his face caused by it. She elaborated on that injury in the course of her evidence by saying that it appeared as if the appellant had been struck a blow on his right cheekbone leaving a cut which had subsequently been stitched. It appeared as if the stitches had been removed.

Although she could not point out any scar on the appellant's face during the trial more than a year and a half after the incident, it is of vital significance that the appellant admitted during his testimony that he had an injury on the right hand side of his face at or about the time of the incident. He had apparently been hit with a stone in the face and the force thereof caused a fracture of his jawbone. He was taken to hospital where his jaws and loose teeth were fixed with iron plates and wires. He was discharged after a week of hospitalization and, as it happened, on the very same day as the one on which he allegedly committed the crime. Although he tried to minimise the effect of it, he also admitted that the one side of his

face was swollen. He denied, however, that he had a cut or marks left by the removal of surgical stitches in his face.

The reliability of the appellant's identification by the complainant is also supported by the fact that she immediately recognised the shirt which the appellant had been wearing the previous night when, accompanied by the police, she entered the house where the appellant was found and arrested. The appellant later admitted that he had indeed worn that shirt the night before.

Although I do not attach much weight to it, it is also relevant to note that the investigating officer, Sergeant Hochtritt, noticed that the imprints which the shoes worn by the complainant's assailant had left in sand were not dissimilar to those left by the shoes that were found in the appellant's possession. The quality of the imprints were however not such that he could make a plaster cast thereof and therefore he could not testify that they were in all respects identical. I also bear in mind that there might have been many persons wearing similar shoes.

Further corroboration for the reliability of the appellant's identification by the complainant is to be found in the evidence of a nine-year old boy, SS. He was inside the room where the complainant was raped for the first time. He recalled with

remarkable clarity how he had woken up when someone had knocked at the door of the shack. He testified that, upon them asking who it was, the person had said “It is me, I’m looking for W.” W, he explained was the complainant’s sister - also known as K. He testified how the person demanded that the door should be opened and that he had broken the door to gain entrance to the shack. He saw how the person lit the match and heard him demanding of the complainant to remove her panty.

He corroborated her evidence of the events inside the shack in all material respects. He testified that the flame of the match had burnt “for a long time” and that he had seen the face of the appellant by its light. He noticed that the appellant had a mark on his cheekbone but, according to him, there were no surgical stitches in the wound. He testified that upon K’s return they told her that the man who had been looking for her had raped the complainant. It was apparently as a result of that report that the police ascertained the whereabouts of the appellant. He confirmed that he had seen the appellant again shortly after the incident when they were on their way from the hospital. He also described the colour of the clothes worn by the appellant but - it falls to be noted - that description does not match the complainant’s description. According to him, he saw the appellant for the first time that night.

Whilst I am mindful of the fact that the two witnesses did not describe the injury on the appellant's face in exactly the same terms and that they differed about the colour of the clothes which the appellant had worn that night, I do not find those discrepancies surprising in the circumstances. The ambient lighting inside the house must have been very limited and it might not have been that easy for S to identify details of a particular wound and the colour of clothes with certainty. I'm also mindful that, given their respective ages, the complainant and S were particularly prone to suggestibility. The circumstances under which they made their observations - having just woken up from their sleep – might have been taxing and it is not altogether surprising they might not initially have had the clarity of mind expected of an alert person.

The cogency of the evidence bearing on the appellant's identification and the accuracy thereof must however be considered with regard to the evidence as a whole, in particular those sections which assist the Court in assessing the trustworthiness of the two witness's observations, recollections and subsequent narration (see: *R v Mputing*, 1960(1) SA 785(T) and *S v Mehlape*, 1963(2) SA 29(A)).

Over and above the corroboration afforded to the complainant's evidence by that of SS, I also find corroboration in the fact that the

assailant also happened to look for the complainant's sister with whom, the appellant admitted during his testimony, he had a relationship. If one were to add to that consideration the fact that the appellant also had a rather severe injury on his face, the probability that another person would also answer to both those descriptions becomes more remote. Add to that the complainant's identification of the appellant's shirt as the one which her assailant had worn the previous evening and the appellant's admission that he had indeed worn it at the time, the Court is left with no other reasonable possibility than to conclude that the appellant was indeed the complainant's assailant.

This was also the conclusion arrived at by the Regional Magistrate. Steeped in the atmosphere of the trial, the learned Magistrate was best positioned to assess the credibility and reliability of the evidence presented by both the prosecution and the defence. Whilst this Court will not overestimate those advantages, it must also be mindful of its limitations by having to adjudicate the matter only by reference to the record of proceedings transcribed for purposes of the appeal (see generally: *R v Dhlumayo & Another*, 1948(2) SA 677(A) at 705-6). The approach to be adopted on an appeal of this nature has more recently been stated by Marais JA in *S v Hadebe & Others*, 1997(2) SACR 641 (SCA) at 645E-F:

> "... there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the Trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this difference is shown by Appellate Courts to factual findings of the Trial Court are so well-known that a restatement is unnecessary."

Valiantly, as Mr Kasuto urged upon us to allow the appeal, he was not able to refer us to any misdirections in the Magistrate's assessment of the evidence. We must therefore allow her a margin of appreciation in the consideration of the witnesses' reliability and credibility and to some extent defer to the findings of fact made by her upon due consideration of the evidence as a whole - including those findings bearing on the identification of the appellant. For the reasons I have given earlier, her conclusions appear to be entirely justified. The appeal against the appellant's conviction should therefore, in my view, fail.

Turning to the appellant's appeal against sentence, it must immediately be noted that both counsel conceded that the Magistrate had clearly intended to impose the minimum prescribed sentence in terms of the Act but that, instead of imposing 15 years imprisonment she mistakenly imposed only 12 years imprisonment.

Section 3(1)(a)(iii)(bb)(A) of the Combating of Rape Act, 2000 provides that -

> "Any person who is convicted of rape under this Act shall, subject to the provisions of sub-sections (2), (3) and (4), be liable ... in the case of a first conviction ... where ... the complainant ... is under the age of 13 years ... to imprisonment for a period of not less than fifteen years".

No substantial or compelling circumstances were advanced which justified the imposition of a lesser sentence as contemplated in subsection (2) of section 3 of the Act. Subsections 3 and 4 of the Act are also not of application. Hence, the sentence imposed by the Magistrate falls foul of the minimum prescribed by the Legislature and must therefore be corrected.

In the result the following order is made:

1. The appellant's conviction of the crime of rape in contravention of section 2 of the Combating of Rape Act, 2000 in the Regional Court under case no. RC 05/02 is confirmed.

2. The appellant's sentence of 12 years imprisonment imposed in case no. RC 05/02 on 17 January 2003 is set aside and the following sentence is substituted:

“The accused is sentenced to 15 years imprisonment.”

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MARITZ, J.

I concur.

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SILUNGWE, J.