ISSASKAR KATUTA v THE STATE

CASE NO. CA 13/2004

2005/06/15

Maritz, J. *et* Mtabanengwe, A.J.

CRIMINAL PROCEDURE

Criminal Procedure – s. 304(2)(c)(i) of CPA - accused convicted of statutory rape but discharged on charge of kidnapping in regional court to avoid impermissible duplication of convictions – conviction of rape set aside on appeal – whether conviction of kidnapping may be substituted – no cross appeal against discharge on kidnapping before Court of Appeal – s 304(2)(c)(i) of CPA only allows for substitution in case of alternative charge and not in case of another substantive charge – also not permissible under s 19(1)(b) of High Court Act.

CASE NO. CA13/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ISASKAR KATUTA

APPELLANT

versus

THE STATE

RESPONDENT

CORAM: MARITZ, J. *et* MTAMBANENGWE, AJ.

Heard on: 2004.09.17

Delivered on: 2005.06.15

REASONS

MARITZ, J: The appellant was arraigned in the Regional Court, Windhoek, on charges of kidnapping, housebreaking with the intent to commit a crime unknown to the State and statutory rape in contravention of s. 2(1)(a) of the Combating of Rape Act, 2000. The appellant pleaded not guilty on all counts but was eventually convicted of housebreaking with the intent to commit a crime unknown to the State and of statutory rape. Because the charge of kidnapping was based on exactly the same facts as those which resulted in the appellant's conviction of statutory rape, the Magistrate held that a conviction on the first count would constitute an impermissible duplication of convictions. He also took the two convictions together for purposes of sentence and sentenced the appellant to 13 years imprisonment.

The appellant appealed against the convictions and against the sentence imposed. The Notice of Appeal was filed out of time and he therefore also brought an application for this Court to condone his non-compliance with the time period prescribed in Rule 67 of the Magistrate's Court Rules. In the course of argument, Mr Kozonguizi, appearing on behalf of the respondent, conceded that the appellant had shown good cause for his failure to comply with the Rule. For reasons that will become apparent later in this judgment, he also conceded that the appellant should not have been convicted of statutory rape in contravention of s. 2(1)(a) of the Combating of

Rape Act, 2000. After we had considered counsels' arguments on appeal, we granted the application for condonation and allowed the appeal for reasons to follow. The reasons for that order now follow.

The Regional Magistrate convicted the appellant on the basis of the evidence presented by three witnesses for the prosecution: the complainant (DJ), the complainant's sister (PA) and the latter's boyfriend (KM). Their evidence, in summary, is to the effect that the appellant forcibly gained entrance into the house where they were sleeping, threatened them and forcibly dragged the complainant out of the house and took her to his house where he assaulted and raped her. The appellant denied those allegations and suggested that the charges against him might have been motivated by spite after he had broken up his relationship with the complainant. We shall elaborate hereunder on the evidence insofar as we deem it necessary for purposes of this judgment but I must immediately note that the complainant was apparently also examined by a medical doctor later the same day. The prosecution expressly declined the Court's invitation to call the doctor, saying that it does "not in essence rely" on the report of the examination. It is to be inferred from the conduct of the prosecutor that the report did not avail the prosecution.

The complainant was a single witness on the charge of statutory rape. Her evidence about the rape was very limited, to say the least. It was recorded as follows:

> "He undressed me, he took off my skirt and he told or ordered me to take of my panty, when I refused, he slapped me in the face and then he started undressing my panty ... When he took off my panty he unbuttoned his shorts up to knee-level and then he had sex with me."

Neither the prosecutor nor the magistrate sought clarification from the complainant about the conduct of the appellant which led her to make the allegation that the appellant "had sex" with her. I should add in passing that in whatever sense the word "sex" may be colloquially used as a verb, it does not even appear in the *Shorter Oxford English Dictionary*, Volume 2, Third Edition, 1990 reprint - other than in the sense of determining the sex of a creature by anatomical examination.

Given the cursory description of her ordeal, the Court *a quo* had to assess whether the prosecution had brought the appellant's conduct within the four corners of s. 2 of the Combating of Rape Act – and more in particular, whether it had been brought within the four corners of the allegations contained in the charge. For that purpose,

it is perhaps expedient to refer to the relevant provisions of the Act. Section 2 of the Act provides:

> "2. (1) Any person (in this Act referred to as a perpetrator) who intentionally under coercive circumstances –
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> (a) commits or continues to commit a sexual act with another person; or
>
> (b) ...
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> shall be guilty of the offence of rape."

The expression "sexual act" as used in Section 2(1)(a) is defined by Section 1(1) to mean:

> "(a) the insertion (to even the slightest degree) of the penis of a person into the vagina or anus or mouth of another person; or
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> (b) the insertion of any other part of the body of a person ... or of any object into the vagina or anus of another person, except where such insertion of any part of the body (other than the penis) of a person or of any object into the vagina or anus of another person is, consistent with sound medical practices, carried out for proper medical purposes; or
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> (c) cunnilingus or any other form of genital stimulation;"

Given the wider definition of "sexual act" and the large number of "coercive circumstances" referred to in Section 2(2) of the Act, the prosecution elected in the formulation of the charge to limit the nature of the "sexual act" committed by the appellant to the

insertion of “his penis into the vagina of the complainant” and the “coercive circumstances” to that mentioned in Section 2(2)(a) of the Act, i.e. by applying “physical force to the complainant”.

We do not have any difficulty with the Magistrate's conclusion that the appellant applied “physical force to the complainant”. Our difficulty lies with his finding that the prosecution proved beyond reasonable doubt that the appellant had inserted “his penis into the vagina of the complainant” solely on the basis of the complainant’s testimony that the appellant had “sex” with her. Precisely what the verb “sex” in colloquial usage encompasses is not at all apparent and this Court is not qualified or able to furnish an all-inclusive definition. In common parlance, it may not mean the same to the prude as it may mean to the libertarian. Suffice it to say that, if the Court is only to have regard to the definition of “sexual act”, it is clear that “sex” may include many other forms of sexual interaction than vaginal intercourse.

The appellant was not represented during his trial and, in order to secure a conviction on the count of statutory rape as charged, the prosecution had to prove that the appellant had inserted his penis into the complainant’s vagina. It did not adduce sufficient evidence to establish that beyond reasonable doubt. Therefore, we agree with both counsel for the appellant and for the respondent that the

appellant's conviction of a contravention of Section 2(1) of the Combating of Rape Act 2000 cannot be sustained.

The question arises whether the conviction of statutory rape should not be substituted for one of kidnapping. The Magistrate, it will be recalled, discharged the appellant on the count of kidnapping because he held that a conviction on that count, in addition to a conviction on the count of statutory rape, would constitute an impermissible duplication of convictions. A similar argument presented itself more recently in the South African Supreme Court of Appeal. In the majority judgment of Mpati, DP and Motata, AJA in *S v Pillay and Others*, 2004(2) SACR 419 (SCA) at 439E-440G that Court held with reference to s 22 of the Supreme Court Act, 1959 (RSA) and s. 322 of the Criminal Procedure Act, 1977, that it was impermissible. The provisions of s. 22 of the Supreme Court Act, 1959 (RSA) are virtually identical to that of s. 19(1) of the High Court Act, 1990. The latter Act provides:

> "19(1) The High Court shall have power –
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> (a) ...
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> (b) to confirm, amend or set aside the judgment or order *which is the subject of the appeal* and to give any judgment or make any order which the circumstances may require." (Emphasis added.)

The South African Supreme Court of Appeal reasoned that it is clear from the wording of the section "that the power to confirm, amend or set aside a judgment or order can be exercised only in respect of a judgment or order which is the subject of an appeal." Inasmuch as the acquittal of the appellant on the count of kidnapping is not the subject matter of this appeal, this Court is not required to and cannot make an order in relation thereto under the powers vested in it by Section 19(1)(b) of the High Court Act, 1990.

Neither may it do so in terms of s. 309(3) read with s. 304(2)(c)(i) of the Criminal Procedure Act, 1977 – the provisions of s. 322(1) of that Act do not apply as they relate to the powers of the Supreme Court in relation to appeals from the High Court. A reading of s. 304(2)(c)(i) makes it clear:

> "(c) Such Court, whether or not it has heard evidence, may, ... –
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> (i) confirm, alter or quash the conviction, and in the event of the conviction being quashed where the accused was convicted on one of two or more alternative charges, convict the accused on the other alternative charge or one or other of the alternative charges; ..."

The section therefore contemplates in express terms that the Court may only substitute the conviction quashed with the conviction on another charge if that other a charge was an alternative charge (or one of the alternative charges) on which the accused had been discharged. It does not contemplate that such a substitution may take place if the accused was discharged on another substantive charge. I agree with the remarks of Beadle, CJ in *R v Kaseke & Another*, 1968(2) SA 805 (RA) at 806H where he said that –

> "In the absence of clear statutory authority empowering the Court to adopt such a course, I cannot see how it can be followed as it cuts across all the fundamental principles related to the doctrine of *autrefois acquit*."

Turning to the appellant's conviction of the crime of housebreaking with the intend to commit a crime unknown to the State, we must point out that the evidence given against the appellant by the prosecution witnesses, who are all closely related to one another, smacks of a rehearsed conspiracy. Vital to the assessment of the credibility of the evidence presented by the prosecution and the defence is the question whether the appellant had a relationship with the complainant until shortly before the incident. The complainant denied it in the strongest of terms and testified that she

had never spoken to the appellant notwithstanding the fact that he had been living in a close proximity for many years. Her sister's boyfriend, KM also claimed to be ignorant of such a relationship. So, too, did the complainant's sister. However, upon questions by the court she said: "They used to fight when they meet each other". Upon a further question whether they "only" used to fight she answered in the affirmative. Pressed by the appellant under cross-examination, she testified that the complainant "got her first periods, menstrual periods, on his bed – on the accused's bed – and (complainant) came to inform me and there are some people also who witnessed that." With this evidence, she admitted to a much more intimate relationship between the two than she had initially wanted the Court to believe.

The appellant testified to the existence of a year long relationship and his evidence was corroborated in that regard by Ambrosius Katuta and Shinohowa Katuta. The State did not even take issue under cross-examination with Ambrosius Katuta's evidence – no questions directed to him under cross-examination. Although the failure to cross-examine a witness does not necessarily imply acceptance of his or her evidence, one would have expected the prosecution to take issue with his testimony and give him an opportunity to respond if the prosecutor intended to contend at the

end of the trial that the witness should be disbelieved on that crucial point (see: *R v Jawke and Others*, 1957(2) SA 187 (E); *R v Qgatsa and Others*, 1957(2) SA 191 (E)). His evidence was certainly not so "palpably false or worthless" that it could have been ignored without more (c.f. *R v M*, 1946 AD 1023 at 1028).

Even more significant is the evidence of Shinohowa Katuta to the effect that, whilst the appellant was in custody as a trial-awaiting accused in this case, the complainant and her sister called on him to enquire about the appellant's whereabouts. They said to him that they wanted to withdraw the case against the appellant so that he and the complainant could get married!

In addition to these apparent and serious contradictions in the state witnesses', there are many others to which Mr Namandje referred during argument and which we need not revisit in this judgment. Suffice it to say that it is our considered view that the prosecution witnesses were not credible and that the State failed to prove the appellant's guilt beyond reasonable doubt.

In the result, we allowed the appeal on 17 September 2004 and made the following order:

> "1. The late filing of the appellant Notice of Appeal is condoned.
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> 2. The appeal is allowed.
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> 3. The appellant's convictions of the crimes of housebreaking with the intent to commit a crime unknown to the State and of rape as defined in Section 2(1)(a) of the Combating of Rape Act, 2000 and the sentence of 13 years imprisonment imposed under case no. RC 81/2003 (Katutura) on 27 November 2003 are set aside and the following order is substituted:
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> > "The accused is found not guilty and discharged."

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MARITZ, J.

I concur.

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MTAMBANENGWE, JA.