



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO. CC72/2019

In the matter between:

THE STATE

and

PATRICK UGOKA

ACCUSED

JUDGMENT

Rugunanan J

[1] The charge against the accused is one of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 read with section 94 of the Criminal Procedure Act 51 of 1977. The State alleges that on divers occasions between 2017 and September 2018, and in

Cambridge, East London, the accused unlawfully and intentionally committed acts of sexual penetration with MD, a girl aged 11 to 12 years, by having repeated intercourse with her per *vaginam* without her consent and against her will. The trial commenced on 31 August 2021. The accused pleaded not guilty to the charge. Save to deny the allegations against him, the accused did not tender a plea explanation.

[2] Before closing its case, the State led the evidence of 5 witnesses, namely: MD, Ms Okuhle Mapholoba, Ms Nomphele Nikelo, Ms Sivuyisiwe Ugoka, and Ms Nomvuyo Makinana, a nurse.

[3] MD testified through an isiXhosa speaking intermediary. For the benefit of the accused, the evidence was further translated into Igbo by an interpreter. The accused had at all times during the conduct of the proceedings been legally represented, and although at some point, the number of his legal representatives on his defence team had altered, this had no material effect on the conduct of the proceedings.

[4] At the close of the case for the State, the defence brought an application for the discharge of the accused in terms of section 174 of the Criminal Procedure Act.

[5] Section 174 of the Act provides:

‘If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.’

[6] It is well established that the words ‘no evidence’ do not mean no evidence at all, but rather no evidence on which a reasonable court, acting carefully, might convict.¹

[7] Under the present constitutional order, the test as to whether a court should grant a discharge at the close of the State’s case is *sui generis* – it entails a discretion by the trial court. It is a discretion, which must, self-evidently, be exercised judicially having regard to the specific facts and circumstances of each case. The test is informed by fair trial principles².

[8] In *S v Lubaxa*³ the Supreme Court of Appeal discarded the contentious pre-constitutional consideration that a discharge should be refused in the event of a reasonable possibility that the defence evidence may supplement the State’s case.⁴ The court maintained that to compel a full trial in the expectation that an accused would incriminate himself where the State’s evidence had failed to do so, was a violation of the constitutional protection accorded to rights of dignity and personal freedom that were long recognised and embodied in common law principles. Fundamental thereto is that there should be ‘reasonable and probable’ cause to believe that an accused is guilty of an offence before a prosecution is initiated.

[9] The court considered that the constitutional protection accorded to dignity and freedom underpins this position. Therefore, if a prosecution is not to commence without that minimum of evidence, it should cease when the evidence falls below that threshold. In that circumstance, where a conviction would no longer be possible except if an accused incriminates himself, fairness

¹ *R v Shein* 1925 AD 6; *Rex v Herholdt & Others* 1956 (2) SA 722 (W); *S v Mpetha & Others* 1983 (4) SA 262; *S v Shuping & Others* 1983 (2) SA 119 (B); *S v Lubaxa* 2001 (2) SACR 703 (SCA).

² *S v M* [2016] ZAFSHC 41 para 16.

³ 2001 (2) SACR 703 (SCA) para 19.

⁴ *S v Shuping supra* at 120-121A.

requires that a trial should be stopped for it threatens to infringe constitutional protection.

[10] At this stage of the proceedings, the credibility of the State witnesses plays a very limited role. Their evidence can only be ignored if ‘*it is of such poor quality that no reasonable person could possibly accept it*’.⁵ This sentiment was also expressed in *S v Agliotti*⁶ where the court considered it ‘*unwise to attempt to banish issues of credibility*’ in a section 174 application.

[11] In summarising the legal position regarding applications in terms of section 174 the following considerations are of note:⁷

(a) An accused person is entitled to be discharged at the close of the case for the State if there is no possibility of a conviction other than if he enters the witness box and incriminates himself;

(b) In deciding whether an accused person is entitled to be discharged at the close of the State’s case, the court may take into account the credibility of the State witnesses, even if only to a limited extent;

(c) Where the evidence of the State witnesses implicating the accused is of such poor quality that it cannot safely be relied upon, and there is accordingly no credible evidence on record upon which a court, acting carefully, may convict, an application for discharge should be granted.

[12] It is common cause that the only witness who implicates the accused is MD. There is no cautionary rule in sexual assault cases⁸ but MD is a child and a

⁵ *S v Mpetha supra* at 265 D-G.

⁶ 2011 (2) SACR 437 (GSJ) at 457b.

⁷ *S v Dewani* [2014] ZAWCHC 188 para 15.

⁸ *Y v S* 2019 (2) SACR 613 (WCC) para 49 in which the following dictum in *S v Jackson* 1998 (1) SACR 470 (SCA) at 476 is quoted with approval: ‘In my view, the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainant’s in sexual assault cases (overwhelmingly women) is particularly unreliable. In our system of law, the burden is on the state to prove the guilt of an

single witness. Her evidence must be approached with caution, and if it is to be accepted it must be credible⁹ and it must be clear and satisfactory in material respects¹⁰. This does not mean that such evidence must be flawless and beyond criticism. There is no rule of thumb test or formula to apply when it comes to a consideration of the evidence of a single witness. Despite shortcomings or defects or contradictions, the court must weigh the evidence, consider its merits and demerits and having done so, it must be satisfied that the evidence is trustworthy in the sense that the truth has been told.¹¹

[13] Trustworthiness depends on factors such as the child's power of observation, the power of recollection and the power of narration on the specific matter testified. The capacity of narration or communication raises the question whether the child has the capacity to understand the questions put, and to frame and express intelligent answers.¹²

[14] It is for these reasons that courts have repeatedly emphasised the need that cases involving alleged sexual molestation of minor children be handled thoroughly and sensitively by all involved. The prosecution of rape represents peculiar difficulties and calls for greater care where the victim is young. The State is required to give thoughtful preparation, patient and sensitive presentation of the available evidence and meticulous attention to detail. For it is in the nature of such cases that the available evidence may be scant and many prosecutions fail for that reason alone. In short, the State is required to be technically proficient in prosecuting its case.¹³

accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.'

⁹ *CB v The State* [2020] ZAWCHC 67 paras 21-21;

¹⁰ *Y v S supra* para 50.

¹¹ *ICM v The State* [2022] ZASCA 108 para 22.

¹² *Y v S supra* para 51 wherein reference is made to *Woji v Santam Insurance Company Ltd* 1981 (1) SA 1020 (A) at 1021.

¹³ *Y v S supra* paras 4 and 51 wherein reference is made to *Matshivha v S* [2013] ZASCA 124 para 24; see also *CB v The State supra* para 18.

[15] Against this background, I will now proceed to analyse the evidence.

[16] To begin with, I intend dealing with the medical evidence by Ms Nomvuyo Makinana. On 28 September 2018 she compiled a J88 medical report in respect of her gynaecological examination of MD. The examination took place at the Thuthuzela rape crisis centre at Cecilia Makiwane hospital.

[17] Following her gynaecological examination of MD, Ms Makinana concluded that her *'findings are consistent with old and fresh genital penetration, erosion of the perineum and fresh laceration in posterior fourchette with minimal bleeding'*.

[18] Ms Makinana's report is incorporated in a certificate in terms of section 212 (4) of the Criminal Procedure Act. She signed the certificate in her capacity as a forensic nurse. Of necessity, the introduction of her evidence meant that the State was required to qualify her to give testimony as a skilled individual, or differently stated – as an expert witness, by ensuring that she was properly qualified and experienced.

[19] A person falling into a specialised category of skill is rendered competent to testify provided that a sound and proper evidential basis is laid in respect of the professional qualifications and experience of the witness.

[20] In that regard, the Court in *Menday v Protea Assurance Company Limited*¹⁴ laid down the following principle governing the admissibility of expert evidence:

'In essence the function of an expert is to assist the court to reach a conclusion on matters on which the court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his

¹⁴ 1976 (1) SA 565 (E) at 569.

special skill, training or experience, the reasons for the opinion which he expresses are acceptable... However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on the topic.’

[21] As for her professional qualifications, Ms Makinana stated that these include a qualification in General Nursing Science, an Advanced Diploma in Forensic Nursing, a qualification in Community Nursing Science, and further qualifications in psychiatry and midwifery. In relation to her experience, she testified that she has an accumulated 4 years’ experience as a forensic nurse and approximately 17 years’ experience as a nurse. As for a description of her duties she stated that she assesses rape victims and collects forensic evidence from patients who have been sexually assaulted. No clinical detail was elicited as to what she meant by assessing rape victims and by collecting forensic evidence. This evidence would have laid the foundation for assessing her experience and competency to conduct gynaecological examinations of rape victims and to express an opinion on her clinical findings.

[22] During argument it was specifically raised with the State whether the certificate under section 212 (4) was relied upon in qualifying Ms Makinana as an expert witness. This was done for the reason, *inter alia*, that there are clear indications that the certificate has not been fully completed. Sections which are required to be deleted where they are not applicable, have not been so deleted. The certificate also contains a declaration to the effect that the findings and observations recorded on the form J88 were established by an examination requiring skills in physiology and anatomy.

[23] The State contended that it did not rely on the certificate and submitted that the *viva voce* evidence of Ms Makinana was sufficient to qualify her as an expert witness. I disagree. The anomaly in the State’s submission is that the

certificate which includes the medical report was handed into evidence as an exhibit. It is perplexing that the State disavows reliance on one part of what is after all a composite document, and then seeks reliance on another part which expresses a conclusion in support of the case it advances.

[24] It is nowhere apparent in Ms Makinana's testimony that she is properly qualified and experienced, and therefore rendered competent to testify and express a conclusion contingent upon skill in anatomy and physiology.

[25] It will also be noted from the certificate that she discloses what appears to be her professional registration number, or perhaps an employee number. She was not asked to clarify this, much less was she asked whether she is affiliated to or enjoys recognition with a professional body as a registered forensic nurse. Although testifying that she is stationed at Cecilia Makiwane hospital, the mere fact of being an employee in a state institution cannot by judicial notice qualify her as an expert witness possessed of the requisite credentials and experience.

[26] The short shrift approach, is that the State failed to lead sufficiently cogent evidence of the witness's experience. Nor did it lead any evidence to qualify her proficiency or competency in the disciplines of physiology and anatomy. Where the witness has not pertinently stated that she is the holder of such qualifications, or that she has experience in those specialities where they are relevant to gynaecological examinations of rape victims, this cannot be inferred for the purpose of qualifying her competency to testify as an individual possessed of the requisite skill in those disciplines. It is apposite to repeat what the Constitutional Court stated in *MEC for Health Eastern Cape and Another v Kirland Investments*¹⁵:

¹⁵ *MEC for Health Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) para 50.

‘[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.’

[27] This *dictum* comes home to presenting evidence in a technically proficient manner.

[28] In matters of this nature the selective approach to the qualification and presentation of expert testimony, requires judicial officers to be vigilant to ensure that specialised evidence of the kind is properly presented and fairly placed before the court. In the circumstances, the failure to have led relevant evidence for ensuring that Ms Makinana was properly qualified and experienced and thus rendered competent, results in the medical evidence being rendered inadmissible.

[29] Focus shifts to the evidence of MD. A clinical psychologist’s report was presented to the Court at the commencement of the trial to support an application that MD testifies with the assistance of an intermediary. At the time of the psychological assessment MD was 13 years of age, and was 15 old doing Grade 7 when the trial commenced.

[30] The report notes that her average range of intelligence is low and that she functions intellectually and cognitively at a developmental age between 7 to 11 years.

[31] Of note, is that the report indicates that her thinking and reasoning is logical about her own experience and that she is able to describe her experiences of the events in this case. The report also notes that she is able to concentrate, to comprehend, and to answer questions satisfactorily. MD’s

performance in court unfortunately came nowhere close to this depiction in the psychologist's assessment. Notwithstanding recourse to a transcript in preparing this judgment, it bears mentioning that no judgment can ever be perfect in detailing all the evidential material, and it does not necessarily follow that what is not mentioned herein, has not been considered.¹⁶ It is therefore unnecessary to recapitulate and analyse the minute details of MD's testimony. It speaks for itself in lending credence to the findings in the ensuing paragraphs of this judgment.

[32] While demonstrating sensitivity to the fact that MD is a child, there is in principle no basis to attach a lower standard of proof or a less exacting assessment of the evidence than in any other criminal case. In *S v DJ*¹⁷ the court appositely stated that to do so would be to expose accused persons to a greater chance of unjust conviction than persons in cases in which the complainants are adults. There can be no warrant for such a regime.

[33] The indictment reduces to one count acts of sexual penetration that were committed on diverse occasions in the period 2017 and September 2018.

[34] The central tenet of MD's evidence is that the accused would perpetrate these acts in her mother's absence when he was alone with her. On the State's case, the year 2017 marks the starting point at which these incidents commenced but this time frame was not independently identified by MD. The record reflects that it was impermissibly proposed to her by counsel for the State when she testified in chief.

[35] On the other end of the time spectrum, a medical examination occurred on 28 September 2018. But with that evidence being declared inadmissible, there is no certainty of the period in which the incidents occurred. This is due to

¹⁶ *ICM v The State* [2022] ZASCA 108 para 40.

¹⁷ 2019 (2) SACR 613 (WCC), quoted in *CB v The State supra* para 20.

the fact that it is not entirely clear from MD's evidence whether there were two, or three or perhaps even a fourth incident involving sexual penetration by the accused. I am conscious of the fact that the charge speaks of diverse occasions for the purpose of securing a conviction on a single count. One is, however, unable to determine with any degree of certainty the frequency and circumstances in which these incidents occurred. The record reflects that MD testified about an incident on the occasion when she wore a black hat, another incident on the occasion when a report was made directly to Ms Mapholoba when apparently, her mother was at 'Hemingways', and another incident when the accused showed her 'dirty things' on his cell phone, and a further incident in which a CD was inserted into a laptop. There is no clarity from MD about whether these incidents occurred during the day or at night. The record however evidences an indication that it was impermissibly suggested to her that one incident occurred during the evening.

[36] MD also recounted an occasion when she came home late from the library. To avoid being chastised by her mother she retorted that her mother should chastise the accused. In that vein she disclosed previously being raped by the accused. It is not clear from the evidence if this incident MD disclosed to her mother was circumstanced by MD wearing the black hat or if it happened when she claimed to have viewed dirty things either on the accused's cell-phone or the laptop.

[37] Attempting to sensibly isolate and individualise these incidents is an impossibility and an exercise in speculation. It is difficult to extrapolate a clear picture and sequence of events from MD's evidence. This is because at some point MD gave a narrative which suggested that there were either one or two incidents which bore the hallmarks of each of the other incidents. If one speculates and reduces everything to two incidents, or arguably even perhaps

one incident, a troubling aspect of MD's testimony is that she stated that the accused penetrated her vagina while she was wearing shorts. This was confirmed in cross-examination and similarly during re-examination when she stated that the accused 'inserted it on top of the shorts'. Reducing it all to one count, this evidence flies in the face of two separate demonstrations using anatomical dolls.

[38] The record also evidences resentment or hatred by MD for the accused due to her suspicions that he assaulted or ill-treated her mother. He is her stepfather, and this brings to light a motive behind her reason for pointing a finger at the accused as being the perpetrator of the offences against her. Objectively considered, it follows that MD may have a reason to narrate incongruent versions about the accused's conduct.

[39] Adverting to the evidence of the remaining witnesses, namely; Ms Mapholoba, Ms Nikelo and MD's mother Ms Ugoka, their evidence is entirely circumstantial to the events in question. Where the medical evidence was the only evidence which would have objectively corroborated MD, and such evidence has been found to be inadmissible, it cannot be argued that the reports and level of detail volunteered by MD to these witnesses about how the alleged rapes were perpetrated corroborates the version of MD where she could not even in the most simplest of terms volunteer such information in a lucid manner. It must immediately be emphasised that by corroboration is meant other evidence which supports the evidence of MD. Put otherwise, it must be evidence implicating the accused. A repetition of what MD may have reported to these witnesses, whether they testified thereto orally or whether contained in police statements, must be weighed against MD's resentment of the accused and cannot furnish corroboration – but can at most, prove consistency – and proof of consistency is not the equivalent of corroboration.¹⁸ Where the cross-

¹⁸ *CB v The State supra* para 25.

examination of these witnesses may not have placed certain aspects of their narrative testimony seriously in dispute, it would be absurd to hold that their evidence corroborates that of MD on the simplistic basis that it is common cause.

[40] I am not oblivious of the pressures put on witnesses in a courtroom, nor of the trauma attendant on victims of sexual assault. Neither Ms Mapholoba nor Ms Ugoka impressed me.

[41] Ms Mapholoba had an affair with the accused and the relationship curdled. She was an inflexible witness who had a motive to give evidence against the interest of the accused. As for Ms Ugoka, her faint pleas that she feared for her safety and was concerned about MD were a veiled attempt to win sympathy with the Court.

[42] And lastly, as for Ms Nikelo, the landlady on whose premises the Ugoka family rented a flat, the information which she acquired about the alleged rape was reported to her by Ms Ugoka and MD. Her evidence for reasons already mentioned does not corroborate MD with the degree of persuasion that implicates the accused. It emerged in cross-examination of this witness, which she confirmed, that she suggested to MD that the accused inserted his 'thing' into MD's vagina.

[43] In my assessment of the matter, the overall unsatisfactory nature of the evidence by MD cannot be excused. On her own failing, MD was unable to express intelligent answers to the most simple of questions. This led to the State repeatedly having to prod her for answers which in most instances were rarely intelligibly forthcoming and at times were put forward after lengthy pauses in the record.

[44] Where satisfactory responses were forthcoming, this was in response to suggestive questioning

[45] In dealing with MD, more attention ought to have been paid to the detail and timing of the alleged instances of sexual penetration. All of this has implications for the factual matrix upon which the accused is expected to answer to the charge against him. In the circumstances, this Court exercises its discretion to curtail a superfluous process.¹⁹

[46] On an overall assessment of the evidence presented by the State, there is no evidence on which a reasonable court, acting carefully, might convict.

[47] While the accused enjoys the benefit of a reprieve on legal grounds, it is emphasised that there appears to have been something seriously and morally disturbing in the Ugoka household.

[48] But despite my own subjective views on the matter, to expect the accused to answer the allegations against him would detract from his right to silence or the protection against self-incrimination.

[49] One has sympathy for MD, but that cannot be allowed to circumvent or tread roughshod over what the authorities referenced in this judgment expect courts to do.

[50] In the circumstances I make the following order:

1. The application in terms of section 174 of the Criminal Procedure Act 51 of 1977 is granted.
2. The accused is found not guilty and discharged.

¹⁹ *S v Dewani supra* para 14.

S RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the State: *S Mgenge*, Office of the Director of Public Prosecutions,
Makhanda.

For the Accused: *D Skoti*, Instructed by Mgudulwa Attorneys, East London.

Dates heard: 31 August 2021; 1 September 2021; 2, 3, 4, 7, 8, 9, 10
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4 October 2022; 11 April 2023; 13 April 2023; 7 August
2023; 13 November 2023; and 17 November 2023.

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