IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MAKHANDA
HELD IN BHISHO

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

CASE NO.: CC36/2022

DATE: 2024.02.29

In the matter between

THE STATE

and

NKOSENKULU MALI Accused

J U D G M E N T

LAING A J

The accused has been charged with crimes allegedly committed in the period of December 2020 until February 2021 at Caweni, Needs Camp, within the area of East London.

Nature of the charges

Count 1 pertains to the contravention of section 22 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 ('CPA'). The accused was charged with having exposed his genitals to the complainant, M, who had been ten years old at the time.

Count 2 pertains to section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007[1], read with section 94 of the CPA. The accused was charged with having raped M by having sexual intercourse with her, *per vaginam*, without her consent and against her will.

The accused pleaded not guilty to both counts and declined to make a statement outlining the basis of his defence.

The case for the state

I[...] P[...]

The first witness for the state was I[...] P[...]. She is a 16-year-old learner in grade nine. On 20 February 2021, she had been watching a sports match at a nearby field and when returning home, she had met up with another learner, A[...] M[...], who asked her whether she had heard what had happened to the complainant, M'. She was advised to ask M directly, which she did, to learn that the accused had exposed his genitals to the

[1] To be read with sections 1, 56(1), 58, 59 and 60 thereof.

complainant. Apparently, this had happened in his shack and had happened on several occasions. When I[...] asked M why she had not informed her mother about this, M said that she was afraid that her mother would beat her. M had been upset. Later, I[...] heard her mother, K[...] P[...],[2] say that M had been raped by the accused.

Under cross-examination, I[...] confirmed that she had told her mother about what M had said to her. After her mother said that M had been raped, the latter had confirmed to I[...] that this was indeed so.

S[...] M[...]

The next witness was S[...] M[...], who is a 17-year-old learner in grade eight. She testified that she had been watching television with her friends sometime during an afternoon in February 2021, when one of her friends, E[...], had asked the complainant why she had lifted her skirt. M had denied this, saying that it had been the wind. She went on to say that the accused had showed her his penis, at which one of the group asked her to describe it, which she did. Everyone had been shocked.

[2] The complainant's mother, K[...] P[...], subsequently passed away, on 22 June 2022.

S[...] admitted, during cross-examination, that there had been much banter amongst her friends at the time that they were all watching television. At some point, E[...] had said to M, that she had showed her buttocks to the accused, which she had refuted, saying that the accused had showed her his penis. S[...] confirmed that her friends had been shocked to hear this.

A[...] M[...]

10 The state then called A[...] M[...], who is a 16-year-old learner in grade ten. She testified that she had been with her friends, watching television, on an afternoon in February 2021. E[...] had asked M why she had shown her panties to the accused, to which she had retorted that it had been the wind that had lifted her dress. Soon afterwards, M said that the accused had showed his penis to her. When A[...] had asked M whether she had told I[...], the former said that she had not because it would be reported to her mother, who would give her a hiding.

20 On the following day, A[...] had met I[...], returning from a sports match. She had asked I[...] whether she had heard from M that the accused had showed his penis to her. I[...] had been surprised and had said that she would tell her parents.

A[...] indicated that the accused is her next-door neighbour.

The complainant

The following State witness was the complainant herself. M testified in camera. She stated that the accused used to show his penis to her on the occasions when she had walked past his shack. He would always be smiling at her.

On the day in question, M had walked past the accused with her friend E[...], who had run on ahead when her mother had called her. The accused had offered her R5,00; when M had entered the yard to accept the money, the accused had grabbed her, pulled her inside his shack, and thrown her onto his bed. He had unbuckled his belt, lifted her dress, lowered her panties, and climbed on top of her. He had then inserted his penis into her vagina and proceeded to rape her.

At the sound of his grandmother's voice, the accused had stopped and ran away. M said that she had then returned to her home to wash her body; she had been bleeding from her vagina. The accused had only raped her once, she said.

M did not tell her mother because she had been afraid that her mother would beat her. However, she said to S[...] that the accused had showed his penis to her. Her mother heard about

the incident and confronted her about it, whereupon M told her what had happened. She subsequently accompanied her mother to the police and to the hospital, where she was examined. The complainant admitted that she had felt very bad afterwards, she still felt depressed.

In cross-examination, M said that she would sometimes be with her friends when the accused had exposed himself. Her friends would run ahead, leaving her behind; it was then that the accused used to show her his penis. She also mentioned that her friend, E[...], would sometimes borrow the accused's cellphone. This had contained pictures and videos of people engaging in sexual acts.

During the rape, said M, the accused had stopped her from crying out by pushing a strip of cloth into her mouth. The accused had warned her at the time, too, that he would kill her if she talked about the incident. She had not mentioned these things during her evidence-in-chief because they had slipped her mind.

Dr Yandiswa Mnyanda

The State called Dr Yandiswa Mnyanda, who had examined the complainant at the Cecilia Makiwane Hospital on 22 February

2021. She testified that M had indicated to her that she had been raped by a man in the neighbourhood on many occasions during the preceding month; the latest incident had occurred three days earlier. After her examination of the complainant, Dr Mnyanda had concluded that there was redness and swelling of the labia, urethra, and hymen, suggesting trauma. A fresh tear of the hymen suggested recent trauma; multiple clefts suggested previous trauma.

10 To questions from the court, Dr Mnyanda confirmed that her findings were strongly suggestive of sexual penetration of the vagina. The possibility of an infection could not be excluded in relation to the white discharge from the complainant's vagina. Her remaining injuries, however, were not indicative of an infection.

Application for admission of hearsay evidence

The state proceeded at this stage, to apply for the admission
20 of a statement made by the mother of the complainant, K[...], to a police officer. Subsequent thereto, she had passed away. The defence opposed the application.

The Court dismissed the application after having considered the factors listed under section 3(1)(c) of the Law of Evidence

Amendment Act 45 of 1988. The probative value of the statement did not warrant its admission. In the present matter, the state's case rested primarily on the evidence of a child, requiring the court to treat such evidence with circumspection. The inability to cross-examine the mother of the complainant, by reason of her passing, prejudiced the accused. It was not in the interest of justice to admit the statement in question.

Consequently, the state closed its case.

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Application in terms of section 174 of the CPA

The defence, at this point in the proceedings, applied for the discharge of the accused. The provisions of Section 174 of the CPA provided that if, at the close of the case for the prosecution, the court was of the opinion that there was no evidence that the accused committed the offence referred to in the charge, then it may return a verdict of not guilty.

20 By reason of the appointment of a new counsel for the defence, however, the application was not pursued. Nothing more needs to be said about it.

The case for the defence

The accused testified in his own defence. He stated that, at

the time of the alleged offence, he had stayed in a shack that was adjacent to the dwelling of his grandmother, who had since passed away. The accused knew M, who resided in the vicinity.

To the allegation that he had exposed his genitals to M, the accused flatly denied this. He also denied that he had ever pulled M inside his shack and raped her. He admitted, however, that he knew M's friend, E[...], who was a neighbour to him and who had sometimes borrowed his cellphone; he denied that it had contained videos of a sexual nature or that he had ever showed these to E[...]. The accused also knew M's friend, E[...], but refuted the allegation that he had ever exposed his genitals to M when she had been with her friends.

During cross-examination, the accused confirmed that he had known M for a considerable length of time; he had known her parents. There had been no prior animosity between the accused and M, and they had previously exchanged greetings; she had never visited his shack, where he stayed alone. He agreed that a footpath led in front of his home.

The accused said that he had been shocked by the allegations and could not understand why M would have falsely implicated him. He confirmed that he had lent his cell phone to E[...] on

numerous occasions but explained that she had needed it to use Facebook to connect with her friends. Although he was adamant that there had been no pornographic videos on his cell phone, he could not dispute that E[...] had been watching these.

Regarding M's injuries, the accused could not dispute the nature thereof. He was insistent, however, that he had never raped her. He could not say how M had been able to point out his bed to the police, inside the shack. To M's account of how the rape had occurred, the accused simply denied this; he also denied that he had ever exposed his genitals to M. He could, moreover, offer no reason for why M would have wanted to land him in trouble.

In re-examination, the accused confirmed that the police had obtained a buccal swab from him, ostensibly to be used as evidence. Nothing further had come of this.

The defence closed its case.

Issues to be decided

At the conclusion of the trial on the merits, and after having heard counsels' submissions in argument, the matter seems to

be capable of being distilled to two key issues: (a) was the complainant, M, indeed raped, and (b) if so, then has the state proved, beyond reasonable doubt, that the perpetrator was the accused?

The above issues form the basis of the court's enquiry. It would be helpful, before embarking upon such an exercise, to reiterate some of the main principles involved.

10 **Legal framework**

The Supreme Court of Appeal emphasised the proper approach to be adopted in *S v Radebe and others*,[3] where Marais J A, quoted the case law as follows:[4]

> 'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a
20 useful aid to proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led

[3] 1998 (1) SACR 422 (SCA).
[4] At 426f-g

> in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'[5]

It is the cumulative effect of the evidence that must determine whether the state has proved its case beyond reasonable doubt. This constitutes the mosaic to which Marais JA referred. There will, of course, be colours or textures or patterns that stand out, to extend the metaphor, and each must be examined carefully. But it is the overall impression that counts in deciding whether the legal test has been met.

The state's evidence in the present matter rests predominantly on the testimony of a single witness, viz. the complainant, M. This is no bar, however, to a conviction. The provisions of section 208 of the CPA stipulate that an accused may be

[5] Moshepi and others v R (1980 – 1984) LAC 57, at 59F -H.

convicted of any offence on the single evidence of any competent witness. Corroboration is usually viewed as a safeguard when relying on such evidence and is understood as 'other evidence which supports the evidence of the state witness, and which renders the evidence of the accused less probable on the issues in dispute.'[6]

Academic writers have pointed out, too, that there is no statutory requirement that the evidence of a child, as in the present case, must be corroborated. It is important, nevertheless, that such evidence be treated with great caution.[7] In *S v Dyira*,[8] Jones J observed:

> 'In our law it is possible for an accused person to be convicted on the single evidence of a competent witness... The requirement in such a case is, as always, proof of guilt beyond reasonable doubt, and, to assist the courts in determining whether the onus is discharged, they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution (R v Mokoena 1956 (3) SA 81 (A) at 85, 86). This means that the courts must be alive to the danger of relying on the evidence of only one witness,

[6] Etienne du Toit (et al), Du Toit: Commentary on the Criminal Procedure Act (Jutastat e-publications, RS 67, 2021), at ch24- p2. See, too, *S v Gentle* 2005 (1) SACR 420 (SCA).
[7] Du Toit, *op cit,* at ch24- p9.
[8] 2010 (1) SACR 78 (ECG).

because it cannot be checked against other evidence. Similarly, the courts have developed a cautionary rule which is to be applied to the evidence of small children (R v Manda 1951 (3) SA 158 (A) at 162E- 163E). The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness, as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity (S v Viveiros [2000] 2 All SA 86 (SCA) para 2). Here, more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness...'[9]

[9] At para 6.

The principles highlighted by Jones J are relevant to the present matter; the complainant, M, is both a single witness and a child witness. The cautionary rules must be applied.

The above overview provides a basic framework within which to evaluate the evidence and to apply the relevant principles to the facts of the matter.

Evaluation of witnesses

As a starting point, the evidence of the complainant's friends was predominantly circumstantial in nature. I[...] testified that M had informed her, on separate occasions in February 2021, that the accused had exposed his genitals and that he had raped her. S[...] stated that she had been with a group of friends, also in February 2021, when M had said that the accused had showed her his penis, which she went on to describe. A[...] supported this account.

Nothing arose during evidence-in-chief or cross-examination to undermine the credibility or reliability of the complainant's friends. Aside from an inherent bias towards M, their testimonies were unremarkable; they were, nevertheless, consistent and were never seriously challenged. Each of the witnesses had heard M say, directly, that the accused had exposed his genitals to her; I[...] testified that M had said to

her that the accused had raped her.

M's testimony contradicted I[...]'s, admittedly, since she said that the latter had heard the allegation from S[...], not from her. Such contradiction was not material, however, when viewed against the remainder of her evidence, which was clear, logical, and detailed. She described how she would walk past the accused's shack and how he would expose himself to her, smiling. She went on to describe his penis. She also described, in detail, how the rape had occurred: how the accused had enticed her into his yard with the offer of R 5; how he had pulled her into his shack, pushed her onto the bed, lowered his trousers and her panties, climbed on top of her, placed his penis inside her vagina and thrust himself against her, only to be interrupted by the sound of his grandmother's voice, whereupon he had fastened his trousers and exited the yard by jumping over a low gate. She described how the accused's grandmother had entered the shack and seen how she had been bleeding, which had stained the bed. She described her visit to the hospital and the examination that was carried out.

The complainant's testimony about the accused's having placed a piece of cloth inside her mouth only emerged during cross-examination. So, too, did her mention of his threat to kill her if she told anyone what had happened. Counsel for the state, however, did not specifically ask her about these

aspects during her evidence-in-chief. The contradiction referred to earlier and the omissions just discussed do not detract, in any way, from either the credibility or reliability of her testimony. They are not material. There were no other contradictions in her evidence, which was, overall, cogent and of satisfactory calibre for an 11-year-old witness. The quality, integrity, and independence of her recollection of the events that form the subject of the charges were more than adequate. There is little, if anything, to prevent the court from finding that the probabilities of what happened were indeed in M's favour.

Regarding the testimony of the medical practitioner, Dr Mnyanda, she came across as an independent witness who was careful to remain within the boundaries of her expertise and to narrate only what she had seen and heard directly. She accepted that the white discharge from the vagina could have been from an infection. She was adamant, however, that her medical findings indicated that there had been sexual penetration. The court is satisfied that she was a credible and reliable witness and that the probabilities coincide with what she found.

It is necessary to turn, finally, to the accused. His testimony amounted to little more than a bare denial of the allegations. He admitted that he knew the complainant and her friends, E[...] and E[...]; he also admitted that he had lent his cellphone to the former. He could not explain, however, how M had been

familiar with the inside of his shack and the location of his bed or why M would have implicated him in the offences. More will be said about his testimony in due course.

Discussion

During argument, counsel for the defence suggested that the complainant had been embarrassed by her friend, E[...], who had accused her of revealing her buttocks to the accused. The complainant, argued counsel, had dealt with her embarrassment by explaining, firstly, that it had been the wind that had lifted her dress, and, secondly, that the accused had started the trouble by exposing her genitals to her. It is difficult to agree, however, that the allegation had been made in reaction to M's social discomfort. The allegation would surely have attracted further accusations and derision on the part of her friends if there had been no basis for it.

It is perfectly plausible, too, that M had not mentioned this before because she had been ashamed of what had happened; she had also been afraid that her mother would have punished her. This invites the question of whether the complainant's mother, K[...], had not extracted a false allegation from her, wrongly implicating the accused. Besides the trite observation that a suspicion of harm to a child would usually attract the ire

of a parent, there is little from the complainant's evidence or that of her friends to indicate that M's mother had been violent or excessively strict.

Counsel referred to *Woji v Santam Insurance Co Ltd*[10], where Diemont JA considered the concept of trustworthiness in relation to a child witness. Academic writers have remarked that Diemont JA reduced it to the following four components:

> '(a) the capacity of observation, as to which the court should ascertain whether the child appears sufficiently intelligent to observe;
>
> (b) the power of recollection, which depends on whether the child has sufficient years of discretion to remember what occurs;
>
> (c) narrative ability, which raises the question whether the child has the capacity to understand the questions put, and to frame and express intelligent answers; and
>
> (d) sincerity, in regard to which the court should satisfy itself that there is a consciousness of the duty to speak the truth.'[11]

With reference to the above, counsel contended that the complainant could only say that it was the accused who had

[10] 1981 (1) SA 1020 (A).
[11] Du Toit, ibid.

raped her; she could not say when. This may be so in relation to precisely when the accused had allegedly exposed his genitals to M, but she explained that this had happened on several occasions. The date of the alleged rape itself was never in dispute at trial; it occurred on or about 19 February 2021, with the complainant's having informed her friends during the next couple of days, before undergoing a medical examination on 22 February 2021. The argument made by counsel is not entirely understood.

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It was also contended that the complainant's narrative ability was so poor that she contradicted the evidence of her friends and that of Dr Mnyanda. The court has already dealt with the earlier contradiction and omission, finding that these were not material in nature. The complainant testified, admittedly, that she was only raped once by the accused, which differed from what she had told Dr Mnyanda and what the medical examination revealed. What is clear, nonetheless, is that the medical evidence corroborates her testimony to the effect that
20 she had been raped. The reason for the discrepancy may arise from a reluctance on M's part to relive past traumatic experiences. It may even arise from an intention to shield the accused to some extent from the consequences of his actions. This remains speculation, of course, but the inescapable fact is that the complainant's allegation that she was raped was

corroborated strongly by the medical evidence. Counsel appeared to concede this during argument.

It is necessary to pause, at this stage, to address counsel's contention that Dr Mnyanda contradicted herself in testimony. During cross-examination, counsel asked her whether the white discharge from the complainant's vagina indicated an infection, to which she had answered that it was impossible to say just by looking. Counsel then asked whether the injuries observed could arise from an infection alone; she agreed that this was possible. Later, the following exchange occurred between the court and Dr Mnyanda:

'COURT: And then I need to understand clearly your response to one of the questions posed to you by the defence counsel. You appeared not to exclude the possibility that the injuries described in the report could have arisen from an infection. Is that correct?

DR MNYANDA: He was asking about the discharge... A discharge could be due to an infection, it could just be due to a physiological bodily response.

COURT: So, your answer then was confined to the discharge, not to the other injuries.

DR MNYANDA: Yes, I think he was asking about the white discharge that I noted coming from the vagina.

COURT: Yes. And the remaining injuries... excluding the discharge, would they possibly be indicative of an infection?

DR MNYANDA: No, no, M'Lord.'

The exchange did not give rise to a contradiction; Dr Mnyanda was merely clarifying her earlier testimony. Whereas the discharge may have been caused by an infection, Dr Mnyanda previously stated, unequivocally, that her findings had been consistent with the allegation that there had been sexual penetration of M's vagina.

Dr Mnyanda testified that she had examined the complainant and noted that the appearance of M's genitalia had indicated trauma; a fresh tear of her hymen had pointed to recent trauma. Counsel argued that this gave rise to the possibility that M had been raped by a third party. The difficulty with this, however, is simply that there was no evidence whatsoever of any third party's involvement. The accused could not name a single person who may have been the actual culprit. This is a major weakness in the defence's argument.

Counsel also pointed to the state's failure to produce DNA evidence; this could have been obtained from the blood stains on the accused's bed. That may be so, but the failure of the state to do so does not detract from the existing evidence regarding the identity of the perpetrator. It is common cause that the accused had known the complainant for some time, as well as her friends, E[...] and E[...]; they had referred to him, in testimony, by his nickname, 'bra Nko'. The accused had, moreover, lent his cellphone to E[...] on several occasions. For a 50-year-old single man, the nature of his relationship with M and her friends strikes the court as unusual, to say the least, if not inappropriate. The complainant, in her testimony, described in detail how the accused would expose his genitals to her; she could describe his penis. She also described in detail how the rape had occurred. She was consistent under cross-examination and maintained her version despite having come under intense questioning from counsel. Her friends confirmed that she had named the accused as the culprit. There was, moreover, no evidence of any animosity between her and the accused or any other reason why M would have wished to falsely implicate him. For his part, the accused offered a bare denial. He could not explain the complainant's accusations. He could not explain her familiarity with his shack and the location of his bed. Importantly, he could not suggest any third party as the real perpetrator.

Verdict

The court is satisfied that the mosaic of evidence, to borrow the metaphor used in Hadebe, demonstrates that the identity of the person who raped the complainant was the accused. Whereas M was both a single and a child witness, her evidence was sufficiently compelling to withstand the application of the usual cautionary rules. It was also corroborated, to a considerable degree, by the medical evidence.

Notwithstanding the allegation contained in the charge that the accused had raped the complainant more than once, the court is not satisfied that this aspect was proved by the state. Whereas the medical evidence suggests previous trauma, the court cannot ignore the testimony of the complainant to the contrary.

The court is persuaded, nevertheless, that, in answer to the two issues identified previously, the state has proved beyond reasonable doubt that: (a) the complainant was indeed raped; and (b) the accused was the perpetrator. A secondary, but no less important, finding of the court is that the state has proved that the accused exposed his genitals to M.

Consequently, the court has reached the following verdict:

(a) regarding Count 1, the accused is found guilty; and

(b) regarding Count 2, the accused is found guilty, save that he is not found to have raped the complainant more than once.

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LAING J
JUDGE OF THE HIGH COURT, MAKHANDA, HELD IN BHISHO

APPEARANCE

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Date of delivery of judgment: 29 February 2024.