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

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

05 SEPTEMBER 2022

DATE SIGNATURE

CASE NUMBER: A14/2022

In the matter between:

T[redacted] P[redacted] APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

DOSIO J:

INTRODUCTION

[1] The appellant was charged in the Regional Court sitting in Palm Ridge on a single count of contravening the provisions of s3 of the Sexual Offences and Related Matters

Amendment Act, Act 32 of 2007 ('Act 32 of 2007'), read with section 51(1) of the Criminal Law Amendment Act, Act 105 of 1997 ('Act 105 of 1997'), for raping his biological daughter in 2014 when she was fourteen years old.

[2] The appellant who was legally represented, pleaded not guilty to the charge but was found guilty and sentenced to twenty-two year's imprisonment.

[3] The appeal is in respect to conviction and sentence, the Court *a quo* having granted leave to appeal both the conviction and the sentence.

EVIDENCE

[4] Three witnesses testified for the State, namely, T[redacted] T[redacted] ('the complainant'), M[redacted] L[redacted] ('the grandmother') and nurse Paula Phoshoko ('nurse Phoshoko'). The appellant and his son, namely, M[redacted] T[redacted] ('M[redacted]') were the only two witnesses for the defence.

T[redacted] T[redacted]

[5] The complainant testified that the appellant is her biological father and that the incident for which he was charged, took place on 16 December 2014 in Magagula. On this day, the appellant and the complainant's mother had a fight and as a result, her mother left the house. The appellant then told the complainant to bring him food in the bedroom, where-after he closed the door, pushed the complainant on top of the bed, slapped her with an open hand and told her not to make a noise. The appellant then undressed his trouser and undergarment, pulled up her skirt and pulled down her undergarment. The appellant then inserted his penis into her vagina and made sexual movements on top of her. The appellant then left her on top of the bed, dressed up and left the house. After the appellant left, she cried, dressed up and went to look for her mother. She did not find her mother, so she came back home, sat and watched television whilst crying.

[6] The complainant only reported this incident to her grandmother in 2017. The complainant was watching a TV program and she started crying. The grandmother asked her why she was crying and she replied that the appellant had raped her. The complainant testified that she did not tell anyone earlier, because the appellant had promised to kill her if she told anyone what he had done. Her grandmother advised her to tell her mother, which she did and then the matter was reported to the police. She was then examined at the hospital.

[7] The complainant stated that she and the appellant had a good relationship prior to the incident. There is no mention of what her relationship was with the appellant after the report was made.

[8] The complainant stated that although she did not report the rape to M[redacted], he noticed her swollen face. Her brother asked her why her face was swollen and she responded by lying that she had fought with somebody on the street and that is how she had sustained the injury. The complainant stated that she saw her mother and her younger sister the morning after this first rape incident. She stated that she moved out of the shared residence with the appellant in 2016.

[9] During cross-examination she testified that the appellant raped her for a second time during December 2014 or 2015. This second incident occurred when they had gone to visit the appellant's parental home in Mpumalanga.

M[redacted] L[redacted]

[10] This witness testified that she and the complainant were watching a soapie on the television when the complainant told her that the lady in the soapie was not telling lies when she said that she had been raped. This witness did not respond, she just covered herself with a blanket and cried. This witness stated that she did not believe the complainant at this stage and did nothing to report the matter. All that this witness did was to go to church the next day and when the pastor saw her crying she told the pastor what had happened. This witness only told the complainant's mother two weeks after receiving the report from the complainant. This is when the complainant told her mother about the two incidents of rape. Although this witness remembers that the complainant told her one of the incidents happened in Magagula, she could not remember the exact year that the report was made to her.

Nurse Phoshoko

[11] This witness testified that she is a nurse and she examined the complainant on 13 July 2017. This witness noted that the complainant was withdrawn, sad and crying at the time of the examination. The hymen of the complainant was irregular with the presence of three clefts at two, eight and six o' clock. This witness concluded that her findings were consistent with sexual penetration with a blunt object.

The appellant

[12] The appellant's version was a complete denial of the allegations. He confirmed that the

complainant and M[redacted] are both his biological children and that the complainant had stayed with him in Magagula. He stated that his relationship with the complainant was fine before and after she moved out of the shared residence in Magagula. The appellant testified that the complainant and her mother moved out of the shared residence on 2 February 2013. According to the appellant, when they all lived together, he was never alone with the complainant. He heard about the allegations of rape from his son, M[redacted].

Mzwakhe Tshwala

[13] The complainant's brother testified that he bore no knowledge of the night where he allegedly had a conversation with the complainant regarding her having a swollen cheek, neither did he ever see the complainant with a swollen cheek. He was only informed of these rape incidents when they were at the police station in Ramakonopi.

AD CONVICTION

[14] It is trite law that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. If his version is reasonably possibly true, he must be acquitted.

[15] It is common cause that the gynaecological area of the complainant confirms that a blunt object penetrated her vagina. The question the Court *a quo* had to decide, was whether there was sufficient proof that it was the appellant who had penetrated the complainant.

[16] In considering the judgment of the Court *a quo*, this Court has been mindful that a Court of Appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.[1]

[17] In the matter of *Stellenbosch Farmer's Winery Group Ltd and Another v Martel & Cie SA and others* [2] the Supreme Court of Appeal held that:

'The technique generally employed by the courts in resolving factual disputes of this nature may be conveniently summarized as follows: To conclude on the disputed issues, a court must make findings on (a) credibility of the factual witnesses, (b) their reliability and (c) the probabilities. As to (a) the court's findings on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as:

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[1] See *S v Francis* 1991 (1) SACR 198 (A) at 198 J – 199A and *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 E-F

[2] *Stellenbosch Farmer's Winery Group Ltd and Another v Martel & Cie SA and others* 2003 (1) (SA)11(SCA)

(i) The witness's candour and demeanour in the witness box,

(ii) His bias, latent and blatant,

(iii) Internal contradictions in his evidence,

(iv) External contradictions with what was pleaded on his behalf or with established fact or with his own ..... statements or actions,

(v) The probability or improbability of particular aspects of his own version,

(vi) The calibre and cogency of his performance compared to that of other witnesses testifying about the event or incident.

As to (b), a witness's reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above; on opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c) this necessitates an analysis and improbability of each party's version on each of the disputed issues. In the light of (a), (b) and (c), the court will then, as a final step determine whether the party burdened with the onus of proof has succeeded in discharging it'.[3]

[18] Although the complainant maintains that it was the appellant that raped her, this Court has serious concerns regarding the credibility, reliability and probability of her version. The evidence of the complainant's grandmother is equally concerning. This is based on the following:

(a) The complainant and her grandmother both refer to two incidents of rape. If indeed the complainant was raped twice, mention of these two separate rape incidents would have been in both the statements of the complainant and the grandmother. This would have resulted in the State charging the appellant for two counts of rape and not only one. The failure of the State to charge the appellant for two counts of rape implies that either the State made a mistake in charging the appellant for only one count of rape, or alternatively, it implies that this second count of rape was not included in the statement of the complainant or her grandmother and was accordingly fabricated. At no stage prior to the conviction did the State mention that it was aware of two counts of rape prior to leading the evidence against the appellant. There are contradictions between the complainant and her grandmother as to the exact dates and locations when these rapes occurred. The complainant testified that the first rape, for which the appellant is charged, happened in Magagula. The second count of rape occurred in Mpumalanga. The complainant was herself uncertain whether the second rape incident happened in 2014 or 2015. The evidence of the complainant's grandmother contradicts the complainant, in that she states that the second incident of rape happened at Magagula

[3] Ibid paragraph 5

and at this time, the complainant was staying with her and not with the appellant or the mother.

(b) The complainant contradicted her own evidence. She testified that when the incident of rape happened, her younger sister had not yet been born, yet later, she changed her version to state that her younger sister was born and was actually with the neighbour. The complainant testified that the incident happened in December 2014 whilst she was still staying with the appellant and her mother. However, the evidence of her grandmother states that the complainant came to stay with her during the middle of the year, however, she could not remember which year that was. There is accordingly uncertainty between the evidence of the complainant and her grandmother as to when the complainant went to live with her grandmother and when these rapes occurred.

(c) The complainant testified that her grandmother saw her crying whilst watching television and asked her why she was crying and that is when she told her grandmother that the appellant had raped her. The grandmother on the other hand testified that the complainant was not crying and out of the blue, whilst they were watching television, the complainant said '*This lady is not telling lies when she says she is raped*'. The complainant initially testified she reported this rape to her grandmother in 2018, later, she changed her version and said it was in 2017. The grandmother testified the complainant reported the rape to her in 2018, later she stated she cannot remember the year.

(d) This Court finds the behaviour of the grandmother very odd. When the complainant told her she had been raped, the grandmother did nothing. In fact, she did not enquire about any details of the alleged rape, stating that she initially did not believe the complainant when the report was made. Furthermore, she states she told the complainant's mother only two weeks after the complainant had told her she was raped. The evidence of the grandmother is sadly very confusing and unreliable.

(e) The complainant states the rape in Magagule happened in 2014, yet she tells no one for three years. This Court is aware that we are dealing here with a daughter who has allegedly been raped by her biological father and who according to the complainant's version was threatened that she would be killed if she told anyone. However, according to the complainant's evidence, after the rape occurred in Magagule, she stood up, got dressed and went out to look for her mother. Even though she says she had been threatened not to tell anyone, she still went to look for her mother. Neither the State nor the defence asked why the complainant went out to look for her mother. It is clear that the complainant was not living with the appellant for quite some time before she reported the rape incident to the grandmother, accordingly, it is strange that she did not

tell anyone after she left the appellant's home. She was clearly much freer to report this. The complainant's reason for reporting the rape incidents is because she could no longer concentrate at school. This report was made three years after the rape and one would have expected the complainant to already have had problems of concentration immediately after the first incident of rape occurred and not only three years later.

(f) The complainant states she sustained a swollen cheek when the appellant assaulted her with an open hand and that M[redacted] saw her swollen cheek. According to M[redacted], he never saw the complainant with a swollen cheek. Neither did he ask her as to why she had a swollen cheek and neither did she tell him that she had sustained the injury as a result of fighting with someone in the street.

(g) When the complainant was assessed by nurse Phoshoko, she told the nurse that she was fourteen years old and gave her date of birth. In the judgment of the Court *a quo*, the Court changed the age of the complainant at the time of the nurse's assessment, by stating that the complainant must have been twelve years old at the time she was raped. The Court *a quo* changed this age without the complainant, her grandmother or the nurse being questioned fully about whether the child might have made a mistake as to the actual age when she was examined. The nurse testified that the complainant was born on 25 February 2002 and she was examined on 13 July 2017, therefore, there is an error in the Court *a quo's* assumption that the complainant was twelve years old at the time the nurse examined her, in fact it is more likely that she was already fourteen or possibly fifteen years old.

(h) Although it is common cause that the complainant has three clefts in the hymen, which is suggestive of sexual penetration, there is a serious aspect which was totally ignored by both the State and the Court *a quo*. This aspect pertains to the version that was put to the complainant during cross-examination that she had already been taken by her mother to a doctor when she was seven years old and that a foreign object was found in her vagina [4]. This incident arose as the mother of the complainant had seen the complainant scratching her vagina. The foreign object was referred to as being a piece of rope. In regard to this version, the complainant stated '*she recalled.*' [5] Later during cross-examination, she states that this did not happen when she was seven years old, it happened when she reported this incident of rape to her mother. Yet shortly thereafter, on a question from the appellant's legal representative that, '*Yes my instructions are that at the age of seven after your parents noticed that you were scratching your vaginal area, your mom checked you and found a foreign object inside your vagina. And*

[4] Transcript page 137 line 11-14
[5] Transcript page 137 line 15

then you were taken to the doctor thereafter '[6], the complainant answered '*I do not recall*'.[7] It is clear that during the examination by nurse Phoshoko, no rope was found, therefore, this rope must have been found at some other time. During the re-examination, the State should have obtained further clarity in this regard, yet, no such questions were asked. This version of a previous penetration, should have been followed through by the State, by calling the mother of the complainant to verify or dispute such an occurrence having existed when the complainant was seven years old. In addition, in the absence of the State calling the mother, the Court *a quo* should have called the mother in terms of s186 of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977') to verify or dispute such a version. The importance of not clearing up this version posed by the appellant, creates the possibility that nurse Phoshoko may have seen clefts which had healed from an earlier incident. In the absence of any evidence to clarify the contrary, this Court cannot come to the only reasonable conclusion that it is the appellant who penetrated the complainant. In fact, This Court may draw a negative inference from the failure of the State to call the mother of the complainant to clarify this.

[19] Although the sexual history of the complainant in terms of s227 of Act 51 of 1977 is inadmissible, the fact is that at the time this complainant testified, she was sixteen years old and already had a baby that was ten months old. If the age of this complainant was indeed fourteen when the nurse examined her, it means that the complainant could already have been sexually active.

[20] Section 277 (2) and (5) of Act 51 of 1977 states that:

'(2) No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience of conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless-

(a) The court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or

(b) Such evidence has been introduced by the prosecution....

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[6] Transcript page 138 line 6-9

[7] Transcript page 138 line 11

(5) In determining whether evidence or questioning as contemplated in this section is relevant to the proceedings pending before the court, the court shall take into account whether such evidence or questioning-

(a) is in the interests of justice, with due regard to the accused's right to a fair trial;

(b) is in the interests of society in encouraging the reporting of sexual offences;

(c) relates to a specific instance of sexual activity relevant to a fact in issue;

(d) is likely to rebut evidence previously adduced by the prosecution;

(e) is fundamental to the accused's defence;

(f) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or

(g) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue.' [my emphasis]

[21] This Court is privy to the necessity of preserving a complainant's dignity and privacy in a rape case, however, when such a glaring fact is apparent, that this complainant was sexually active at such a young age, then this should have been a concern for the State, the defence and the Court *a quo*, to have enquired into what the circumstances were that led to the complainant having given birth to a baby that was already ten months old. There is no suggestion that the appellant was the father of this baby, therefore who the father of this baby was and how long the complainant was sexually active, prior to the examination by the nurse, remains unknown. This was totally ignored by the State, the defence and the Court *a quo*. In the judgment of the Court *a quo*, the evidence of nurse Phoshoko is summed as follows:

'*Upon gynaecological examination, she indicated that she was sexually active. She found that hymen was irregular. She found three clefts at two, eight and six o'clock area. The vagina admitted two fingers. Because there were clefts, it showed that she had been penetrated. The hymen was no longer round and smooth*'. [8]

Only later in the judgment does the Court *a quo* state:

'*Court wishes to correct one aspect. Under evidence of sister Phoshoko, the medical practitioner. Court indicated that she testified that the child was active, sexually active. That is incorrect. The child was not sexually active at that stage.*'[9]

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[8] Transcript page 253 line 21-25 and page 254 line 1.

[9] Transcript page 255 line 8-11

This is totally incorrect. The only reference to sexual activity is the nurse's evidence who states that it is the complainant who '*indicated that she was not active, sexually*'. [10] At no other stage during the leading of the evidence in chief or during the cross examination of nurse Phoshoko was anything asked about the sexual activity of the complainant and neither did the nurse add anything further about this.

[22] The failure to enquire as to when the complainant started being sexually active, specifically because she had given birth to a baby, would have been necessary. Section 227 of Act 51 of 1977 should not be interpreted to supress evidence which may ultimately create doubt as to an accused's guilt. In fact, the Constitutional right to a fair trial dictates that such questions should be asked by the State to exclude the possibility that someone else did not penetrate the complainant, thereby exculpating the appellant. The State failed during the re-examination of the complainant to clear up the possibility that there was a penetration of the complainant's vagina at the age of seven years. The State also failed to ask the grandmother about this and did not act in the interests of justice by failing to call the mother to verify whether there was any veracity to the version of the appellant that some penetration to the complainant's vagina occurred at the age of seven years old. Such an oversight on the part of the State is a serious misdirection in the handling of this rape trial and should have created doubt in the Court *a quo's* mind as to the guilt of the appellant.

[23] In the matter of *S v Teixeira* [11] the Supreme Court of Appeal held that:

'Evidence of a single witness can only be relied upon if it is clear and satisfactory in all material aspects. Further one should not lose sight of the fact that the court is entitled to convict on evidence of a single witness if it is satisfied, beyond reasonable doubt, that such evidence is true.' [12]

[24] This Court is not convinced that the complainant's evidence was clear and satisfactory in all material respects.

[25] The version of the appellant and his son was not broken down. The appellant states he had a good relationship with the complainant before and after this allegation was made against him. The version of the appellant that the complainant had already moved out of his house in 2013 was not broken down by the State. The complainant testified that '*everything was good Your Worship, he liked buying us things and when we request money from him, he would give us*'.[13] The complainant was never asked if the relationship worsened after this

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[10] Transcript page 181 line 5
[11] *S v Teixeira* 1983 SA 755(A)
[12] Ibid page 761

allegation of the rape surfaced and neither was it ever put to the appellant by the State that the relationship with between him and the complainant worsened at any stage. The evidence of the complainant's grandmother was that after the complainant came and stayed with her, the complainant would visit the appellant and enjoyed a very good relationship with the appellant right up until the incident of rape was reported in 2017.

[26] Although the appellant could not explain how the complainant could have sustained the injuries noted in the medical report or why the complainant would want to falsely implicate him, the matter of *S v Ipeleng* [14] held that:

'It is dangerous to convict an accused person on the basis that he cannot advance any reasons why the State witnesses would falsely implicate him. The accused has no onus to provide any such explanation. The true reason why a State witness seeks to give the testimony he does is often unknown to the accused and sometimes unknowable... It is for these reasons that the Courts have repeatedly warned against the danger of the approach which asks: 'Why should the State witnesses have falsely implicated the accused?'[15]

[27] In the matter of *S v MB* [16] the Supreme Court of Appeal held that:

'The approach, that accused persons are necessarily guilty because the complainants have no apparent motive to implicate them falsely and they are unable to suggest one, is fraught with danger'.[17]

[28] In the matter of *S v Shackell* [18] the Supreme Court of Appeal held that:

'A Court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the Court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. It cannot be rejected merely because it is improbable, it can only be rejected on the basis of inherent improbabilities if it can be said to be so improbable that it cannot be reasonably possibly true'.[19]

[29] The only mention made by the Court *a quo* in respect to the appellant's version is the following:

'*The accused raised a bad denial. Now under cross-examination in an endeavour to adapt his testimony, he avers that he had never been left alone with the complainant, I agree with counsel for the State that it*

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[13] Transcript page 119 line 16-18
[14] *S v Ipeleng* 1993 (2) SACR 185 (T)
[15] Ibid page 190
[16] *S v BM* 2014 (2) SACR 23 (SCA)
[17] Ibid paras [25]
[18] *S v Shackell* 2001 (2) SACR 185 (SCA)
[19] Ibid page 288 paras e-f

is highly improbable. This is his own child.' [20]

[30] The Court *a quo* never dealt fully with the improbability of the appellant's version. The laconic reasoning and conclusion in the judgment as to why the appellant should be found guilty is not sufficient.

[31] As regards M[redacted]'s evidence, there is also no reason to fault his evidence. He appeared consistent in his version. All that the Court *a quo* dealt with in rejecting his evidence is that he lied about his age. Nothing else was mentioned by the Court *a quo* as to the fact that this witness was adamant that he was never told by the complainant that she had been slapped or that he never saw her swollen face. No version was put to him by the State why he would want to protect his father for allegedly committing such a heinous crime. Accordingly, his evidence should have been accepted as the truth.

[32] After a thorough reading of this record, this Court has doubt as to the correctness of the Court *a quo's* factual findings. I find there is misdirection which warrants this Court disturbing the findings of fact and credibility that were made by the Court *a quo*. The State did not prove the guilt of the appellant beyond reasonable doubt, and the Court *a quo* incorrectly rejected the version of the appellant as not being reasonably possibly true.

[33] Due to this Court setting aside the conviction, naturally the sentence falls away as well.

[34] In the premises I make the following order;

The appeal in respect to conviction is upheld. The conviction and the sentence are set aside.

D DOSIO

JUDGE OF THE HIGH COURT

I agree

AK RAMLAL

ACTING JUDGE OF THE HIGH COURT

[20] Transcript page 261 line 16-20

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 05 September 2022

Appearances:

On behalf of the Appellant	:	Adv. T.P Ndhlovu
On behalf of the Respondent	:	Adv. M.J. Morule

Date Heard	:	29 August 2022
Handed down Judgment	:	05 September 2022