

REPUBLIC OF SOUTH AFRICA



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

APPEAL CASE NO: A174/2015

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u> <u>YES/NO</u>
(3)	<u>REVISED.</u>
.....
	DATE
SIGNATURE	

In the matter between:

SITHOLE BANNE

APPELLANT

And

THE STATE

RESPONDENT

MABESELE J ET SIDWELL AJ

J U D G M E N T

MABESELE J:

[1] The appellant was convicted in the regional court on a charge of rape, read with the provision of section 51(1) of the Criminal Law Amendment Act.¹ He was sentenced to life imprisonment. Exercising his automatic right of appeal², the appellant now appeals against his conviction and sentence.

[2] The appellant contends that the court below should have found that the evidence against him has failed to prove sexual intercourse between the complainant and him.

[3] The appellant was convicted on the evidence of the complainant and three witnesses, including a professional nurse who examined the complainant.

[4] The complainant was 11years old when she was raped. She was doing grade 6 at school.

[5] The complainant testified that on 20th July 2013, around 19:00, her mother asked her to go to the place of residence of the appellant to look for her brother. The appellant, according to the evidence on record, stays a street away from the residence of the complainant. The appellant and the family of the complainant had a close relationship. As a result of this relationship the complainant regarded the appellant as her uncle.

¹_105 of 1997

²_Section 309(1)(a) of the Criminal Procedure Act, 51 of 1977

[6] The complainant testified that upon arrival at the residence of the appellant, the latter informed her that her brother, Tebogo, did not come to his residence. At the same time the appellant pushed her on the bed, took off her clothes and *raped* her, by inserting his penis into her vagina and made movements on top of her. Thereafter the appellant told her to put on her clothes and to not tell anyone about the rape incident.

[7] She went back home and was scared to tell anyone. She later on told aunt Elisa that the appellant raped her. She was not exactly sure when she related the story to her aunt. After the aunt had received the news she informed her mother and both of them took her to the police station and subsequently hospital.

[8] During cross-examination the complainant testified that on the day of the incident she had knocked off from school at 14:00. Since it was common cause that the 20th of July was a Saturday the complainant was asked whether she attended school on Saturday. She responded that she never attended school on Saturday. When she was asked at what stage did the appellant assault her, she said: "that was the time he *raped* me"

[9] The mother of the complainant testified. She confirmed the version of the complainant that the complainant went to the place of residence of the appellant to look for her brother, on her instruction.

[10] The mother testified that the complainant came back home alone. Her brother, Tebogo, came home late that night. The mother said that after the complainant had come back from the residence of the appellant she never went to school from Monday to Wednesday. She was hiding her books. She did not find out from the complainant the reasons for not going to school. Instead, she assaulted her. On 24th July 2013 she called her friend, Elisa, and requested her to ask the complainant the reason for not going to school. Elisa took the complainant to her place of residence for an interview. At approximately 19:00, Elisa came back and reported to her that the complainant informed her that she was raped by the appellant. On 25th July 2013 she took the complainant to the police station and hospital. She was accompanied by Elisa.

[11] During cross-examination the mother was asked whether the complainant said anything to her when she came back home from the residence of the appellant. She responded that the complainant never said anything. It stands to reason that she never enquired from the complainant about the whereabouts of Tebogo. This is despite the fact that she had asked the complainant to go and look for Tebogo. She said she has never confronted the appellant about the rape incident although she had a close relationship with him.

[12] Ms Elisa Ramola testified that indeed she was requested by the mother of the complainant to enquire from the complainant why she was not going to school. She interviewed the complainant privately. During the interview the

complainant informed her that the appellant inserted his penis into her vagina. The complainant did not tell her the date or day on which the rape took place. She, too, did not ask the complainant about the day on which the incident occurred. After the interview she went to the mother of the complainant and informed her about the incident.

[13] Ms Helen Ntshaube, a professional nurse, confirmed the contents of the J88 which she had prepared after she had performed a gynaecological examination on the body of the complainant. The examination was performed on 25th July 2013. During the examination the nurse found that the hymen was irregular and there were old injuries in the vagina. Her conclusion was that the injuries in the hymen were consistent with vaginal penetration.

[14] The appellant took the stand. He testified that on 20th July 2013 he went to the shebeen at 18:00 and came back at the 22:00. He testified that the complainant's brother, Tebogo, frequents his place of residence. On one occasion Tebogo stole his cellphone. He confronted the complainant's mother about this, on the Sunday the 21st. He suspects that the complainant's mother has laid the charges against him because he confronted her about the behaviour of her son.

[15] The magistrate was alive to the fact that: (i) the onus rests on the state to prove its case beyond reasonable doubt in order to secure the conviction,(ii) the complainant was a single witness, (iii) cautionary rule is applicable. The

magistrate correctly stated that 'the court must try to find safeguards against the wrong conviction'.

[16] The law allows a Court to convict on the uncorroborated evidence of a single witness provided that the evidence is clear and satisfactory. In considering such evidence the Court, as stated in R V Mokoena,³ should investigate closely both the credibility of the witness and the reliability of the evidence given by that witness. If the evidence shows that the witness might have a bias against the accused or a motive for giving false evidence against the accused that would be a very important factor. Even if the witness appears to the Court to be an honest witness, the accuracy of the witness' evidence must be closely examined.

[17] The complainant testified that on the day of the alleged incident, being 20th July 2013, she had knocked off from school at 14:00. It was brought to her attention that the 20th July 2013 was a Saturday and she was asked whether she attended school on Saturday. Her answer was 'no'. It stands to reason that since the complainant attended school on the day of the alleged incident and does not attend school on Saturday, she could not have visited the residence of the appellant on Saturday 20th July 2013. The mother of the complainant and her friend, Elisa Ramola, were not helpful in this regard. When the prosecutor asked the mother of the complainant whether she did ascertain from the complainant about the date on which the complainant was raped the mother responded as follows: "That I did not get your worship, as to when she was raped, because she was scared to tell me" Elisa Ramola

³_1932_O.P.D at p.79

responded to the same question as follows: "She did not tell me about the date your Worship..."The following question was asked: Did you ask if this happened the day that she told you(about rape) or a few days or few months or few weeks?' Ramola responded as follows:

'I did not ask her that'

[18] The complainant, according to the mother, never said anything to her on her return from the residence of the appellant. A few days thereafter, the mother assaulted the complainant for not going to school and without first enquiring from her why she was not going to school. After the complainant was assaulted she subsequently informed Elisa Ramola that she was raped by the appellant. The question that arises is whether the complainant told Ramola the truth or was influenced by the assault on her.

[19] Considering her age, it would not be expected of her to have knowledge that what happened to her constituted rape. The complainant in her evidence-in-chief and cross-examination continually accused the appellant of 'rape'. What follows here-under transpired in Court.

Prosecutor : 'Do you know the reason why you went to the police station to open a case ?.....Yes'

Prosecutor : Can you tell us that reason, can you tell us what happened ?....It is because Malume Banne, uncle Banne raped me'

Prosecutor : 'Okay proceed'....Your Worship after undressing my clothes he raped me'

Defence counsel : '.....at what stage did he assault you with open hands?'...that was the time he raped me.

[20] The answers which are stated in paragraph 19 above, with reference to the word 'rape', creates an impression that the complainant might have possibly been coached, unless she had explained how she got to know that what happened to her was rape.

[21] The professional nurse performed examination on the body of the complainant on 25 July 2013. Her finding that the complainant was sexually penetrated was not disputed. However, her finding insofar as it relates to the old injuries on the hymen should not have advanced the case of the complainant against the appellant. This is because there is no clear evidence on the date on which the offence was committed.

[22] The magistrate, in his judgment, was of the view that the complainant made a very good impression to the Court, her evidence was short and sweet and she withstood the cross-examination. The question is whether her evidence was clear and satisfactory. As I have stated earlier, the complainant has failed to elaborate and clarify certain issues which were material in her evidence. In particular, the day on which the alleged offence was committed.

It seems to me that the complainant was treated as an adult during the trial. She was not assisted, either by the prosecutor or magistrate, to present her evidence clearly and satisfactorily. Here are the reasons: First, the complainant testified that she went to look for her younger brother at the residence of the appellant. She was not asked to tell the Court whether she reported to her mother that she found the brother or not, and what happened further. The response would probably enable the Court to determine, during that early stage, whether something sinister happened to the complainant. Second, it was brought to the attention of the complainant that the day of the 20th July 2013 which she alleged she was at school and later at the residence of the appellant, was a Saturday. Following this assertion, the magistrate should have asked the complainant to explain why she attended school on Saturday, instead of him asking the complainant whether she attends school on Saturday or Sunday, thereby suggesting to the complainant that she could not have visited the residence of the appellant later that Saturday because she could not have gone to school on Saturday. Third, the complainant should have been asked whether she did tell Elisa Ramola about the day and date on which she was sexually abused and if not, why? She should have been asked whether the assault on her by the mother did not influence her to name the appellant as a culprit.

[23] My view is that when the minor testifies in Court the presiding officer has a duty to ensure that a minor presents evidence fully and in a clear and satisfactory manner. The minor should be assisted by being asked to clarify the material issues which he or she has testified about.

[24] The mother of the complainant, too, has failed the complainant. Had she asked the complainant about the whereabouts of her younger brother, on her return from the residence of the appellant, she could have probably detected something sinister from the appellant and investigated the matter further. Further investigation at that early stage could have probably assisted the nurse to detect fresh tears on the vagina of the complainant. Alternatively, the DNA of the appellant, having been taken earlier, could have resolved the dispute. For all these reasons the appellant is given the benefit of doubt that he committed rape. In the result, the appeal succeeds. Accordingly, the conviction and sentence are set aside.

M.M MABESELE
(Judge of the High Court Gauteng Local Division)

I agree

G.Y.SIDWELL
(Acting Judge of the High Court Gauteng Local Division)

Appearances

On behalf of the Appellant	: Adv Mosang
Instructed by	: Legal Aid Board S.A
On behalf of the Respondent	: Adv. Nel
Instructed by	: Director of Public Prosecutions
Date of Hearing	: 6 November 2023
Date of Judgment	: 13 November 2023