IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- REPORTABLE: **NO**
- OF INTEREST TO OTHER JUDGES: **NO**
- REVISED

2017-10-17
DATE

SIGNATURE

CASE NO: A184/2017

In the matter between:

MOSES MOLATHA **APPELLANT**

and

THE STATE

JUDGMENT

VUMA AJ

[1] This is an appeal following the arraignment of the appellant in the North West Regional Court, held at Klerksdorp, on two counts of contravening section 3 of Act 32 of 2007 read together with the provisions of section 51(1) of Act 105 of 1997, namely:

- Count 1: Attempted rape; and
- Count 2: Rape.

[2] Subsequent thereto the appellant was convicted of both counts and then sentenced to 6 (six) years in respect of count 1 and to 25 (twenty five) years in respect of count 2. The appellant's effective sentence was a period of 25 years as the sentence of 6 years imprisonment imposed in respect of count 1 was ordered to be served concurrently with the sentence of 25 years imposed in respect in respect of count 2.

[3] The court *a quo* refused the appellant leave to appeal. However, upon petitioning the Judge President, leave to appeal in respect of both sentence and sentence was granted.

AD CONVICTION:

[4] What both parties submitted as being common cause is the fact that the complainants were indeed violated as they described in their evidence but that from the defence, the issue in dispute was whether the appellant was correctly identified as the perpetrator of the said offences as he denied any involvement therein.

[5] In respect of count 1, Thobeka Thamanyana was the complainant who was almost six years old at the time of the incident. *Via* an intermediary, she testified that the appellant was the person who had sent both herself and Palesa, the complainant in respect of count 2, to go buy him cigarettes. She further testified that upon their

return to the appellant's house he did "bad things" to her and Palesa and that throughout the said incident, Palesa was also present in the appellant's bedroom.

[6] In respect of count 2, Palesa Lekopa, who was almost six years old at the time of the incident also testified, *via* an intermediary, that the appellant had sent her and Thobeka to go to the shop to buy him cigarettes. Upon herself and Thobeka returning to the appellant's house, he undressed Thobeka first and raped her, though Palesa herself did not witness this incident as she was in the kitchen at the relevant time. After raping Thobeka the appellant then took her to the bedroom, undressed her and raped her also and also offered her 5Oc. She even identified the appellant in court.

[7] Nthabileg Thamanyana, the mother of Thobeka, was the third witness to testify. She stated that on 15 April 2009 a certain Ntombi's mother visited her house, after which Thobeka told her of the 'funny things' which the appellant did to her after she and Palesa were sent to buy cigarettes for him. She admitted knowing the appellant prior to the alleged incident and that there were no issues between herself and the appellant prior to the alleged incidents. She stated that Thobeka never informed her of any such rape incidents before Ntombi's mother's visit to her house. Under cross-examination she denied that she ever loaned the appellant R2000-00, the balance of which stood at R300-00. After a protracted denial, she stated that all the appellant was owing her Ladies club was R160-00 only. She further denied ever threatening the appellant anyhow due to the alleged unpaid loan amount. She testified that upon enquiring from Palesa the said incidents' occurrence as alleged by Thobeka, Palesa just kept quiet. The matter was then reported to the police and Thobeka was taken to a medical doctor for examination.

[8] Tseleng Lekopa is Palesa's mother who testified that upon being called to Thobeka's home by the latter's mother, she went there with Palesa. When Palesa was asked if the rape incidents occurred as Thobeka had alleged, Palesa remained quiet but upon arriving back at their home, the latter confirmed same and they then

proceeded to report the incidents to the police and Palesa was then taken to a medical doctor for an examination.

[9] By consent with the defence, the state handed in a J88 medico-legal report in respect of both complainants, wherein the examining doctor had concluded that there were signs of possible penetration in respect of Palesa.

[10] In his defence the appellant testified and did not call any witnesses. He denied the allegations against him, saying it was a fabrication by Thobeka's mother who held a grudge against him due to unpaid loans by him which had since created a dispute between them.

[11] The grounds of appeal raised were that the Court *a quo* erroneously convicted the appellant as a result of the following misdirections:

11.1 By finding that the State has proved its case even though the two complainants, being single and child witnesses, materially contradicted each other;

11.2 By not finding that the version of the appellant is reasonably possibly true.

[12] The appellant further submitted that since the complainants were child witnesses, their evidence should be treated with caution.

[13] The nub of the submissions on behalf of the appellant was that the complainants who should be treated as single witnesses since, from their evidence, it can be concluded that there is doubt that the one complainant witnessed the other's alleged rape. It was further argued that their evidence was not satisfactory in material respects and further that same is negated by contradictions and improbabilities

[14] The appellant's counsel cited the following as some contradictions:

- Palesa testified that she has been at the house of the appellant before the day of the incident (Record p 42 line 20-21)
  - ➢ Palesa later testified that she has never been to the house of the appellant before the day of the incident (Record p 48 line 22-24)
- Palesa testified that the appellant gave them R5-00 to buy cigarettes (Record p 53 line 3-5)
  - ➢ Thobeka testified that the appellant gave them R0-50 each to buy two cigarettes (Record p120 line 2-7)
- Palesa testified that after buying the cigarettes they found the appellant seated under a tree (Record p 54 line 3-8)
  - ➢ Thobeka testified that when they came from the shop with the cigarettes, the appellant was no longer outside, but inside his house (Record p 120 line 25 – p 121 line 5)
- Palesa testified that Thobeka was not present, but in the kitchen doing dishes when bad things were being done on her (Record p 55 line 5-21)
  - ➢ Thobeka testified that she was present and she saw when the appellant did bad things to Palesa (Record p 115 line 13-18)
  - ➢ Thobeka testified that she never went to the kitchen alone that day (Record p 100 line 10-11).
- Palesa testified that Thobeka told her what to testify in Court (Record p 51 line 6-7)
  - Thobeka denied that she told Palesa what to testify in Court (Record p 125 line 10-12)
- Palesa testified that after the appellant climbed on Thobeka, he climbed on her (Record p 45 line 2-3)
  - Thobeka testified that the appellant first did bad things to Palesa and then to her (Thobeka) (Record p 122 line 18-21).

[15] With regard to improbabilities, the following was cited on behalf of the appellant:

- That the complainants, after being violated, would go and play in the street before they went home (Record p 57 line 15-17)

[16] With regard to the J88, it was submitted that the appellant's conviction on both counts on the strength of a J88 whose author or compiler was not even called by the state to testify as to what he, *inter alia*, meant when he came to the conclusion that there was prior penetration, raised some doubt whose benefit must be for the appellant.

[17] It was further submitted that the versions of events placed before the court by the complainants were conflicting and that it cannot be that both are true. It was lastly argued that in the premise the version of the appellant is reasonably possibly true and that his appeal against both his conviction and sentence be upheld.

[18] In amplifying its argument, the appellant's counsel cited the matter of ***S v ML 2016 (2) SACR 160 (SCA)*** where the Court held the following at paragraph 7:

> "*In the present case where the complainant is a very young child and the only witness implicating the appellant, her evidence must not only be treated with caution, but a degree of corroboration is required to reduce the danger of relying solely upon her evidence to convict the appellant.*"

[19] Counsel for the appellant further cited the matter of ***S v Mahlangu and Another 2011(2) SACR 164 (SCA)***, where the Court held the following at paragraph 21:

> "[21] Section 208 of the Criminal Procedure Act 51 of 1977 provides that:
>
> 'An accused may be convicted of any offence on the single evidence of any competent witness.'

The court can base its finding on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration."

[20] The state, on the other hand, conceded that the complainants were not really forthcoming about the incidents given the humiliating nature of rape and that regardless, they had no motive whatsoever to fabricate lies against the appellant.

[21] The state again conceded that the evidence of the witnesses had contradictions but argued that regard must be had that it is child witnesses that are being dealt with. The state therefore argued that under the circumstances the appeal against both the conviction and sentence must be dismissed.

[22] *In casu*, what needs to be established is whether the state has managed to prove its case beyond reasonable doubt that the court *a quo* had convicted the right perpetrator. The question whether or not the complainants were indeed sexually violated it would seem, is common cause between the parties, save for when the prior incidents occured, if at all, and if so, who the perpetrator was.

[23] Throughout his evidence the version of the appellant was that it is a case of mistaken identity and further that the mother of Thobeka fabricated these allegations to get back at him due to unpaid loans, which version she denied. It is trite that it is the state that bears the onus to prove its case beyond reasonable doubt and that all that an accused has to do is to tender a version which is reasonably possibly true.

[24] Having regard to some of the contradictions and improbabilities enumerated above, I am persuaded that the state failed to prove on the balance of probabilities that the appellant is indeed the perpetrator of the alleged incidents. This I say because I find it very opportunistic that precisely on the day on which Thobeka was

violated, coincidentally Ntombi's mother visits with Thobeka's mother being the bearer of similar news but allegedly in respect of somebody else. Coupled to that is also how Thobeka's mother, 'intuitively' encourages her kids to be open with her in the event similar incidents beset them and how in a case of a million in one, so to speak, her daughter raises her hand and say "speak of the devil, I have been violated in a similar manner, today!".

[25] It is for these reasons that I find that these fortuitous series of events do raise an eyebrow somewhat. Furthermore, I find that it is not only the complainants' version which is fraught with contradictions, even Thobeka's mother. Repeatedly she denied ever being owed any money by the appellant, yet ultimately she conceded and said yes, the appellant was owing her ladies club an amount of R160-00 following a loan he was granted. This on its own goes to the heart of the credibility of her entire version, ultimately that of the complainants. Thobeka's mother's concession in this respect gives traction to the appellant's version.

[26] In ***S v Sauls and Others 1981 (3) SA 172 (A)*** it was held that '*caution in the context means applying common sense to assess whether the truth has been told and the evidence is trustworthy and that caution cannot displace common sense. Credibility must be assessed 'in the light of all the evidence'*.

[27] The question is, on the state's own version, can be said that beyond reasonable doubt the state has proved its case? I am inclined to agree with appellant's counsel that the complainants' versions are contradictory and mutually destructive in material respects that it stands to be rejected. Without even considering the appellant's version, the complainants' versions are not reconcilable *inter se* and therefore the court *a quo* ought to have rejected same and returned a verdict on guilty on behalf of the appellant.

[28] In the result I make the following order:

1. The appeal is upheld.

2. Both the conviction and the sentence imposed are set aside.

L. Vuma

Acting Judge of the High Court

Gauteng Division, Pretoria

I agree

N Janse Van Nieuwenhuizen

Judge of the High Court

Gauteng Division, Pretoria

Heard on: 10 August 2017
Judgment delivered on August 2017
Appearances:
For appellant: Adv H Steynberg
Instructed by: Pretoria Justice Centre
For Respondent: Adv P.W Coetzer
Instructed by: Office of the DPP