



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA**

CASE NO: A266/22

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

In the matter between:

JOHN JOHANNES KHOZA

Appellant

and

THE STATE

Respondent

JUDGMENT

MKHABELA AJ:

Introduction

[1] This case involves the ultimate betrayal of a trust relationship, allegedly committed by a father against his 9 year old son who had accused him of rape that allegedly happened when his son visited him at his home in Heidelberg. The case is

before us pursuant to the leave to appeal granted by the regional court in respect of the conviction of the appellant.

The Facts

[2] The appellant was convicted of one count of rape¹ in the regional court, Greylingstad, Heidelberg. He was sentenced to twenty years' imprisonment. The regional court refused him leave to appeal against sentence but granted him leave to appeal against his conviction.

[3] The events giving rise to the conviction can be stated briefly. The appellant lives alone in his house on which he sells alcohol. On or about 16 December 2016, his son who is the complainant visited him at his house and both of them slept in the same room and at the same² bed. The complainant testified that the appellant undressed him, closed his mouth slapped him on his face and then penetrated him in his anus with his penis without using a condom. The complainant then reported the rape incident to the appellant's friend who then took him to his maternal's grandfather.

[4] On his arrival at his grandfather's place he then told his aunt whom he refers to as his sister about the rape incident. He was subsequently taken to the clinic by his grandfather after having told him about the rape incident where he was medically examined and the Police came to see him. He was also interviewed by a social worker who drafted a report which was admitted into evidence by agreement.

[5] The second state witness that testified was, Thenjiwe Lettie Mangena (Mangena), the complainant's aunt who told the court that the complainant told him that

¹ The conviction was in terms of Section 3 of the Criminal law Sexual Offences and Related Matters Amendment Act 32 of 2004 as amended read with the provisions of section 51(1) and part 1 of Schedule 2 of the Criminal Amendment Act 105 of 1997.

² The appellant gave two contradictory evidence in this regard, in his plea explanation, he informed the court that he slept in the room and in the same bed as there was no other bed. However, in his examination in chief he testified that he slept on the couch and the complainant slept on the bed.

his father raped him by penetrating him from behind and inserted his penis inside his anus. The grandfather was not at home when the complainant arrived at home and was later informed about the rape incident and subsequently took the complainant to the clinic. Mangena refuted the appellant's assertion that the complainant's family do not like the appellant since he was allowed to visit and the family also allows complainant to visit him.

[6] The third and last state witness was, Ms Rakgwati, a forensic nurse who was working with the nurse that examined the complainant but unfortunately had since passed away. She confirmed the contents of the medical report which was admitted into evidence by agreement. In particular, Rakgwati pointed out that the redness in the orifice must have been caused by "something that was inserted or put in at the hole of the anus".

[7] Rakgwati conceded in cross-examination that apart from the redness on the orifice under section 9 which was the section dealing with anal examination there were no other injuries that were marked. Furthermore Rakgwati accepted that the author of the medical report did not write any conclusion about the medical examination of the complainant. The state then closed its case.

[8] Two witnesses testified for the defence, the first was the appellant and his testimony is summarised as follows. The complainant was his biological child and he confirmed that the complainant had visited him on the relevant day on or about 16 December 2016. He went to bed after 02:00 am in the morning after having closed his liquor business and confirmed the complainant's version that he undressed him because his witness, being his neighbour, by the name of Thandi had told him that the complainant had pimples on his shoulders.

[9] The complainant testified further that the first time he noticed that the complainant had pimples was in court and that the complainant had slept on the bed and he slept on the couch. He also told the court that the complainant does not listen to him and he had observed this when the complainant was testifying in court. He also told the court that he suspected that it was the grandfather of the complainant that had influenced the complainant to lay a false charge against him.

[10] The next and last witness for the defence was Ms Thandi Maria Ngubeni (Ngubeni) and her evidence was very brief. She testified that the complainant had been visiting the appellant often and that anyone who would inform the court that the complainant visited the appellant once would be telling a lie.

[11] In closing argument the prosecutor contended that it had proven its case beyond all reasonable doubt in that the complainant testified in detail about how he was penetrated and his evidence was corroborated by the clinical findings as per the J88 report which showed redness on the orifice approximately 10 days after the incident. The prosecution contended further that the appellant's version that he was falsely implicated was farfetched and that his version of the number of visits on which the complainant had visited him was disputed by his main and only witness in the form of Ms Ngubeni.

[12] On the contrary, Mr Venter on behalf of the appellant contended that on the available evidence there should be doubt in the mind of the court as to whether the State had proven its case against the accused beyond any reasonable doubt and that the accused should be given the benefit of the doubt. He submitted that the complainant was lying about the rape since from the assessment report the complainant did not tell the social worker that he was raped.

[13] He submitted further that there was no medical evidence that the complainant was penetrated since the redness in the sketch markings on the J88 shows redness on an area below the anus. He emphasised that the medical officer who examined the complainant could not come to a conclusion and that Ms Rakgwati could not draw any conclusion since she is not the person who examined the complainant.

[14] He submitted that the contradictions about the number of times the complainant had visited the appellant are not material.

[15] The regional court found the complainant's evidence to be credible in that the complainant gave a detailed account of the sexual encounter and made an overall good witness and that his evidence was given in a straightforward manner and he was never hesitant in giving his answers in cross-examination.

[16] In addition, the regional court found that there was an explanation for the delay in reporting the matter since the complainant first told his father's friend about the rape who seem not to have done anything except to take the complainant to his grandfather some two days after the incident.

[17] The Magistrate observed that there was no internal contradiction in the complainant's evidence particularly in respect of the crucial aspects dealing with the sexual encounter. There were also no material contradictions present in the evidence of the complainant and that of Mangena.

[18] As to the lack of a conclusion in the medical report concerning the rape, the court took into account that the complainant was penetrated in the anus. The court also took into account that it was not in dispute that the examination took place a week after the incident.

[19] In the main the court was satisfied with the demeanour of the state witnesses and it found them to be reliable and credible witnesses and took into account that the evidence of a single and child witness should be approached with caution and referred to relevant authorities.³

[20] The court then evaluated the appellant's evidence and noted that acceptance of the state's case does not mean it is a sufficient reason to automatically reject the defence's version and that the appellant's version must be fully evaluated and if it is found to be reasonably possibly true, the appellant is entitled to be acquitted.

[21] The court then went on to note the following contradictions⁴ in the defence's case. firstly, that the appellant stated that the complainant visited him only once whilst the neighbour, Ms Ngubeni, testified to the contrary and asserted that the complainant had been visiting the appellant quite often. Secondly, the appellant's assertion that he was being falsely accused by referring to an incident that happened almost nine years ago was not sustainable. It is contradicted by the testimony of the aunt and his neighbour since the complainant was allowed to visit the appellant.

[22] The Magistrate found it odd that the grandfather would allow the complainant to visit the appellant and suddenly after all those years instigate a child to falsely implicate the appellant about rape the charge.

[23] Moreover, the court also took into account the contents of Exhibit C⁵ which recorded that the complainant was always hyperactive. However, his aunt indicated that

³ *S v Sauls and Others* 1981 (3) SA 172 (A) 180, was referred to by the Learned Magistrate who found that the complainant was a child witness and a single witness in respect of the sexual penetration incident. The Magistrate further appreciated that corroboration of a single witness evidence is not necessary but some other safeguards which eliminates the risk of conviction is required in such a way that before a Court could place reliance on the evidence of a single witness, such evidence must be clear and satisfactory in every respects.

⁴ As well as inconsistencies.

⁵ The assessment report compiled by the forensic social worker.

the mood of the complainant was that of a person who was looking tired when he arrived home.

[24] Ultimately, the regional court relied on Section 208 of the Criminal Procedure Act⁶ which provides that an accused person may be convicted on the evidence of any competent single witness and that there was no basis to find that the complainant was a liar and that the appellant's version is not reasonably possibly true and accordingly rejected it as false beyond any reasonable doubt. It then convicted the appellant on one count of rape.

Issues

[25] The issue that falls crisply for determination is whether the trial court committed a misdirection or an irregularity which would warrant a court of appeal to interfere with the trial court's factual findings.

The Law

[26] It is trite that a court of appeal should not on the basis of mere assumptions and in the absence of clear evidence find that a trial court has committed an irregularity⁷.

[27] The case law is replete with authorities to the effect that in criminal proceedings the state bears the onus to prove the guilt of the accused beyond a reasonable doubt.

[28] The accused's version cannot be rejected solely on the basis that it is improbable, but only once the trial court has found credible evidence that the explanation is false beyond reasonable doubt.⁸ The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal.⁹

⁶ Act 51 of 1977.

⁷ *State v Jackson* 1998 (1) SACR 470 (SCA) at para 9.

⁸ *S v V* (1) SACR 453 (SCA) 455b.

⁹ *S v Van der Meyden* 1999 (1) SACR 447 (W) (1999 (2) SA 79) at 448f-h.

[29] The case law is unambiguous that the *“correct approach is to weigh up all the elements which point towards the guilty of the accused against all those which are indicative of his innocence taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused’s guilt.”*¹⁰

[30] It is also well established in our law that the distressed condition of the complainant in a rape incident is clearly capable of amounting to corroboration¹¹ where this was required and such evidence was also admissible to show that sexual contact had taken place where this was denied.

Analysis

[31] Before this court the appellant’s attorney contended that the trial court misdirected itself in two respects. Firstly, that the trial court misdirected itself in relying on the complainant’s single evidence for which there is little corroboration. Secondly, that the trial court misdirected itself in finding that the appellant’s version could not be reasonably possibly true.

[32] In respect of the first ground, the trial court was alive to the fact that the complainant was both a single and a child witness and approached the evidence with the necessary caution as required.¹² In this respect the trial court found that the complainant’s behaviour was consistent with what one would expect of a person who has been sexually penetrated. In particular the complainant reported the incident the following day to the appellant’s friend who took him to his grandfather (albeit two days later).

¹⁰ *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 15.

¹¹ *S v Hammond* 2004 (2) SACR 303 (SCA) at 313-314.

¹² The Magistrate even relied on relevant authorities, in the case of *S v Sauls & Others* 1981 (3) SA 172 (A) at p 180.

[33] The evidence by the complainant that he had reported the rape incident the following day to the appellant's friend was not challenged in cross examination. The consequence of the failure to challenge that evidence is that it could not have been expected¹³ of the State to call the appellant's friend to corroborate the complainant's evidence.

[34] Furthermore, the appellant's contention that there was little corroboration overlooks the following undisputed evidence. Firstly, the complainant averred that he visited the appellant in December 2016 and slept with him in his bed. That evidence was corroborated by the appellant's assertion in his plea explanation that he slept with the complainant in the "*same bed as there is no other bed*".

[35] Secondly, the complainant asserted that the appellant undressed him and the appellant confirmed that evidence in his examination in chief even though the rationale for undressing the complainant was not satisfactorily explained. Thirdly, the complainant testified that he had never visited the appellant after the rape incident and the appellant confirmed that crucial evidence. The fact that the complainant had stopped visiting the appellant, who is his biological father whom he testified that he loved is consistent with his assertion that the appellant raped him. The complainant's decision not to visit his father after the rape incident is consistent with his assertion that the appellant raped him and accords with common sense as to why he would not be interested in visiting the appellant after the rape incident.

[36] Lastly, the complainant testified that he was alone¹⁴ with the appellant in his room when the appellant perpetrated the rape against him and the appellant confirmed that assertion that he was alone with the complainant. In addition the substitute,

¹³ *S v Boesak* CCT 25 00 (2000) ZACC 25, paragraphs 25-26 and 27, 2001 (1) BCLR 36 (1) 912 (1 December 2000).

¹⁴ As already mentioned it must be appreciated and be borne in mind that the defence did not dispute the complainant's testimony that he reported the rape to the applicant's friend. Hence it would have been superfluous for the State to have called the appellant's father since that part of the evidence was uncontested. *S v Boesak supra*.

forensic nurse, Ms Rakgwati testified that the redness in the orifice of the anus meant that something was inserted or put in and that the complainant was not happy on his arrival at home. All these factors when considered cumulatively do not support the appellant's contention that there was any misdirection on the part of the regional court.

[37] Moreover, the social worker's report which was admitted into evidence by agreement stated as follows "during the three assessment sessions that the social worker had documented in the report the child was consistent about what and where the alleged incident took place".

[38] The complainant was also consistent about who the alleged perpetrator is¹⁵. Since the report was part of the evidence that was before the trial court, it is difficult, if not impossible to flout the regional court's reasoned conclusion that the state was able to prove its case beyond any reasonable doubt and that in the circumstances the appellant's version could not be regarded as reasonably possibly true.

[39] The evidence that there was redness in the orifice is compatible with the complainant's evidence that the appellant had raped him. The complainant would not have known that there would be redness in the orifice when he subjected himself for medical examination.

[40] Moreover, it was not disputed in cross-examination that the complainant left the following day after the rape incident – just less than a day after having visited the appellant which was still during the school holidays.

[41] The suspicion or speculation proffered by the appellant that he was suspicious that the complainant was instigated to falsely implicate him has no merit since it is based on something that happened when the complainant was only 9 years old.

¹⁵ Paragraph 5.4.1 dealing with consistency of the complainant when he was interviewed. See also paragraph 3.4 of the Social report which stated as follows "according to Thapelo (a reference to the complainant) the alleged perpetrator was his biological father.

[42] In the circumstances, the alleged enmity between the appellant and the complainant's family from the complainant's mother is not borne by the objective evidence. The aunt testified that the appellant is allowed to visit her family and they have allowed the complainant to visit him. This evidence was also not challenged in cross-examination.

[43] I now turn to the second reason of the alleged misdirection, namely that the trial court misdirected itself in finding that the appellant's version could not be reasonably true. In respect of this attack, it is inconceivable that any court could have found that the appellant's version could be reasonably possibly true on the evidence given by the appellant and his witness. Firstly, he lied or contradicted himself about the number of times the complainant visited him and called a witness who contradicted him sharply on this aspect. Secondly, he was not able to explain his assertion that the complainant was not listening to him notwithstanding the Magistrate's intervention to give him a second chance to answer that question. Thirdly, he was not able to explain as to why he undressed the complainant. His explanation that he was informed by his neighbour about the complainant's so-called pimples was not corroborated or confirmed by his neighbour, Ms Ngubeni, who testified on his behalf.

[44] Fourthly and lastly, the appellant's assertion that he undressed the complainant after being alerted about his "*pimples*" on the appellant's shoulders or down on the complainant's body is not congruent with the objective evidence. On the appellant's own evidence, he arrived in his bedroom at or after 02h00 in the morning after having closed his liquor business. It begs the question as to why a caregiver like a biological father in the form of the appellant would undress a nine year old child in the wee hours of the morning. His neighbour was probably asleep by that time the appellant went to bed and could not have reasonably informed the appellant about any pimples on the complainant's body.

[45] However, even if this was so, it would not have made any logical sense to undress the complainant at 02h00 in the morning without a reason. This must be so since it was not the appellant's evidence that he undressed the complainant to administer any medication on him in order to cure the pimples.

[45] The grandfather had no qualms in allowing the complainant to visit the appellant and could not have persuaded the complainant to lay a false charge of rape since he was not at home when the complainant arrived at home and found his aunt.

[46] There appears, from the evidence to be no rational basis whatsoever why the complainant would have lied to the appellant's friend, to her aunt, to his grandfather, to the clinic, to the school, to the police and to the trial court. The regional court verified the suitability of the complainant to give evidence and whether he was able to distinguish between right and wrong prior to the complainant giving evidence¹⁶.

[47] Similarly, the social worker was of the same opinion that the complainant was able to distinguish between right and wrong after having interviewed the grandfather and the complainant's teacher¹⁷.

[48] In the absence of an irregularity or misdirection, a court of appeal is bound by the credibility findings of the trial court, unless it is convinced that such findings are clearly incorrect¹⁸.

[49] The trial court's findings on both fact and credibility that the complainant was a good witness is supported by the objective evidence. For an example the complainant was willing to give concessions¹⁹ where it was warranted and there were no contradictions in his testimony.

¹⁶ Page 102 - 104 of the record.

¹⁷ Paragraph 5 of the Social worker's report.

¹⁸ *S v Jackson (supra)* at p 10.

¹⁹ The complainant conceded that he told his father that his cousins were ill-treating him at his grandfather's place.

[50] For all the above reasons, I am constrained by the objective evidence to come to one conclusion and one conclusion only, that there was no misdirection or irregularity on the part of the regional court. Since the appeal is in respect of conviction only, the conviction is upheld.

Order

[51] In the result, I make the following order:

1. The submissions made on the appellant's behalf must fail and the appeal is therefore dismissed.

R B MKHABELA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
PRETORIA
Electronically submitted therefore unsigned

I concur.

M P MOTHA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
PRETORIA
Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **1 September 2023**.

FOR THE APPELLANT: H L Alberts

INSTRUCTED BY: Legal Aid, Pretoria

COUNSEL FOR RESPONDENT: Adv L F Sivhidzho

INSTRUCTED BY: Director of Public Prosecutions, Pretoria

DATE OF THE HEARING: 17 August 2023

DATE OF JUDGMENT: 1 September 2023