IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

AR No: 562/19

In the matter between:

THOKOZANI PETROS TSHWENE XABA AP

APPELLANT

and

THE STATE RESPONDENT

ORDER

On appeal from: Regional Court, Madadeni (Mrs M. T. Lubuzo)

1 . The appeal against conviction is upheld.

2. The conviction and sentence is set aside.

3.. The verdict of the trial court is replaced with:

'Not guilty and discharged.'

JUDGMENT

Delivered on: 16

Mngadi J: (Bezuidenhout J concurring)

[1] The appellant appeals, by virtue of having been convicted and sentenced to life imprisonment by the court of a regional division, against both conviction and sentence. The appellant was charged before the regional court with and convicted of rape in contravention of s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) and sentenced to life imprisonment.

[2] The charge of rape alleged that on or about during the year 2011 at or near Osizweni the appellant did unlawfully and intentionally commit an act of sexual penetration with the complainant, [T ...M...] inserting his genital organ into her genital organ without her consent. The charge was read with the provisions of ss 51 and/or 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA), as amended, in that the complainant was under the age of sixteen (16) years, in that she was eight (8) years old. Further, the charge was read with s 94 of the Criminal Procedure Act 51 of 1977 (the CPA) which provides that where it is alleged that an accused on divers occasions during any period committed the offence in respect of any particular person, the accused may be charged in one charge with the offence.

[3] The appellant (who was legally represented) when the charge was put to him pleaded not guilty. He as the basis of his defence denied the allegations against him and he put the State to the proof thereof. The regional magistrate after hearing evidence found the appellant guilty as charged. The regional magistrate in terms of the provisions of the CLAA having found no substantial and compelling circumstances to impose a sentence lesser sentence than the prescribed minimum sentence of life imprisonment, sentenced the appellant to life imprisonment.

[4] It is apparent that the charge was laid with the police against the appellant on 23 September 2011. The appellant was arrested on 25 September 2011. The trial commenced on 5 December 2013. The trial court during the evidence of the complainant experienced challenges relating to the competence of the intermediary. It referred the proceedings on review. The review court set aside the proceedings and ordered the trial to commence de novo before another presiding officer. On 22 January 2014, the trial court released the appellant on bail. The trial commenced de novo on 5 July 2016. It was finalised on 28 March 2019. It is regrettable, without putting blame on any party in particular, that the matter involving children as witnesses dragged on for about nine (9) years.

[5] Five witnesses including the appellant testified. It was the complainant, her cousin, her aunt, her schoolteacher, and the police officer who took the statement from the complainant. The exhibits were the extract from the record of the aborted proceedings, the complainant's police statement, complainant's aunt police statement, the medical examination report of complainant 088) and the complainant's teacher's police statement.

[6] The court after a competency enquiry admonished the complainant and allowed her to testify in camera through an intermediary appointed in terms of the provisions of s 170A of the CPA. She testified that she was in the sports field with other children. They were participating in a traditional dance ceremony. The appellant stood at the gate of his home about 15 meters from the sports field. He beckoned the complainant to come to him. She went to him. He took her into his room. He locked the room and left the complainant. He went away to fetch snacks. He returned to the room. He ordered the

complainant to take off her clothes and her panty. She did that. He ordered her to climb on the bed. He removed his pair of trousers and his underpants. He climbed on the bed on top of the complainant. He inserted his penis into the vagina of the complainant. She felt pain in her vagina. He told her to dress and leave. She dressed up. He told her not to tell any person. She told him that she would tell her cousin [N...]. She went to her home. She told N that the appellant stretched her panty. N went and told her aunt [N...M...]. She stated that the incident took place on a Saturday. She told N on Sunday and N told her aunt on the same day. On Monday, her aunt went to school.

[7] The complainant testified that she knew the appellant by seeing him in the area. His home was about six houses from her home. She had never been to the appellant's room before. Her aunt after [N...] told her called the complainant. She went to her aunt. Her aunt questioned her. She told her aunt what the appellant did to her. N...M... went to her school on Monday. The principal gave N...M... a letter to take to the police. The police told N...M... to report the matter to social workers. The social workers told them to go to Madadeni Crisis Centre. The doctor examined her at Madadeni Crisis Centre. After a few days, the police arrested the appellant. The incident took place when she was eight (8) years old on a Saturday. She did not know the month in which the incident took place. She also did not know whether it was at the beginning, the middle or the end of the year. Nevertheless, under cross-examination, the complainant said it was before the Easter holidays.

[8] N... testified that she was 18 years old and the complainant was her cousin. In 2011, she stayed with the complainant and her parents. During an afternoon on a day in 2011 after they had attended a traditional dance at the sports field, she came back to her home. She found the complainant playing with another child. She noticed that the complainant was quiet. She asked her what was wrong. The complainant told her that the appellant stretched her panty. She knew the appellant; he stayed about six houses from her home. There was a car wash at his home and a tuckshop. She did not pay attention to what the complainant told her. Later, when they were taking a bath, the complainant told her again that the appellant stretched her panty. She was surprised. She went to tell her mother N...M... N...M... called the complainant and spoke to the complainant.

[9] N...M... testified that the complainant was her brother's child. She stayed with the complainant and her children including N... who was years old at the time. She knew the appellant. She used to sell liquor and the appellant used to buy liquor from her. She testified that on 21 September 2011 she was at her home. The children were playing outside. N... got inside the house and told her that the complainant told her that the appellant stretched her panty. She sent N... to call the complainant. The complainant came to her. She asked the complainant the reason for the appellant to stretch her panty. The complainant told her that she was playing with other children when the appellant called her to his room. She told her that the appellant in his room instructed the complainant to take off her panty; he climbed on her and slept with her. She testified that when the complainant made the report, she was with N.... She stated that initially the complainant did not tell her but kept crying. She stated that the following morning she went to the school to report to the complainant's teacher. The teacher advised her to go to the police. She went to the police and the police told her to go to the social workers. The social workers told her to go to Madadeni Crisis Centre. She went to the crisis centre and the doctor examined the complainant. She went to the school, to the police, to the social workers and to the Crisis Centre on the same day on 22 September 2011. She testified that she received a letter from the school informing her that the complainant was not concentrating at school but playing. She questioned the complainant and the complainant told her that the appellant called her into his room from the sports field and slept with her.

[10] The schoolteacher, Mrs Zungu testified and she confirmed the correctness of the contents of her police statement. She made her statement on 31 October 2011. She stated that from January 2011 the complainant's school performance was below average. She at times came to school with no writing materials and not having done her schoolwork. She requested by letter her parents to come and see her but they did not come to her. In September 201 1, again, she wrote a letter to the parents of the complainant and her parents came to see her. She told the complainant's aunt the problems with complainant. The complainant's aunt told her that the complainant was sexually abused and the complainant told her after she had promised to give her R40.00. She told the complainant's aunt to report the matter to the police.

[11] The evidence of the police officer Kunene related to the taking of the complainant's police statement and it is not necessary to summarise it. The medical examination report 088)

shows that the doctor examined the complainant on 22 September 2011. It recorded under findings:' thin posterior rim of hymen noted genetelia examination'. Under conclusions it recorded:' The finding of a thin posterior rim of hymen could be suggestive of previous history of vaginal penetration.' Under schematic drawing of findings, it is written: 'thin rim less than 50% of the thickness of the whole hymen'. The police statement of the complainant was obtained on 23 September 2011. It states:' I do not remember the exact date but it was in the beginning of this year 2011. On a Saturday and it was during the day. I was on the ground with my friend Sindisiwe and we were playing. Whilst we were playing Tswene called me to him and I went to him. Tswene was standing in his yard when he called me. Tswene told me to get into his room and I did as he told me. Then Tswene came into his room and he was holding a packet of snacks. He then placed the snacks on his bed. Tswene told me to get on the bed and sleep. Tswene took out my trousers, he then told me to take out my panty, and I took it out. He then jumped on top of me, he put his pipi (penis) into my momozi (vagina), and he kissed me on my mouth. He then got up, he told me to dress myself, he gave me the snacks, and he told me to go home. I did as he told me. He also told me not to tell anyone but I told him that I was going to tell my sister. I then went home and I then told my sister, N what Tswene did. I only told her that Tswene pulled my panty.' It was common cause that Tswene is the appellant.

[12] The appellant testified for the defence and he did not call any witnesses. He denied that he had called the complainant to his room. He denied that he sexually assaulted the complainant. He denied any encounter with the complainant. He testified that in about 2009, N...M...'s husband assaulted him for failing to pay money owed to N...M... He opened a criminal case against him. The complainant's aunt was involved in pleading with him not to proceed with the case. He accepted compensation and he withdrew the case.

[13] The learned regional magistrate pointed out that the incident took place in broad daylight, and identification was not an issue. She stated that the complainant gave a detailed account of what happened. She was consistent insofar as the identity of the appellant and the actions of the appellant. The medical evidence, she found, corroborates the complainant's version. She concluded that considering the evidence in its totality, she was convinced that the truth had been told despite minor contradictions in the evidence of the complainant. She found that the evidence of the complainant was clear and satisfactory in all material respects.

[14] The regional magistrate, further, in her judgment stated that in the assessment of evidence of children, the court should remind itself that it is dealing with the child

witness and that it should guard against two elements, namely; imaginativeness and suggestibility. She stated that it is true that there were contradictions in the evidence of the complainant, however, sight should not be lost of the fact that the complainant gave her testimony on 5 July 2016 thereafter a period of four years lapsed.

[15] The learned regional magistrate, in my view, missed the essence of the case. She proceeded on the basis that an incident occurred and that the dispute is whether the appellant was the perpetrator and if so whether the incident took place as explained by the complainant. She seems not to have considered whether the complainant was fabricating the incident or not. Further, it is irrelevant whether the presiding officer is convinced that the truth has been told or not. The question is whether the evidence by the State correctly approached and assessed objectively proves the guilt of the appellant beyond reasonable doubt.

[16] The learned regional magistrate found that the medical evidence corroborated the version of the complainant. She, in my view, over looked that the medical evidence did not implicate the appellant. Further, the court accepted the medical report examination report, which was equivocal on whether there was sexual penetration or not without calling the doctor to explain the report. It also appeared to be inconsistent with the version of sexual penetration taking place on 21 September 2011 and it also stated nothing about early in 2011. I find it shocking that the regional magistrate ignored the contradiction of whether the incident, if any, on the evidence, it took place early in 2011 or on 21 September 2011. This inconsistency alone created a big question mark of the State case against the appellant. The State due to the conflict in its evidence, even before it commenced presentation of its case, it did not know whether the incident took place early in 2011 or 21 September 2011 thus the vagueness in the charge. It created a great difficult in proving a case against the appellant.

[17] The hearing of an appeal against findings of fact is guided by the principle that in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence

shows them to be clearly wrong. See S v Hadebe and Others 1998 (1) SACR 422(SCA) p426b; R v Dhiumayo and another 1948 (2) SA 677(A).

[18] The conviction of the appellant, whether he had sexual intercourse with the complainant, and if so, whether it was without the consent of the complainant, is founded on the evidence of the complainant. It was the evidence of a single witness and a child. The evidence of the complainant as evidence of a child is required to be approached with great caution. See R v Manda 1951 (3) SA 158 (A) at 162H it was held that the evidence of young children should be accepted with great caution. A child may not understand the nature or recognise the obligation of an oath or affirmation and yet may appear to the court to be more than ordinarily intelligent, observant and honest. It was held that the danger inherent in reliance upon the uncorroborated evidence of as young child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting to perhaps suspicion. The trial court must fully appreciate the danger inherent in the acceptance of such evidence, and where there is a reason to suppose that such appreciation was absent, a court of appeal may hold that the conviction should not be sustained. see Manda at 163E. In SvDyira 2010 (1) SACR 78 (EGHC) at 82 it was held that the danger of accepting evidence of a young child is 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 a truth of a statement which may not be true or entirely true, particularly where the allegation is of a sexual misconduct, which is normally beyond the experience of small children.

[19] The complainant in her first report to N said the appellant stretched her panty. She could not explain why she said that. Instead, she contradicted her earlier evidence that she took off her panty and placed it on the floor by saying the appellant in fact took the panty and stretched it. The complainant testified that she told the appellant that she was going to tell her cousin N… what he did to her. However, inexplicable, she did not tell N… what the appellant allegedly did to her. She said she did not tell N… because she was angry, which does not make sense. The evidence is that N…M… questioned the complainant. It is obvious that her questions conveyed to the complainant that something happened to her. She initially resisted the suggestion but her aunt would not accept that nothing happened. She increased the pressure by promising the complainant

R40.00. The complainant relented and accused the appellant of having sexually molested her. It was an eight (8) year old facing her probably irate aunt. A report made under such circumstances is not made freely and voluntarily and it taints the pointing out of the appellant as the perpetrator by the person subjected to such undue influence. If the incident took place early in 2011 , the delay in reporting it suggests that it was a fabrication. In S v De Villiers en Ander 1999 (1) SACR 297(0) at 306b it was held that the longer the delay, the greater the prospect of fabrication and the more likely the possibility of untrustworthiness or unreliability. In addition, the evidence indicated that the complainant faced challenges in her schoolwork and the allegation of sexual abuse was made to explain her poor school performance, which is the reason it was alleged to have taken place early in 2011. Mr Naidoo for the respondent argued that the incident took place early in 2011 and the complainant reported it in September 2011. The submission, in my view, is in conflict with the tenor of the complainant's evidence.

[20] The onus was on the State to prove the guilt of the appellant beyond reasonable doubt. It relied on the evidence of the complainant to prove the commission of the offence and that the appellant committed it. An established rule of practice requires the evidence of a single witness to be approached with special caution. The danger is that evidence of a single witness cannot be checked against other evidence, which fact is known to the single witness. The regional magistrate correctly found that there were contradictions and inconsistencies in the evidence of the state witnesses including the evidence of the complainant. In my view, the record is replete with such contradictions and inconsistencies apart from those mentioned above herein. It is not necessary to mention the contradictions and the inconsistencies in this judgment although they may not be apparent in the summaries of the evidence because the summaries were confined to the evidence in chief of the witnesses. A finding that the evidence of the complainant, as found by the regional magistrate, in the face of the contradictions and inconsistencies, was clear and satisfactory in all material respects, with respect, constitute a misdirection.

[21] It is not the labels that are given to the evidence by a judicial officer that count. Evidence as it appears on record must be clear and satisfactory in all material respects. The exercise of caution entails scrutiny of the evidence, noting discrepancies and attaching due weight to the discrepancies that are found. See R v Mokoena 1932 OPD 79 at 80; R v Mokoena 1956 (3) SA 81 (A) at 85-86; S v Webber 1971 (3) SA 754 (A) at 757-

759; Stevens v S [2005] 1 All SA 1 (SCA) para 17; S v Altman & another 1968 (3) SA 339 (A) at 340H;

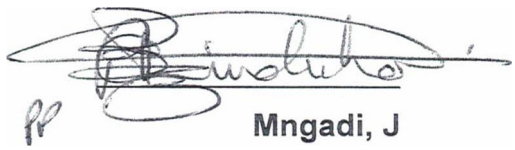
[22] The evidence looked at holistically and approached with caution exhibited numerous unsatisfactory features. It fell short of proving the guilt of the appellant beyond reasonable doubt. The State was unsure of its case and it presented a contradictory case. The incident either took place in early 2011 or in September 2011 or it is not proved to have happened. I am of the view that the conviction of the appellant falls to be set aside.

[23] I propose the following order:

1 . The appeal against conviction is upheld.

2. The conviction and sentence is set aside.

3. The verdict of the trial court is replaced with:
'Not guilty and discharged'.



I agree, ~~it is so ordered.~~

ezuidenhout

APPEARANCES

Case Number AR .. 562/19

For the Appellant .. M. Tengwa

Instructed by .. Pietermaritzburg Justice Centre
PIETERMARITZBURG

For the respondent .. D. Niadoo

Instructed by .. Deputy Director of Public Prosecutions
PIE-TERMARITZBURG

Heard on .. 17 February 2021

Judgment delivered on: 18/3/22