IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

AR No: 498/19

In the matter between:

SANDILE SAM MASONDO **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from: The Regional Court, Pietermaritzburg (Mrs V. Jamuna sitting as the court of first instance)

1. The appeal against conviction is upheld. The conviction and sentence is set aside.

2. The order of the trial court is replaced with the order :
'Not guilty and discharged'.

JUDGMENT

Delivered on:

Mngadi J:

[1] The appellant appeals by virtue of an automatic right of appeal having been convicted and sentenced to life imprisonment by a court of a regional division, against both conviction and sentence. The appellant was charged before the regional court with one count of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). The regional magistrate convicted the appellant as charged on the count of rape. The court having found no substantial and compelling circumstances sentenced the appellant to life imprisonment.

[2] The charge of rape was read with the provisions of section 51(1) Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA). The charge alleged that on or about 2 April 2017 and at or near France Location in the regional division of KwaZulu-Natal, the appellant did unlawfully and intentionally commit an act of sexual penetration with complainant [L...D...] by inserting his genital organ into her genital organ and her anus without the consent of the said complainant. The complainant was eleven (11) years old. Section 51(1) and Schedule 2 of the CLAA was applicable, in that the complainant was 11 years old at the time of the commission of the offence. The appellant, who was legally represented, pleaded not guilty to the charge. The appellant in terms of s115 of the Criminal Procedure Act No. 51 of 1977 (the CPA) disclosed the basis of his defence in an oral statement made by his legal representative. He stated he was with two of his friends, namely; Mjeyi and Thulani. They were from a tavern to another place to buy cigarettes. It was at about 2am. The route passed next to the complainant's home. His sister and the complainant's uncle were in a love relationship and they were staying at the complainant's home. He also had a love relationship with the complainant's mother.

He stated that he decided to go and give stokvel money to his sister and he asked his friends to wait for him at the gate at the complainant's home. He knocked enquiring about his sister. The complainant told him that his sister, her mother and her uncle were not present. He noticed that doors of one structure and of the kitchen were not closed. He told the complainant to close the doors that were not closed. He went back to his friends and they went away. He stated that he knew the complainant because he had a relationship with her mother. He denied that he raped the complainant and he stated that he did not enter the house.

[3] The State lead evidence from the complainant, the complainant's ten (10) years old brother[S] the complainant's uncle Thulani Mncube and the medical practitioner, Dr. Akino. The birth certificate of the complainant and the medical examination form (j88) were handed in as evidence. The appellant testified for the defence and he did not call any witnesses. Both the complainant and her brother S.. were subjected to a competency enquiry and the regional magistrate found them to be competent witnesses. They gave their evidence in camera and through an intermediary.

[4] The learned regional magistrate found that the complainant testified in a clear, concise and satisfactory manner. She found the evidence of the complainant was consistent with that of her younger brother [S...] that of her uncle and that of the medical practitioner in relation to the report that the complainant made. The regional magistrate, in addition, held it was not in dispute that the complainant was in fact raped on that morning both vaginally and anally. She said the only issue in dispute was whether the appellant sexually penetrated the complainant on the morning in question both anally and or vaginally, in other words, she said, whether or not it was the appellant who raped the complainant on the night in question.

[5] The complainant testified as follows. She was sleeping with her younger brother S and another younger brother. Her brother S woke her up and he told her that there was a person knocking at the door. The person who was knocking she recognised as the appellant pushed the door open before she could open it. He came in the room. He

asked her where was her mother and his sister. She told him that her mother was in the neighbour's house and she did not know where his sister was. The appellant asked her why they did not switch off the light in the kitchen. She asked her brother S.. to accompany her to go to the kitchen to switch off the light. The appellant said her brother S must sleep, children of his age are asleep and the elder one must go to switch off the light. The appellant walked away.

[6] The complainant testified that she proceeded to the kitchen. She switched off the light. She went out of the kitchen. Whilst she was closing the kitchen door, the appellant emerged. He told her to sit down. She was in front of the kitchen door locking it. She told the appellant to get out because she wanted to go back to sleep. The appellant refused to get out of the kitchen. He again told her to sit down. She then sat down on the bench. The appellant remained standing. The appellant again asked her where was her mother and his sister. He told her that he wanted to do something to her but she must not tell any person about it. She told him that she shall tell her mother if it is something wrong. The complainant testified that it was dark in the kitchen but she knew that she was talking to the appellant because she knew his voice. The appellant told her to undress. She told him that she did not want to. He pushed her onto the floor. He pulled up her skirt. He took off her panty. He pulled his pants down to his knees. She could see because he was using a torch from his cell phone. He knelt between her thighs. He inserted his penis into her vagina. He jumped on top of her until he finished. He told her to stand up and she refused. He made her stand up and hold onto the wall. He then inserted his penis into her anus. He made some movements. He finished and he dressed up. He gave her the panty and he told her to dress up. He then went away. She remained behind and she dressed up. She went back to the bedroom. She told her brother S that the appellant raped her. S kept on disputing everything she told him. S after sometime said he was joking, he saw what happened to her.

[7] The complainant testified her uncle arrived. S went to her uncle and he told him that the appellant raped her. Her uncle came to her and he asked what happened. She told him that the appellant raped her. Her uncle told her to wait for those still asleep for them

to go to the clinic. They eventually went to the clinic. They referred her to the hospital. She went to the hospital. A doctor examined her. He asked her what happened and she told him. She testified that when she went to switch off the light at the kitchen, the appellant was at the gate to her home with his two friends talking. They were at the gate about 4 metres from her. She could not see who were they and she could not hear what they were talking about. She saw the appellant closing the gate; he then walked straight to her home. He came straight to her in the kitchen. All the time she was busy locking the kitchen door and she was on the doorway trying to lock the door when the appellant told her to sit down. The incident took place at about 5 o'clock in the morning. It was visible and there was some light. It was at dawn one could see things. There was light on in the yard from a light fixed at the corner of the structure forming the house. The light at the time was on and it assisted her to see the appellant walking straight from the gate. From that lighting she could see in the kitchen but not that clearly. The appellant's phone from its light assisted her to see. The cell phone was on and he placed it on the bench. He placed it on the bench when he was about to undress. She was on the floor facing up and crying when he got on top of her.

[8] The complainant testified that when the appellant told her to sit down, she walked into the kitchen. The door was open. She sat on the bench. The appellant closed the door. When the appellant inserted his penis into her vagina, she felt pain and she told him that it was painful. The appellant did not say anything. She testified that in the room in which they were sleeping the light was on. The appellant pushed the door and he entered. She saw that it was the appellant. She knew the appellant because her mother was the appellant's friend. The appellant and her mother used to talk and hug. She last saw the appellant two days before the incident. S woke her up. The door was closed with a latch and the light was on. They used a pair of scissors to latch the door. The kitchen door was closed. The appellant did not ask why the door was not closed. She checked the time when she got into her bedroom after the incident. She checked it on her mother's cell phone. Her mother left her cell phone behind with her. She did not fall asleep after the incident. Her uncle arrived soon after the incident and he told her it was after 5 o'clock. Her mother was in the neighbour's house, which was across the driveway

from her home. She had gone to help the neighbour for preparing for a function the following day. The neighbour's house was nearby. She could shout to the neighbour from her home. She confirmed that the appellant after he told her to switch off the light in the kitchen, he walked away. She saw him walking out of the gate, she saw him talking to his friends outside the gate, and they were five. She remembered that two of them were Mngomeni and Thulani. She said it not Mjeyi and Thulani.

[9] The complainant testified that she found it difficult to lock the kitchen door. It resulted in the appellant finding her still busy locking the door. She was locking the door with latch. She struggled to lock the door because of poor light.. In the kitchen and at the gate, it was not that dark. In the kitchen, once the door was closed, it was completely dark. The appellant used the cell phone torch to light in the kitchen. He did not switch on the light in the kitchen. The cell phone directed the light to her. The appellant in the kitchen tried to call her mother. He wanted to find out where was she and his sister. The cell phone rang but her mother did not answer it because she had left her cell phone with her, and she told the appellant. When she was back in her bedroom, she saw the missed call made by the appellant in the kitchen to her mother. She testified that she was not influenced by her mother to say the appellant raped her. She said she had no idea whether her mother and the appellant were lovers or not. When what was recorded in the j88 as what she told the doctor that her mother's boyfriend grabbed her whilst she was switching off the light, chased away her brother who heard her cries and raped her, she said she told the doctor what happened.

[10] S testified as follows. He was sleeping. He heard someone knocking. He woke up the complainant. The appellant appeared. He asked him where was his mother and others. He told him that they were not present. The appellant asked him why they had not switched off the light in the kitchen. He wanted to switch off the light in the kitchen, the appellant stopped him. The appellant said the elder one referring to the complainant should go and switch off the light. The appellant then went away. The complainant woke up. She went to the kitchen to switch off the light. She did not return from the kitchen. He woke up to see what was going on. He found the appellant on top of the complainant.

He was bumping on top of her. He observed through a whole between the doors of the kitchen. In the kitchen there was light. The light came from a cell phone torch. The appellant was carrying the cell phone in his hand. He did not remember in what position was the appellant and the complainant. The complainant was lying down but he did not remember where faced. The appellant faced down. The complainant when the appellant bumped on her, she was not doing anything. He observed and he did not do anything. The appellant got up and fastened his belt and he left. He ran back to the bedroom. The complainant came and told him that the appellant raped her. He told her that he saw. His uncle arrived and he told him. S testified that the appellant did not enter the bedroom where he knocked. He stood outside and he asked where was their mother was. The door was open. He S opened the door. The complainant told him to open the door. He said in the kitchen, he did not remember whether any person was crying. He told his uncle that the complainant was raped but he did not know what rape means.

[11] In the middle of the evidence of S, the court conducted an inspection *in loco* and made the following findings. The incident took place in an L shaped structure. In the structure there is a bedroom in which the complainant and S were sleeping. On the opposite end is the kitchen. From the bedroom door to the kitchen door it measured five footsteps. The gap in the kitchen door is about 10 cm. Through the hole, one could see part of the kitchen. One could see the top part of a person lying on the floor on the spot S said the appellant was lying on top of the complainant. Through the hole, one could not see the bench in the kitchen. S during the inspection in loco said he could not remember whether he saw any movement made by the person on top of the complainant. It was noted that there were no electric lights fixed on the outside of the structure of the home. From the bedroom, one could see at the gate to the property. No light came from a neighbouring property.

[12] Thobani Mncube testified as follows. He returned on 2 April 2017 to the complainant's home at 4 o'clock. He worked as a taxi driver. He parked the vehicle in the yard. S came to him and he told him the appellant raped that complainant. He phoned the complainant. The complainant confirmed that the appellant raped her. The

complainant told him that when she entered the kitchen, the appellant entered with her, he grabbed her, he placed her on the floor, and he raped her. Mncube testified that he later took the complaint to the hospital. He said he had warned the appellant not to visit their home at night, but the complainant's mother did not heed the warning. He did not have a problem about the relationship between the appellant and the complainant's mother. He assumed that they were in a love relationship.

[13] The Doctor Akintunde Akinola testified as follows. He obtained the MBCHB degree in 1999 from the University of Lagos in Nigeria. He has been practising as a medical practitioner in South Africa since 2007. From 2013 to date he has been dealing with sexually abused children and adults, seeing between 45 and 55 cases a month. On 2 April 2017 at 10:15, he examined the complainant and recorded the examination in the prescribed medical examination form (j88) which he identified in his handwriting and bearing his signature. He testified that the complainant reported to him that 'around 05:00 on 2 April 2017 she answered the door and she was confronted by the mother's boyfriend. He demanded that she switch off the lights and grabbed her into the kitchen and forcefully kissed her. And he made her lie down and chased a sibling who came at her cries. He then removed her panties and inserted his penis into her front and her back.' The doctor testified that he examined her and the examination revealed the following; a whitish powdery substance on her skirt, a whitish fluid stain on her panties, her weight was above average, she had multiple pustules which are small tiny balls or abscesses on her body and there excoriation marks/abrasions which are signs of scratching, healing septic wounds as a result of infection and she had scabies an infection by small insects causing bacteria infection. The doctor testified that other significant findings were that redness was noted on the inner labia minora, abrasions on the posterior fourchette, annular shaped hymen with traverse diameter measuring 12mm, redness on the complete hymen, whitish fluid coming out from the vagina, abrasions on the perineum. He testified that due to the above noting he concluded that there was evidence of blunt hymeneal penetration.

[14] The doctor testified that he examined the anal orifice. There were no stains around the anus; redness noted around the anus; a fissure (crack) noted at 6 o'clock position; a

tag (excess skin) noted at 12 o'clock; tears noted at 11, 12 and 6 o'clock of the anal orifice. There was a reflex dilatation of up to five millimetres noted on the anus which means when you put pressure on the bum it opened up to 5mm. He concluded that the finding were compatible with blunt anal penetration. He testified abrasions, tears and cracks pointed at something that happened recently. The redness he could not describe as recent, ongoing or chronic. Redness may be caused by trauma, irritation or infection. He stated that on a child of eleven (11) years a hymeneal opening of not more than 8 mmm is expected. He testified the samples for DNA examination were collected using the evidence collection kit with serial number 13 D7AA2730 that was handed to the police as recorded in the medical examination form.

[15] The appellant testified as follows. On 2 April 2017, he was with Mjeyi and Thulani that night. He was woken up at night when there was burglary in a neighbour's residence at midnight. The appellant repeated the contents of the statement in which he disclosed the basis of his defence. He stated that he did not enter the bedroom. He spoke only to the complainant. He then left and joined his two friends who waited for him at the gate. He parted ways with them when he left to his home. He did not return to the home of the complainant and he did not rape the complainant. He denied that he had a love relationship with the complainant's mother. He could not explain why in the statement of the basis of defence it stated that he had a love relationship with the complainant's mother. He said they were close friends. I He said it was door to another room and thyat to the kitchen which were not properly closed.

[16] The record of the proceedings indicates after the appellant testified his legal representative requested the court to call Mjeyi and Thulani as court witnesses. The learned regional magistrate summarily refused the request indicating that Mjeyi and Thulani were defence witnesses and they should be called by the defence. The court advised the State to assist the defence to subpoena the witnesses. The prosecutor stated subpoena could be issued if full addresses were furnished because the investigating officer tried to get hold of the mentioned persons but failed. The matter was postponed for the purpose. On resumption after two weeks, the appellant's legal representative

stated that they could not get hold of the said witnesses. The defence case was then closed.

[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. 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 based 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. The danger inherent in relying upon the uncorroborated evidence of a 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 perhaps to 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. The full appreciation of the risks associated with the evidence results in the correct approach on the issue of probabilities.

[18] The learned regional magistrate in her judgment indicated that the onus was on the State to prove its case against the appellant beyond reasonable doubt and that there was no onus on an accused to persuade the court of his innocence. If the version of an accused is reasonable possible true, he is acquitted. The court gives the benefit of the doubt to the accused. The court does not have to believe the accused's version and does not have to find that it is the truth. The regional magistrate properly warned herself of the applicable multiple cautionary rules relating to evidence of children and evidence of single witnesses. In case of a single witness, evidence to be accepted, it is required to be clear, concise and satisfactory in all material respects. She stated the court in assessing

evidence of children must approach it with caution owing to dangers inherent in such evidence.

[19] The learned regional magistrate at the commencement of her judgment stated that it is not disputed that the complainant was raped. In my view, this constitutes a material misdirection. The appellant pleaded not guilty to the charge. The plea placed in dispute all the elements of the charge. The appellant made no admissions in terms of section 220 of the CPA. During the trial at no stage was it placed on record by the defence that it was admitted that the complainant on the date in question was raped. Unfortunately, the misdirection tainted the entire approach to the evidence by the trial court. It diluted the caution that was required to be exercised. It resulted in an assumption that the complainant was a credible reliable witness whereas credibility was crucial in the determination of issues. In addition, it resulted in the probabilities being viewed in favour of the State. If it is accepted that the complainant is truthful in that she was raped, it follows that she is probable truthful in her evidence that the appellant is the person who raped.

[20] It is not enough to pay lip service to the cautionary rules. The evidence of children in particular poses a peculiar risk. It must be demonstrated that the necessary caution was exercised in the approach to their evidence. It must be shown that the evidence was closely scrutinised, its unsatisfactory features were noted and proper weight given to them. Evidence tending to corroborate or support the evidence must itself be properly scrutinised. The evidence of S and that of the complainant is contradictory on whether the appellant entered their bedroom or not. S being nine years old late at night is very unlikely to have woken up on his own to see what was delaying the complainant in the kitchen. Further, S stated the appellant whilst on top of the complainant had his cell phone with its torch on in his hand whereas the complainant stated that the cell phone was placed on the bench. S if he actually witnessed the rape, he would not have failed to see that the complainant was crying, if she was crying. S testified that he saw the appellant on top of the complainant raping her, and fastening his belt and leaving. There is no explanation why S did not see the appellant causing the complainant to stand up

and hold the wall and raping her from behind. The behaviour of S not to report immediately what he saw and to dispute everything the complainant who was supposed to be in a distressed condition was telling him is inexplicable. The inspection *in loco* revealed that the bench in the kitchen could not be seen through the hole. The complainant stated that she was pushed onto the floor from the bench. It appears that S could only see through the hole far from the bench. The complainant in the inspection *in loco* was not invited to point out in the kitchen the spot on which she was raped. The complainant in her evidence said there was light affixed to the outside wall and that light provided lighting in the yard, in the gate and in the kitchen but on inspection *in loco* it was established that there was no light affixed outside the building. The complainant could not explain why locking the kitchen door from outside, something she was used, gave so much problem to her. When asked she said it was due to poor lighting She also could not explain why she went back to the kitchen when she had switched off the light in the kitchen and she was outside not far from her bedroom. When she saw the appellant coming straight to her from the gate, she could have left the door and get into her bedroom. The complainant testified of a discussion she had with the appellant in the kitchen before he raped her, but in her report to her uncle and to the doctor, she reported of an attack, which took place unexpectedly and quickly. The complainant had an opportunity to cry out for help but she did not do so. When the appellant left after he told the complainant to close the doors or to switch off the kitchen light, there is no indication that he knew that the complainant would be delayed in locking the kitchen door for him to come back and find her. It also makes no sense that in the course of attacking the complainant the appellant would be phoning the complainant's mother. The complainant made to a doctor a report that differed from her evidence. She said the appellant said he wanted to have children with her; he kissed her and he chased away her brother who came to her aid when he heard her crying.

[21] It is part of the exercise of caution to require that all available evidence be presented before court, if it cannot be presented, it must be explained on record why such evidence is not available. The DNA evidence was crucial evidence. Samples were collected from the complainant. There was no explanation for the failure to present before court the DNA evidence. The complainant agreed with the appellant that there were people who

were with the appellant. The complainant agreed that there was Mngomeni and Thulani. The appellant said it was Mjeyi and Thulani. These people were crucial witnesses. The State had a duty to disprove the alibi of the appellant. The evidence of these witnesses would have indicated whether there was any merit in the alibi of the appellant. In the absence of evidence that would have been available to the State, there is no basis to reject the appellant's alibi. The court well aware that it was faced with evidence of young children and that no DNA evidence had been presented, could have acceded to the defence request to call the said witness as court witnesses as part of its duty to approach evidence before relying on it for a conviction with caution.

[22] The State relied heavily on the medical evidence. The quality and strength of expert evidence is determined mainly by the standing of the expert and the grounds given by the expert for his conclusions. The complainant suffered from severe scabies affecting her entire body. Her private areas including the vaginal area and the anal area would not be spared. Scabies causes bacterial infection resulting in itching and scratching. It may result in abrasions and lacerations. Scratching is constant which results in healing scars fresh scars or abrasions. The doctor in his evidence gave no reasons that the abrasions, tears or abrasions observed were not related to scabies. The learned regional magistrate similarly did not in her judgment consider that the injuries observed by the doctor could have been because of scabies. The opening diameter of either anal orifice or the hymen is, in my view, of no significance since the complainant was of a larger size compared to children of her age group. In addition, an isolated forced penetration would not necessarily result in orifice with a large opening diameter. There were no injuries on the hymen. There was no evidence of any bloodstains on the complainant or on her clothes. The alleged eyewitness S did not see the complainant being raped from her back which contradicts evidence of the complainant and medical evidence suggestive of anal penetration.

[23] The State bore the onus to prove the guilt of the appellant beyond reasonable doubt. In terms of section 208 of the CPA, an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well-established judicial

practice that the evidence of a single witness should be approached with caution. It is required to be clear and satisfactory in every material respect. 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 Artman & another* 1968 (3) SA 339 (A) at 340H; *S v Dyira* 2010(1) SACR 78 (ECG) para5.

[24] 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. It fell short of being credible and reliable evidence to form the basis of a conviction. I am of the view that the conviction of the appellant falls to be set aside.

[25] I propose the following order:

1. The appeal against conviction is upheld, the conviction and sentence is set aside.

2. The order of the trial court is replaced with the following 'Not guilty and discharged'.

Mngadi, J

I agree, it is so ordered.

Bezuidenhout, J

APPEARANCES

Case Number AR	:	489/19
For the Appellant	:	A Hulley
Instructed by	:	Pietermaritzburg Justice Centre PIETERMARITZBURG
For the respondent	:	D. Naidoo
Instructed by	:	Deputy Director of Public Prosecutions PIETERMARITZBURG
Heard on	:	22 July 2022
Judgment delivered on	:	