IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE PROVINCIAL DIVISION, CAPE TOWN)

Coram: Le Grange, J et Saner. AJ

-REPORTABLE-

CASENO: A304/10

In the appeal between:

GIDEON HANEKOM **APPELLANT**

and

THE STATE **RESPONDENT**

Matter was heard on the 3rd of September 2010.

Judgment was handed down on 6 October 2010.

Counsel for Appellant: Adv E.S. Grobbelaar.

Counsel for Respondent: Adv L. Mcani.

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JUDGMENT: SANER AJ (06 October 2010)

[1] This is a case where, unfortunately it seems, the danger of believing a young child where her evidence stands alone, was indeed underrated. In this regard see: ***Woji v Santam Insurance Co Ltd 1981 (1) SA 10201 (A).*** 1027 bottom and 1028E-F

[2] The Appellant was charged with one count of indecent assault in the Regional Division of the Western Cape at Knysna. He tendered a plea of not guilty on 18 February 2009. He was subsequently convicted as charged on 23 July 2009.

[3] On 22 October 2009. the Appellant was sentenced to three years imprisonment and it was ordered, in addition, that his name be entered into the National Register of Sex Offenders

|4] The Appellant now comes before this Court on appeal against his

conviction and sentence.

[5] The first question which arises is whether there are grounds for this Court to interfere with the conviction in the Magistrate's Court. Certainly, it seems clear that this Court may interfere if the Magistrate misdirected himself in a material respect as far as his approach to the evidence was concerned. See: ***R v Dhiumayo 1948 (2) SA*** 667 ***(A),*** 706-6 and ***State v Hadebe 1997 (2) SA CR 641 (SCA)*** at 645e-f

[6] I am of the opinion that the Magistrate did indeed misdirect himself in that he failed to have sufficient regard to the two cautionary rules applicable in this case and failed to apply them with that degree of attention to detail demanded by the particular circumstances of this case. It seems to me as if the Magistrate did not pay sufficient heed to the caveat set out in ***R v Manda 1951 (3) SA 158 (A)*** at 163, where the following was held:-

> *"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 dangers inherent in the acceptance of such evidence and where there is reason to suppose that such appreciation was absent a court of appeal may hold that the conviction should not be sustained.*

[7] In this matter it seems to me as if the Magistrate, whilst paying lip service to the applicable cautionary rules, did not demonstrate in his judgment the required degree of analysis in his approach to the inconsistencies and contradictions in the complainants evidence, as I will demonstrate below.

[8] The starting point in any criminal matter must of course always be that the State must prove the guilt of the accused beyond reasonable doubt. This must never be lost sight of even where a number of cautionary rules come into play. However, to assist the courts in determining whether the onus has been discharged, they have developed a rule of

practice that requires the evidence of a single witness to be approached with special caution. See: ***R v Mokoena 1956 (3) SA 81 (A)*** at 85-86.

An application of this rule means that a court must be alive to the danger of relying on the evidence of only one witness, because it cannot be checked against other evidence. In this regard see: ***S v Dyira 2010 (1) SACR 78 (ECG)*** para 6.

[9] In the particular case before me a further cautionary rule needs to be applied since the complainant was a child of five years old when the crime was committed and was eight when she gave her evidence. She was therefore of very tender years. The second cautionary rule was therefore that which has to be applied to the evidence of small children. As to this second rule applicable in the present matter, the Court is admonished to be aware of the danger of accepting the evidence of a little child. This is because of its potentially unreliable and untrustworthy nature. It could also be as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence in suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity. See: S ***v Viveiros [2000] 2 All SA 86 (SCA)*** para 2.

[10] So, to reiterate, in the present case more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the Court must have a proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness.

[11] In ***Manda****'s* case above (at p. 163) Schreiner JA said the following:-

> *'Nevertheless the dangers inherit in reliance upon the uncorroborated evidence of a 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, perhaps, to suspicion. It seems to me that the proper approach to a consideration of their evidence is to follow the lines adopted in the case of accomplices (Rex v Ncanana 1948 (4) SA 399 *{AD)) and in the case of complaints and charges of sexual assault (Rex* v W 1949 (3) SA 772 *(AD)) the trial court must fully appreciate the dangers inherent in the acceptance of such evidence and where there is reason to suppose that such appreciation was absent a court of appeal may hold that the conviction should not be sustained. The best indication that there was proper appreciation of the risks is naturally to be found in the reasons furnished by the trial court."*

[12] The first thing to be said about this pronouncement is that it has been followed in numerous cases from when it was made up until the present and I fully intend doing so as well. Having said that, I do not understand the admonition set out in the cases referred to above to apply the cautionary rules in the case of young children and single witnesses, to mean that the evidence of such a witness is to be scrutinised or indeed measured in any way differently from the evidence from any witness in a criminal case As I have referred to above, the test must always be as to whether the State's evidence, even if it rests on the evidence of a single witness, is sufficient to prove the guilt of the accused beyond a reasonable doubt. Even if the evidence of the State rests upon a multitude of witnesses their evidence must still be scrutinised carefully in order to make sure that it enables the State to overcome the requisite burden of proof. To my mind the same applies as far as the evidence of a single young child is concerned. All the cautionary rules do is wave a red flag in front of the Court when such a situation arises, warning that court to bear a number of particular factors in mind when conducting its evaluation of that evidence. In the present matter those factors consist of the two cautionary rules.

[13] Indeed, a court should be particularly alert to an application of the cautionary rules where factors such as evasiveness on the part of the witness, the lapse of a significant

period of time between the incident complained of and the trial, the fact that a witness had a grudge against the complainant or a motive falsely to implicate him, and the fact that a child may generally have had some difficulty in separating reality from fantasy have to be considered. See: ***S v V 2000 (1) SACR 453 (SCA).***

[14] Such factors seem to me to be present in the instant case. There was indeed a lapse of a significant period of time between the incident complained of and the trial, namely a period of some three years. Again, it seems to have emerged from the evidence tnat the complainant did not get on well with her father and certainly her mother, who was close to her, had a grudge against the Appellant because of the breakup of their marriage. Most pertinently, it does not seem as if there was ever any report of any more than one incident of indecent assault on the complainant However, in giving evidence in chief and following a leading question from the prosecutor in the *court a quo.* the complainant suddenly elevated the number of assaults to two She thereafter ran into considerable difficulty in explaining when each of them had been reported and to whom and in what circumstances. Such an incident suggests to me not only the fact that the complainant in the present case had difficulty separating reality from fantasy, but also gives an indication as to her suggestibility.

[15] So, in evaluating the evidence of a single witness who is also a child, our courts have laid down certain general guidelines which are of assistance when applying the cautionary rules. In such a case:

(a) A court will articulate the warning in the judgment, and also the reasons for the need for caution in general, and with reference to the particular circumstances of the case.

A court will examine the evidence in order to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in all material respects.

(b) Although corroboration is not a prerequisite for a conviction, a court will sometimes, in appropriate circumstances, seek corroboration which implicates the accused before it will convict beyond reasonable doubt.

(c) Failing corroboration, a court will look for some feature in the evidence which gives the implication by a single child witness enough of a hallmark of trustworthiness to reduce substantially the risk of a wrong reliance upon her evidence. See: S ***v Artman 1968 (3) SA 339 (A)*** at 340H and ***Dyira's*** case above, para 10.

[16] In short, what was necessary in the present case was a detailed evaluation, not confined to demeanour, of the extent to which the evidence of the child complainant could be regarded as reliable and acceptable. In my opinion, the Court did not do this. For example, the Magistrate found that the so-called "first report" that the complainant made to her mother was consistent with the evidence of the complainant in all material respects and that this consistency between her evidence and the first report is a factor which in law strengthens the credibility of a young complainant. The reality is that the first report is not consistent with the evidence of the complainant in all material respects.

[17] The complainant testified that on both occasions of the alleged indecent assault, the Appellant first masturbated himself and then went to the bathroom to wash himself and thereafter cleaned the carpet before he inserted his finger into her private parts. In her first report to her mother the complainant, however, reported that he touched her private parts while he was masturbating himself. This point goes even further: in the social worker's report for the purposes of sentencing, there is a quotation from what appears to be a statement made by the complainant to the police. The statement made by the complainant in this regard seems to indicate that in fact the Appellant, according to the complainant, had masturbated himself after he had inserted his finger into her vagina. If this last is the

case then there are indeed three different versions which appear to have been put forward by the complainant,

[18] Again, the complainant did not tell her mother that the Appellant had undressed himself completely when he committed the alleged indecent acts, although this was her clear evidence in chief. The complainant's mother also did not testify that the complainant had told her that the incidents occurred on two separate occasions, as I have already noted.

[19] Of more concern is that the complainant contradicted herself materially and repeatedly. In her evidence in chief the complainant testified that after the second indecent assault, she spent the night in the caravan on her own bed, but ran to her grandmother the next morning and told her that the Appellant had hurt her. She did not tell her grandmother how the Appellant had hurt her, but her grandmother told her to sleep with her after the report. The next day the complainant's mother came to fetch her at the school and they then went back to her grandfather's house where she told her mother everything. She testified that she had first only told her grandmother that the Appellant had hurt her and then told her mother how the Appellant had hurt her. After her mother went out, she then told her grandmother.

[20] The complainant then told the prosecutor that she only told her mother what the Appellant did to her when they had returned to Midrand in Gauteng. This materially contradicts the above initial version where she had testified she had told her mother what the Appellant did to her in Sedgefiefd (in the Southern Cape) at her grandfather's house and when her mother left, she told her grandmother what the Appellant did to her.

[21] The complainant then further contradicted herself during cross-examination. After initially testifying in cross-examination that it was after the second indecent assault that she told her grandmother, she then contradicted her evidence-in-chief and earlier evidence under cross-examination by testifying that she told her grandmother about the incident after the first indecent assault and her mother after the second indecent assault.

[22] The complainant then further contradicted her evidence in chief by testifying that she told her mother about the assault in Midrand and that her grandmother was not there. The contradictions go even further than this: the complainant contradicted herself in that, initially she testified under cross-examination that only herself, the accused, her brother, her grandmother and her grandmother's husband lived in Sedgefield when she stayed with them. When she was asked in re-examination why she did not tell her grandmother about the second indecent assault, she replied that it was because she was scared that her grandmother would tell her three nieces, who also stayed there, about the assault.

[23] Another contradiction arose when the complainant initially stated in evidence in chief that her mother came to fetch her from the school and then she testified in evidence in chief that her stepfather came to fetch her. When she was cross-examined she initially testified that only her stepfather came to fetch her at school. She then changed her evidence back to say that her mother and stepfather had fetched her and ended off her cross-examination in this regard by testifying that it was only her stepfather that came to fetch her, and not her mother. As an explanation for these contradictions she merely explained *'ek vergeet bale goeters".*

[24] It was the complainant's mother's clear testimony that both her mother and stepfather came to fetch her at the school.

[25] The complainant changed her story in that initially she testified that she had on a pair of denim pants when the indecent act was perpetrated on her. She later changed this evidence to testify she had on a pair of pink pants.

[26] Taking the complainant's testimony further, she initially testified that her brother was staying with her grandmother when the incidents took place and that he was with his grandfather when the incidents took place. She testified at a later stage that the incidents happened on a Tuesday and a Wednesday. Later, during cross-examination, she changed this version and testified that her brother was in the school hostel in George at the time

that the incidents took place. But this was clearly incorrect. When it was put to her that the Appellant would testify that her brother only went to the school hostel in 2009 (well after the incident in question), she was so adamant that her brother was at the school hostel at the time that she said "nee *hy jok".* Complainant's mother's evidence was clearly that complainant's brother was not at boarding school at the time of the incident, but was at school at Sedgefied.

[27] In his judgment the Magistrate assumed that the complainant did not deviate from the statement that she made to the police by virtue of the fact that her attorney did not bring any such deviations to the attention of the Court. The Court therefore found that the complainant's evidence in Court was consistent with her statement to the police and took this into account as a corroborating factor and as one which positively affected her credibility. The Magistrate erred in such an approach, because this clearly offends against the rule against self-corroboration by self-consistent statements. In this regard see: S ***v Scott-Crossley 2008 (1) SACR 223 (SCA)*** para 17.

[28] I believe the Magistrate also erred in finding that the medical evidence supported the version of the complainant. Although the medical evidence, which was largely unchallenged, established that there had possibly been forcible penetration by some object of the complainant prior to the examination, there was nothing in that evidence which could link it either in time or in any other way to the persona of the Appellant. In this regard I believe that the Magistrate also misdirected himself

[29] The evidence of the Appellant was not shaken in any way in cross-examination. He was consistent throughout his testimony that he never had, and never would, do something such as that he had been accused of to his daughter. To my mind the accused was honest and direct as a witness. For example, he openly admitted in chief that the relationship between him and his ex-wife was anything but good. He also fairly conceded that his daughter's evidence was correct when she said that she and her brother Renier,

when at Sedgefield, slept either with him in the caravan or with their grandmother, as they were close to her. When it was put to the Appellant that his ex-wife had no reason to make up a false case against him, he told of a telephone call from her shortly after she removed the complainant from him to the effect that she intended to make out a sexual harassment case against him so that he would never see his daughter again. Furthermore, when it was put to him that his ex-wife would not be too biased against him as she had subsequently sent him photos of his daughter he fairly conceded that this was so and added that he was very happy that she had done so. Reading the record of the Appellant's evidence shows that he was not evasive or untruthful in anyway In short, there does not appear to be any aspect of his evidence which is improbable - on the contrary, in my opinion, his evidence was entirely probable It is noteworthy that the Magistrate made no adverse credibility or demeanour findings against the Appellant and neither do there appear to have been any inconsistencies or contradictions in his evidence.

[30] Having regard to the totality of the evidence and with the cautionary rules in the forefront of one's mind, the conclusion is inevitable that the evidence of the complainant does not have that degree of trustworthiness which would allow the State to overcome the burden of proof beyond a reasonable doubt. If I cannot trust the evidence of the only material witness called on behalf of the State, then that raises a doubt in my mind as to whether in fact the complainant's evidence is reliable. If I have such a doubt then, particularly in light of the acceptable evidence given by the Appellant, the conclusion is inevitable that the State has not proved its case beyond a reasonable doubt.

[31] In the circumstances. I am of the opinion that the appeal against the conviction should succeed.

[32] In the result I propose the following order:-
a) The Appeal succeeds,
b) The conviction and sentence is set aside.

SANER, AJ

I AGREE. IT IS SO ORDERED.

LE GRANGE, J