THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 453/15

In the matter between:

RONSON PILLAY **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Pillay v The State* (453/2015) [2016] ZASCA 26 (18 March 2016)
Coram: Tshiqi, Petse and Zondi JJA

Heard: 24 February 2016

Delivered: 18 March 2016

Summary: Criminal law and procedure - Assessment of evidence – trial court's failure to evaluate evidence of a child witness who is also a single witness by overlooking various contradictions in the evidence and their effect on its credibility constituted misdirection.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Pillay and Mbatha JJ sitting as court of appeal):

The appeal succeeds and the conviction and sentence are set aside.

JUDGMENT

Zondi JA (Tshiqi and Petse JJA concurring):

[1] The appellant was convicted in the regional court, Verulam on a charge of indecent assault read with s 94 of the Criminal Procedure Act 51 of 1977 (the Act). He was found to have indecently assaulted the complainant, a 13 year old girl, over the period June 2006 to May 2007 by making her touch his penis and by showing her a picture of a penis on his cellular phone. On 26 November 2009 he was sentenced to four years' imprisonment in terms of s 276 (1)(i) of the Act. He appealed to the KwaZulu-Natal Division of the High Court, Pietermaritzburg. On appeal the conviction was confirmed, but the appeal against sentence was allowed to the extent that the sentence imposed by the trial court was set aside and replaced with one of two years' imprisonment in terms of s 276(1)(i) of the Act. The appeal against conviction and sentence is before this court with the leave of the court a quo. (This was prior to the enactment of the Superior Courts Act 10 of 2013 which came into effect on 23 August 2013).

[2] It is common cause that the appellant, a 30 year old metro police officer, was a tenant at the complainant's residence from 2004 to June 2007. He stayed in the main house with the complainant and her family from 2004 to October 2006 and later in the outbuilding from November 2006 to June 2007. The events giving rise to the charge are alleged to have occurred during the appellant's stay at the complainant's residence.

[3] The relationship between the appellant and the complainant's father was not only that of a landlord and tenant but they were also friends and colleagues. As he was experiencing financial problems the complainant's father assisted him financially and secured a loan on his behalf to help him get on his feet. In due course the appellant's financial situation worsened and in consequence he fell into arrears with his rent and failed to repay the loan secured by the complainant's father on his behalf. This was the beginning of the end of their friendship.

[4] Although the charge sheet refers to a single incident, the complainant, who was 15 years when she testified, referred to the following four incidents: She alleged that the first incident occurred on a Sunday shortly before midnight around June 2006. When the appellant arrived from work she was watching television in the lounge. As he walked into the house she switched off the television and went to the bathroom before going to bed because, as she put it, she did not want to give the appellant the wrong impression. On her way back to her room she stopped for a chat with him in his room. They sat on his bed and started chatting. During the course of the conversation the appellant asked her to 'play' with his penis. She refused. The appellant closed the door and after undoing his pants grabbed hold of her hand and asked her to 'play' with his penis, which act she performed reluctantly. According to her, she did not see the appellant's penis despite the fact that the appellant had exposed it to her. Thereafter the appellant asked her if she had ever seen a boy's penis. When she answered in the negative the appellant offered to show her how it looked like. He then asked her to leave his room for a moment and wait outside at the door and she complied. Shortly thereafter the appellant called her in and showed her a picture on his Nokia cellular phone depicting an object which he said was his penis.

[5] The second incident is alleged to have occurred when she was in the appellant's bedroom to collect her clothes. The appellant asked her to 'play' with his penis but on this occasion she refused and walked away from him. She alleged that the third incident occurred when she collected her face towel from the appellant's bedroom. On this occasion he found him sitting on his bed onto which he pulled her and fondled her. He also forced her to perform oral sex on him. She alleged that during the fourth incident the appellant made her 'play' with his penis.

[6] She alleged that she did not report these acts of sexual assault perpetrated on her to her parents after they occurred. They were only brought to her mother's attention on 1 June 2007 through her friend, Moodley, in whom she allegedly confided. There is a dispute between Moodley and the complainant's mother as to whether the complainant was also present in the room when the report was made to her mother, but what is clear is that her mother had a discussion with her in connection with the allegations. Her mother in turn informed her father of the allegations and he suggested that the complainant write everything down which she did. When the appellant returned from work the complainant's mother confronted him with these allegations but he denied them. The following day the complainant accompanied by her father went to the police station and laid a charge of indecent assault against the appellant. Consequent upon these allegations against the appellant, the complainant's father terminated his tenancy and evicted him from the property.

[7] The appellant testified in his defence. He denied all of the allegations against him contending that the charges were orchestrated by the complainant's father in an attempt to force him to pay the debt and arrear rental. A further possible reason suggested by the appellant for the complainant's father to use her to instigate malicious charges against him was that he suspected that the appellant was spying on him for his wife. The trial court rejected the appellant's version as false and accepted that of the complainant as truthful. On appeal the court a quo confirmed the conviction, but reduced the sentence.

[8] As the appellant's conviction was based on the evidence of a child witness who was also a single witness, it is useful to set out the legal principles applicable in relation to such evidence. It has long been accepted that the evidence of a child is potentially unreliable because of the child's inexperience, imaginations and susceptibility to influence and for that reason it should be approached with caution.[1] The trial court must fully appreciate the dangers inherent in the acceptance of such evidence and where it is

1*Viveiros v S* (75/98) [2000] ZASCA 95; [2000] 2 All SA 86 (A) para 2.

apparent that such appreciation was absent a court of appeal may hold that the conviction should not be sustained.[2]

[9] In my view, the trial court misdirected itself in two respects. First, it failed to properly apply the cautionary rule in analysing the complainant's evidence. Her evidence on the first incident was improbable. It seems improbable that after the appellant had allowed the complainant to 'play' with his penis, he would send her out of the room when he wanted to take a photograph of it. It is incomprehensible why she would agree to wait outside while the appellant took a photograph of his penis after he had made her to perform what she described as a disgusting act. According to her the act occurred in a room inside the house where her parents were present and her own room was also in the same house. It is thus not clear why she elected to remain outside, wait for the appellant and then return to his room and again look at the picture on his cellular phone after she had been exposed to the disgusting act. The State conceded that her behaviour in that regard is inexplicable and that the court should reject her evidence concerning that incident.

[10] There were also discrepancies between the complainant's evidence-in-chief and the statement she made to the police on 2 June 2007. In that statement the complainant only referred to the first incident and that incident only referred to the touching of his private part. No mention is made of the appellant showing the complainant a photograph of his penis. There is also no mention of the other later incidents. In her handwritten statement she stated that, during the third incident, the appellant called her into his bedroom, but when she was cross-examined on it, she testified that he called her, but she did not go. Regarding the fourth incident the complainant testified that the appellant made her 'play' with his penis. But when she was cross-examined on it, her reaction was that she could not remember it very clearly. The State could offer no explanation for these inconsistencies and agreed that there is lack of clarity on which of the incidents the appellant was convicted.

[11] The complainant also contradicted herself materially regarding when the appellant stopped perpetrating the acts of sexual assault on her. In her evidence-in-chief, she testified that they ended when he moved into the outbuilding. But under cross-

2*R v Manda* 1951 (3) SA 158 (A) at 163C-F.

examination she testified that the fourth incident occurred in the outbuilding. Her mother on the other hand suggested that the relationship between the appellant and the complainant soured after he moved into the outbuilding, thereby suggesting that whatever happened probably occurred during that time period. Moreover, the complainant and Moodley, the person to whom she allegedly reported the indecent assault, contradicted each other as to how it came about that the report was made and on the content of that report.

[12] The trial court did not deal with these apparent contradictions and improbabilities in the complainant's evidence. It unreservedly accepted her evidence. From the reasoning of the trial court, it does not appear that it fully appreciated the dangers inherent in the acceptance of the complainant's evidence and the need to subject her evidence to proper scrutiny to avoid the risk of a wrong conviction.

[13] The trial court's failure to carefully scrutinise the complainant's evidence is demonstrated by the following passage in its judgment:

'Be that as it may, the Court is focused on the interests of justice. Looking at the evidence in its totality, looking at the demeanour of the complainant, looking at the nature of her evidence, looking at her evidence-in-chief, tested by cross-examination, looking at the basic content of the statement that she made to the police and the basic content of the handwritten statement she made for her parents to read, the Court can only find that in material substance they are the same.'

The analysis of the complainant's evidence makes it clear that the trial court's finding that the evidence that was before it was 'in material substance . . . the same' cannot be correct. The evidence was not substantially the same. The inherent contradictions undermined the reliability of the complainant's evidence and her trustworthiness as a witness.

[14] The trial court also misdirected itself by applying the wrong standard of proof in determining the guilt of the appellant. The trial court rejected as far-fetched and fanciful the appellant's suggestion that the charge against him was orchestrated to get him evicted from the complainant's home. It reasoned that it was 'highly improbable [and] against the totality of the evidence that [the complainant's] parents would put [her] through this difficult experience of testifying in court . . . .' This approach is incorrect and

was deprecated by this Court in *S v Shackell*[3] in which the following was stated at para 30 regarding the standard of proof:

'It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.'

[15] If regard is had to the shortcomings in the State's case, mainly the unreliability of the complainant's evidence and the misdirections displayed in the judgment of the trial court, it cannot be said that the guilt of the appellant was proved beyond reasonable doubt. The State conceded, correctly so, in my view, that these contradictions in the complainant's evidence were serious and that in consequence it could not support the conviction.

[16] In the result the following order is made:

The appeal succeeds and the conviction and sentence are set aside.

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D H Zondi
Judge of Appeal

3*S v Shackell* 380/99 [2001] ZASCA 72; 2001 (4) SA 1 (SCA).

Appearances

For the Appellant:	J H Du Plessis Instructed by: Maniklall Ravindra & Co, Verulam Hill, McHardy & Herbst Inc, Bloemfontein
For the Respondent:	A A Watt Instructed by: The Director of Public Prosecutions, Pietermaritzburg The Director of Public Prosecutions, Bloemfontein