



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Unreportable

Case no: 692/2021

In the matter between:

ICM

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *ICM v The State* (692/2021) [2022] ZASCA 108 (15 July 2022)

Coram: Dambuza and Nicholls JJA and Tsoka, Musi and Salie-Hlophe AJJA

Heard: 10 May 2022

Delivered: 15 July 2022

Summary: Criminal law and procedure – evidence – sexual assault and rape of child complainant in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 – whether evidence was sufficient to sustain convictions despite contradictions in testimony of single witness – complainant's motive to lie – admissibility and weight dependent on the facts of a case.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Maakane and Noko AJJ, sitting as court of appeal):

1 The appeal is dismissed.

JUDGMENT

Musi AJA (Dambuza and Nicholls JJA and Tsoka and Salie-Hlophe AJJA concurring):

[1] The appellant was convicted in the regional court, Pretoria, on five counts of sexual assault in contravention of s 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) and one count of rape, in contravention of s 3 of the Act. He was sentenced to 6 years' imprisonment in respect of the rape count and 18 months' imprisonment on each of the sexual assault counts. It was ordered that three of the sentences imposed for the sexual assault counts should run concurrently with the sentence on the rape count; the effective sentence was therefore 9 years' imprisonment.

[2] He appealed against the convictions and sentences to the Gauteng Division of the High Court, Pretoria (high court). The appeal against the convictions was dismissed, however, the high court amended the sentence by ordering that all the sentences in respect of the sexual assault counts should run concurrently with the sentence on the rape count. The effective sentence was accordingly reduced to 6 years' imprisonment. This appeal, which is with the leave of this Court, is only against the convictions.

[3] Although the allegations of sexual assault and rape were disputed by the appellant, the incidents during which it was alleged they occurred were not in dispute. The appellant's defence was essentially that the complainant had stretched the truth by fabricating the sexual assault and rape aspects of the incidents. The argument was further that it was at the complainant's mother's instigation that the complainant concocted the lies about the incidents. The facts were the following.

[4] The complainant, having been born on 2 April 2001, was about 11 years old at the time of the incidents. She lived with her parents at a housing complex in Centurion. Their home was opposite that of the appellant who lived with his wife. The complainant was very fond of the appellant's wife and visited their (appellant and his wife's) home frequently. As neighbours, they got along well until the events that led to the appellant's arrest.

[5] On 5 May 2012, the complainant attended a friend's party. On Sunday 6 May 2012, at approximately 09h00 her mother fetched the complainant from her friend's home. When they got home the complainant cried. Her mother enquired what was wrong, to which she replied that her vagina was painful. Her mother examined her and noticed two ulcers on her vagina (labia majora). She took a photograph of the ulcers and asked the complainant who had interfered with her, using the Afrikaans word 'peuter'. Whilst the complainant did not answer initially, she pointed in the direction of the appellant's house, when her mother persisted with her enquiry. The mother thereafter enquired whether it was the appellant and the complainant confirmed.

[6] The mother called her husband and on his arrival, they took the complainant to Unitas Hospital where she was examined by a doctor. The doctor prescribed medication and referred them to Ms Preston, a psychologist. She bought the medication and her husband took the complainant to the psychologist the next day.

[7] On 8 May 2012 the mother laid a complaint against the appellant. The investigating officer took them to the Tshwane Medico Legal Crisis Centre where the

complainant was examined by Dr Thosago who referred them to a gynaecologist. They contacted the gynaecologist but could only secure an appointment during June 2012. The mother decided to consult their family doctor, Dr Sommerville.

[8] The complainant's mother testified that the complainant was initially not very forthcoming about the details of the incidents but gradually opened up and told her what the appellant had done to her. The complainant told her that the appellant touched and rubbed her vagina and breasts and that he inserted his finger in her vagina. The complainant told her that the last incident occurred on 24 February 2012. It was a few days after her birthday, which is on 21 February.

[9] The complainant was 13 years old when she testified during 2014. She pertinently recalled four incidents but testified that the appellant touched and or rubbed her vagina and or breasts on more than seven occasions. The first occasion was during 2011 when her father fetched her from school and they drove home. After he parked the car, he went to the house while she went to the boot of the car in order to take out her schoolbag. Whilst standing by the boot of the car the appellant approached her from behind, touched her shoulder, and rubbed her breasts with his hands. She felt very uncomfortable. She took her bag out of the boot and walked away. There was nobody in the vicinity and she did not tell anybody about the incident. She was afraid that she would be in trouble if she told anyone.

[10] The complainant was an athlete and also played hockey and netball. She used to jog in the complex as part of her exercise routine. One day, during 2011, after jogging, she went to the appellant's house to greet his wife. The appellant and his wife were home. She entered and sat on a one-seater couch. He was sitting on a three-seater couch while his wife was busy in the kitchen. He requested the complainant to sit next to him on the three-seater couch, which she did. They watched television and the appellant hugged and then pressed her against him. He asked whether he may tickle her stomach. She said yes but that he may do so on her back. He ignored what she said and started tickling her on her stomach. The appellant made the complainant lie on the couch in a supine position with her head on his lap. He initially tickled her over her clothes but later he put his hand under her

shirt and tickled her stomach and rubbed his hand over her breasts. She tried to stand up but he pulled her back and continued rubbing her breasts. He then rubbed his hand over her vagina and ultimately put his finger in her vagina. He painfully moved his finger in and out of her vagina followed by smelling his fingers after removing it from her vagina. While all this was happening his wife was cooking in the kitchen. She was penned down on the couch by his arm. She did not tell anybody about the incident because she was afraid.

[11] During 2011 the complainant was playing with a ball in the street. She accidentally kicked the ball into the appellant's yard. She entered the yard to retrieve her ball. The appellant and his wife were preparing to have a braai. They were sitting outside on camp chairs. She greeted them and the appellant requested her to sit on his lap, she obliged. His wife went into the house. While she was sitting on one leg he touched and rubbed her vagina with his hand, on top of her clothing. He also moved his knee hard up and down against her vagina in a state of arousal. She removed his hand, stood up, gave him a dirty look, took her ball, said goodbye to his wife and went home.

[12] On another occasion she went to the appellant's house and sat on the couch. She was wearing ski-pants. The appellant sat next to her and suddenly rubbed her thigh with his hand whilst also touching her vagina. His wife was in the garage when this occurred. She did not tell anyone about this incident because the appellant threatened to hurt her mother if she did.

[13] She confirmed that she told her mother on 6 May 2012, that the appellant tampered with her. Although she told her mother that the last time that the appellant interfered with her was during February 2012 a few days after her mother's birthday, she testified that nothing happened on that day.

[14] Dr Thosago's medico-legal report was handed in as an exhibit after the defence admitted its contents. He examined the complainant on 8 May 2012 and observed two ulcers on her labia majora and a creamlike discharge. He referred her to a gynaecologist.

[15] Dr Sommerville testified that she examined the complainant on 9 May 2012. The complainant presented two large irregular shaped hyperaemic ulcers on her right labia majora with a thick non-offensive vaginal discharge. Her hymen was still intact and the complainant was not bleeding. She was of the view that the ulcers were pathological and might have been caused by the herpes virus or human papilloma virus. This could not be determined because no tests were done to detect viral antibodies in her blood. According to her these viral infections can be transmitted by digital penetration or touching. She explained that the fact that the hymen was still intact does not mean that there was no penetration.

[16] Ms Du Plessis-Emmerich, a psychologist, testified that she interviewed the complainant, her parents and the appellant. She did a forensic assessment of the complainant. She did not do an intellectual or neurological assessment. She testified that due to the complainant's age and brain development, traumatic events would not be stored in sequence and that it would be difficult for such a young child to remember dates and times. She confirmed the contents of her discussions with all the parties, which was contained in her report.

[17] The appellant testified that he was born on 12 April 1948. He was 66 years old when he testified in 2014. He confirmed that he had known the complainant and her parents since 2007 when he and his wife moved to the residential complex in which they lived. He used to play badminton with the complainant and she frequented their home. He denied having a three-seater couch. According to him there are only two two-seater couches in his house.

[18] He testified that during 2009 the complainant asked him to tickle her because her grandfather used to tickle her, until her mother put a stop to it. He asked why she did not ask her father to tickle her and she told him that her father was busy playing games. He asked what her mother would say if he tickled her, and she said her mother would not have a problem if he did so. His wife was busy making pickled peaches in the kitchen. He was busy reading a magazine. According to him, the complainant merely sat next to him; she later lay on the couch with her head on his

right leg. She pulled her t-shirt up and pushed her short pants downward and he tickled her stomach. He testified that he tickled her again in 2010. On this occasion his wife was in the kitchen while he and the complainant were watching television. He denied ever touching or rubbing her vagina or breasts or inserting his finger in her vagina.

[19] The appellant's wife asserted that she would have seen if the appellant had done anything untoward to the complainant. She confirmed that, during 2009, the complainant requested the appellant to tickle her, which he did. She further confirmed that the appellant went to Gqeberha on Monday, 20 February 2012 and returned on Saturday, 25 February 2012. On this version, the appellant was not at home on the 24 February 2012, the day on which, according to the complainant's mother, the last incident of sexual assault occurred.

[20] Dr Van Wyk testified that he did not examine the complainant but had access to the photograph that was taken by her mother and the medical reports compiled by Drs Sommerville and Thosago. He was of the opinion that the ulcers were not caused by a sexually transmitted disease. His opinion was that the complainant was not penetrated because if she was, her hymen would not be intact and she would have bled.

[21] In the high court the appellant submitted that the regional magistrate erred in the following respects: (i) by not applying the cautionary rule when he evaluated the complainant's testimony; (ii) by not considering the testimony of Dr Van Wyk; and (iii) by not properly assessing the testimonies of Dr Sommerville and Dr Van Wyk. The high court rejected the appellant's submissions and found that the regional magistrate did not misdirect himself and that he did not commit any irregularity in his evaluation of the totality of the evidence. It found that the regional court's factual findings were correct.

[22] The complainant was a single witness and a child. Her testimony had to be approached with caution. In terms of section 208 of the Criminal Procedure Act¹ it is

¹ Section 208 of the Criminal Procedure Act 51 of 1977 reads: 'An accused may be convicted of any offence on the single evidence of any competent witness.'

competent for a court to convict on the evidence of a single witness. However, the evidence of a single witness must be clear and satisfactory in every material respect.² This does not mean that such evidence must be flawless and beyond criticism. In *S v Sauls*³ it was held that:

‘There is no rule of thumb test or formula to apply when it comes to a consideration of the single witness . . . The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932. . . may be a guide to a right decision but it does not mean “that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence were well-founded...” It has been said more than once that the exercise of caution must not be allowed to displace the exercise common sense.’⁴

[23] With regard to the complainant’s age the legal position is that a court considering the evidence of a child, must be satisfied that the child is a credible and reliable witness. The credibility assessment relates to the child’s honesty whilst reliability relates to the child’s cognitive ability or brain development. The child’s cognitive ability is assessed by having regard to factors such as his or her ability to encode, retain, retrieve and recount information or an event. The ‘intimidating and bewildering atmosphere’⁵ under which the child testified should also be factored in. As with any other witness, the child witness’ testimony should be evaluated in the light of the totality of the evidence.

[24] Ms Du Plessis-Emmerich’s testimony relating to the complainant’s brain development and the difficulty for such a young child to store and retrieve traumatic events in sequence provided valuable guidance. The prosecutor’s guidance kept the complainant’s testimony focussed and to the point. The complainant was subjected to lengthy cross-examination. Her version remained consistent.

² *R v Mokoena* 1932 OPD 79 at 80; *R v Mokoena* 1956 (3) SA 81 (A) at 85.

³ *S v Sauls* 1981 (3) SA 172 (A).

⁴ *Ibid* at 180E-G.

⁵ *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC) at para 104.

[25] The complainant's testimony was not beyond criticism. She could not remember the last time the appellant tampered with her. In her first affidavit, which was taken in the absence of her parents, she said that the last time was at the end of 2011. In her second affidavit she stated that the last occasion was during February 2012. During cross-examination she testified that nothing happened during February 2012 or specifically on 24 February 2012. Much of the cross-examination centred around what happened or did not happen on 24 February 2012. It was submitted on behalf of the appellant that he had prepared his defence around the dates that the complainant had given, particularly in relation to the 24 February 2012. At the trial the appellant produced a receipt for payment made to a guesthouse in Gqeberha, as proof that he was not at home on the day in question.

[26] However, on the complainant's own version nothing happened on that day. Only her mother testified that the complainant told her that the last incident (the rape) happened on 24 February 2012. This discrepancy in the evidence of the complainant and her mother is immaterial because the rape incident was attached to broader events which were not in dispute, such that the appellant was able to recall the day on which the incidents was said to have happened. With regard to the other sexual assault and rape incidents, the complainant described them also with reference to other incidents that happened on those respective days. And those other events were not in dispute. Consequently, the submission that the appellant suffered prejudice as a result of uncertainty about the days on which the incidents happened is misplaced.

[27] Equally untenable was the criticism of the credibility findings of the trial court. Apart from the complainant's inability to give exact dates on which the incidents happened, the discrepancies between the various statements made by the complainant to the police and her testimony in court were highlighted. In the statements the complainant stated that the appellant had penetrated her digitally every time when he touched her vagina, which was contrary to her testimony. The submission on behalf of the appellant was that this was a material contradiction.

[28] The complainant's testimony that the first statement was taken in the absence of her parents or an accompanying adult is particularly troubling. Although the presence of a parent or an accompanying adult when a statement is taken from a child is not a strict requirement, it is preferred.

[29] It is also necessary to say something about the relevance of the medical evidence, obtained from Drs Sommerville, Van Wyk and Thosago, when considering the contention that the charges were fabricated at the instance of the complainant's mother. Whilst the report of the incidents of sexual assault and rape were triggered by the discovery of the ulcers on the complainant's private parts, it is not correct that the trial court impermissibly found support or corroboration for the charges in the presence of the ulcers. On the evidence of the three doctors the cause of the ulcers was undetermined, except that Dr Van Wyk, who did not even examine the complainant referred to the usual causes thereof, without giving a firm opinion on the likely cause.

[30] Dr Van Wyk's testimony to the effect that because the complainant's hymen was intact, she had never been penetrated was disputed by Dr Sommerville. Dr Sommerville testified that the hymen would not necessarily be torn after penetration because it will depend on the extent of the penetration. In any event, Dr Van Wyk did not testify about sexual penetration as defined in our law. Even under the common law, when rape was narrowly defined as penile penetration of the vagina without consent, the slightest form of penetration was sufficient to prove penetration.⁶ 'Sexual penetration' is defined in the Act as, inter alia, including any act which causes penetration to any extent whatsoever by any other part of the body of one person into or beyond the genital organs or anus of another person.⁷ It is clear from the definition that the slightest form of penetration is enough to constitute penetration. Penetration certainly does not mean that the hymen must be torn as Dr Van Wyk testified. Dr Van Wyk's opinion is clearly untenable and was correctly rejected.

⁶ *S v K* 1972 (2) SA 898 (A) at 900C.

⁷ Section 1 of the Act.

[31] Furthermore the appellant's suggestion that the complainant was coached by her mother to falsely implicate him in allegations of sexual assault and rape is improbable. To do so the complainant and her mother would have had to conspire about what they would tell the psychologist. The detail and consistency in the evidence of the complainant and Ms Du Plessis-Emmerich disproves this contention.

[32] It is trite that the State bears the onus to prove the guilt of an accused beyond reasonable doubt. The decision to convict or acquit must be based on the totality of the evidence. It has been said that '[s]ome of the evidence might be found to be false, some of it might be found to be reliable, and some of it might be found to be only possibly false or unreliable, but none of it may be ignored.'⁸

[33] I agree that generally, as the appellant submitted, it is unfair and irregular for a judicial officer to expect an accused to demonstrate that a complainant had a motive to lie. In most cases this would amount to calling on the accused to speculate on the possible motive. This might amount to inadmissible opinion evidence, because no witness can give factual evidence of the motives of another person. An accused may put a possible motive to a complainant during cross-examination. He may testify and be cross-examined on that aspect. Where an accused alleges and proves a possible motive to lie, that fact must be evaluated with all the other evidence in order to discern whether it should detract from the complainant's credibility. However, the fact that the complainant had a motive to lie is not proof of the fact that the complainant lied.

[34] The regional magistrate said the following, in his judgment:

'Maar waarom moet die kind nou verwys na die beskuldigde as dit nie hy was nie? Waarom het die kind nie na die pa verwys nie, of die onderwyser by die skool, of 'n seun iewers in die kompleks nie; ... Waarom, dit is die vraag.'⁹

He then found that the complainant had no motive to lie about the appellant. Counsel for the appellant submitted that the regional magistrate harnessed the lack of a motive to lie to make an adverse credibility finding against the appellant.

⁸ *S v Van der Meyden* 1999 (1) SACR 447 (W) at 450a-b; *S v Trainor* 2003 (1) SACR 35 (SCA) at para 9.

⁹ 'But why would the child refer to the accused if it was not him? Why did she not refer to her father, or a teacher at school, or a boy somewhere in the complex... why is the question.' (My translation.)

[35] Indeed the absence of a motive to lie should not be used to enhance the complainant's credibility. Likewise, it should not prejudice an accused. In most cases the absence of a demonstrable motive to lie would be a neutral factor. Each case must be judged on its own facts.¹⁰

[36] In the context of this case, the regional magistrate's remark and finding must be considered in its proper context – that is that the remark was triggered by the appellant's testimony that the complainant and her mother were protecting the real perpetrator, whose identity they knew, but concealed to falsely implicate him.

[37] It was submitted, on behalf of the appellant, that the regional magistrate did not give due consideration to the testimony of the appellant's wife. Whilst it is true that the regional magistrate did not refer to her evidence in his evaluation of the evidence, this does not mean that he ignored it. The regional magistrate accepted the appellant's wife's testimony that the appellant was not at home on 24 February 2012.

[38] The appellant's wife's testimony was not without fault. During cross-examination she contradicted the appellant and her own testimony. The appellant had testified that the complainant told him and his wife that her breasts were developing and that she had a boyfriend. His wife confirmed that the complainant told her that her breasts are developing, but she did not mention anything about a boyfriend. She testified that he tickled the complainant on one occasion in 2009, whilst it was common cause that he did it twice in her presence. It was common cause that the appellant tickled the complainant while she was laying on the couch with her head on his lap, his wife testified that he did so while she was sitting next to him. She explicitly denied that the complainant lay with her head on his lap. When she was confronted with the appellant's version that the complainant's head was on his lap, she testified that she did not see that because she was busy.

¹⁰ *Palmer v The Queen* [1998] HCA 2 – 193 CLR1; 72 ALJR 254. *R v Laboucan* [2010] 1 SCR 397. *S v Lotter* [2007] ZAWCHC 70; 2008 (2) SACR 595 (CPD) at para 38.

[39] In addition she could not remember the braai incident and testified that complainant went to their house and spoke to the appellant. When she was pressed to give detail about this incident, she could not remember any detail. In fact, she could not even remember the year in which the incident occurred. When the prosecutor put to her that she cannot remember what happened, she said it is because nothing happened. It is clear that she tried to protect the appellant.

[40] I do not agree that the trial court's silence on these aspects of the appellant's wife's testimony constituted a misdirection. Ultimately the judgment accounted for all the evidence on record. As it has been said '[n]o judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered'.¹¹

[41] It is true that in making the following remarks, the regional magistrate misunderstood aspects of the complainant's mother's testimony. In his judgment the regional magistrate's judgment said:

'Die beskuldigde het nie oop kaarte met die Hof gespeel nie. Die beskuldigde is nie 'n persoon wat die Hof kan maar maklik glo wat hy sê nie, die beskuldigde is 'n persoon wat 'n ander man se vrou snaakse goed op haar BBM stuur. Dit is 'n buurman se vrou. Die beskuldigde sê hy is 'n kerkman, maar hy probeer die buurman se vrou se borste vat. Watter tipe man is hierdie?

Die Hof is nie oortuig dat die beskuldigde is 'n persoon wat die Hof kan glo nie. Sy weergawe is nie redelik moontlik waar nie. Die beskuldigde se weergawe is total verwerp'.¹²

[42] Contrary to these remarks, what the complainant's mother testified was that the appellant tried to kiss her and not that he tried to touch her breasts. She further testified that the appellant sent her 'strange' things on her email, and not on BlackBerry Message (BBM). These remarks do not detract from the fact that on a

¹¹ *R v Dhlumayo and Another* 1948 (2) SA 677 (AD) at 706.

¹² 'The accused did not play open cards with the Court. He is a person whom the Court cannot easily believe. The accused is a person who sends strange BBM's to another man's wife. It is his neighbour's wife. The accused says he is a churchly person, but he tries to touch his neighbour's wife's breasts. What kind of man is this? The Court is convinced that the accused that the accused is not a person that the Court can believe. His version is not reasonably possibly true. The accused's version is totally rejected.' (My translation.)

conspectus of all the evidence, the guilt of the appellant was proved beyond reasonable doubt.

[43] Other than maintaining that the charges were based on fabrication, the appellant's alibi with regard to 24 February 2012 turned out to be irrelevant. He admitted that he tickled the complainant on two occasions, at her instance, during 2009 and 2010 (rather than 2011 and or 2012), and with the assurance that her mother would be agreeable. But he was aware that the complainant's mother did not want her to be tickled. On his own version, his belief that the complainant's mother would be agreeable to the tickling was not reasonably possibly true. His suggestion to Ms Du Plessis-Emmerich during a consultation that it was, in fact, the complainant who had pulled her shirt up and her panty downward, before he tickled her, was also not reasonably possibly true. Blaming the 11 year old complainant for his unlawful conduct cannot be a valid defence. In addition, the fact that he continued to tickle her for a long period (approximately an hour) despite having observed that she seemed to 'retreat into fantasy or a trance' is particularly disturbing.

[44] Lastly, counsel for the appellant bemoaned the fact that the appellant was convicted on five counts of sexual assault while the complainant testified about four incidents only. This is not correct. On the complainant's version the first tickling incident constituted both sexual assault (rubbing her breast) and rape (digital penetration). I am satisfied that the State proved the appellant's guilt beyond reasonable doubt. The high court properly dismissed the appeal on conviction. This appeal ought to be dismissed.

[45] I accordingly make the following order:

The appeal is dismissed.

C MUSI
ACTING JUDGE OF APPEAL

APPEARANCES:

For appellant: D J Combrink

Instructed by: Du Toit Attorneys, Pretoria

Lovius Block Attorneys, Bloemfontein

For first respondent: J Cronje

Instructed by: Office of the National Director of Public Prosecutions

Pretoria