



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: CC68/2024

In the matter between:

THE STATE

and

HLUMELO YALI

Accused

JUDGMENT

Govindjee J

[1] Mr Yali pleaded not guilty to a charge of rape in contravention of s 3, read with other sections of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.¹ The state alleges that he raped the complainant, a 7-year-old girl, by having intercourse with her *per anum* and *per vaginam*.

¹ Act 32 of 2007.

[2] Mr Yali, who admitted being known as 'Kwekwe', gave a brief plea explanation. He denied having ever seen the complainant before the present proceedings. He claimed not to know her at all and denied raping her.

[3] The state's case rests mainly on the evidence of the complainant and another child (LM), who both testified via closed-circuit television with the assistance of a duly qualified social worker appointed to serve as an intermediary in terms of s 170A of the Criminal Procedure Act, 1977.² This followed the necessary applications to that effect. Both children were held to be competent to testify, as supported by a psychosocial report in respect of the complainant and an 'intermediary assessment report' in respect of LM.³

[4] The complainant is now almost ten years of age. She testified that she had been raped by the accused, whom she knew as 'Kwekwe', when she was seven years of age and in grade one. She had visited his home to play with A[...] and B[...], who resided with him. Kwekwe, who was in possession of chips, had called her to his bedroom. He picked her up, laid her onto his bed, undressed her, undressed himself and then raped her *per anum*. After turning her over, he raped her *per vaginam*.

[5] The complainant used colloquial terms to refer to the sexual organs described. She explained that she had first lay on her stomach, when he had inserted his penis into her anus, and then on her back when he raped her *per vaginam*. She had cried at the time. LM had peaked inside and observed the events and he and another child had told her mother. The complainant had reported what occurred to her father as she was scared her mother would beat her.

[6] Kwekwe had stood up and dressed himself after realising that his actions had been seen by LM. The complainant had done likewise before returning to her home. She confirmed that she had never been raped by any other person.

² Act 51 of 1977 (the CPA).

³ Both children were duly admonished in terms of s 164 of the CPA.

[7] The complainant confirmed the depiction of Mr Yali's home, including his bedroom and bed, as reflected in various photographs admitted into evidence. She indicated that she had visited the home on approximately five occasions, during which time Mr Yali had been present. She also entered the courtroom and pointed out the accused as the person she knew as 'Kwekwe'.

[8] During cross-examination, the complainant steadfastly maintained that Mr Yali was speaking untruthfully in denying that he knew her or her mother, or that she had previously played at his home. LM had been watching television when Mr Yali had called her. He had undressed himself after undressing her. She had told him to stop doing so, also while he was raping her, but he had refused. She had cried softly and knew that LM had seen her being raped. He had peeped through the curtain that served as Mr Yali's bedroom door and reported the incident to her mother after telling Mr Yali that he would do so. The complainant testified that she had informed her father of the incident on the day it occurred, and recalled that he had told her mother that day in her presence. She later testified that this occurred on the same day that she had visited the hospital. When it was put to her that she had not been raped by Mr Yali, she replied 'it was him'. She indicated, during re-examination, that she had wanted to tell her mother that she was experiencing vaginal pain, but had not explained the reason for this.

[9] LM is presently six years of age and in grade one. He explained that he had been called to testify because 'Kwekwe did some bad things or some dirty things to [the complainant]'. He, B[...], A[...] and the complainant had been playing together when Mr Yali called the complainant to fetch some chips. He had been watching television inside Mr Yali's home when he heard the complainant cry. He and B[...] had then observed Mr Yali on top of the complainant while both were naked. With the aid of anatomically correct dolls, he demonstrated that Mr Yali had used his penis to perform the acts described, before observing LM and chasing him away. He explained that he had been able to observe this by moving the curtain, which served as the door to Mr Yali's room, aside. That curtain, and Mr Yali's room, were also confirmed with reference to the relevant photographs accepted into evidence.

[10] LM indicated that A[...] had been the person who described what had occurred to the complainant's mother. He had played with B[...] on at least three occasions in the past. LM also entered the courtroom and, without hesitation, pointed out the accused as the person known to him as Kwekwe. He knew that Kwekwe resided at B[...]’s house.

[11] During cross-examination, LM explained that he had not seen Mr Yali remove the complainant's clothes, but had observed her lying on her stomach before she was placed on her back. Mr Yali had observed him and B[...] and told them to leave, which they did. He testified that he had not been with A[...] when she had told the complainant's mother about the incident.

[12] Ms M, the complainant's mother, confirmed that LM was a neighbour and friend of the complainant and that B[...] and A[...] were children living in the same premises as Mr Yali. The complainant and her family lived in the same neighbourhood as Mr Yali, less than a street away. Ms M confirmed that the complainant had visited Mr Yali's home previously.

[13] According to the witness, she had heard about the incident from LM and A[...] on 20 October 2022. A[...] was related to the complainant and approximately 13 years of age. Ms M had then proceeded to Mr Yali's residence and informed his relative, Siphokazi, what she had been told. Later that evening, one Babalo, seemingly a relative of Mr Yali, had arrived with Mr Yali and a discussion had taken place in the presence of the complainant's father and the witness. She had observed Babalo strike Mr Yali when he refused to speak in plain language in response to questions about what had occurred. She had opened the door to enable Mr Yali to escape the residence when the complainant's father had departed to fetch a hammer.

[14] On the following day, Ms M took the complainant to the police station and then to hospital. Her evidence was that the child had been demonstrating some discomfort when her vagina was being washed. She would lift her buttocks away from Ms M's hand and, when asked what was wrong, replied that she was experiencing pain, without giving any reason for this. This occurred for a few days

prior to Ms M being informed about the incident. When the report was made to her, she realised the possible connection with the behaviour she had observed. The complainant had not reported the rape to her, but to the complainant's father and she assumed that the incident occurred on 16 or 17 October 2022.

[15] Ms M testified that she had known Mr Yali for years and spoken with him previously. She expressed incredulity when it was put to her that Mr Yali would deny knowing her, the complainant or LM whatsoever. She explained that the children would frequently visit his home to play with B[...], and that Mr Yali was a person who was frequently at home. When it was put to her that Mr Yali would deny that he had been struck by Babalo in her presence, she testified that he had been able to run away because she had opened the door for him, and that he had left his slip-slops behind.

[16] Dr Xwazi, a qualified medical practitioner, testified as to her experience in dealing with child sexual offences. She had examined multiple patients who had been victims of such offences in the Port Alfred area. She examined the complainant on 21 October 2022 and observed a broken hymen. An anal examination had revealed minimal dilation and twitching, without any other injuries being observed.

[17] The doctor concluded that sexual assault could not be excluded. Her opinion was that, given the history provided to her, penetration with a penis was the probable explanation for the broken hymen. A broken hymen required some pressure to have been exerted and such an occurrence was by its nature painful. As to the anal dilation, the evidence was that this would have been caused by an object bigger in size having been inserted. The twitching was indicative of trauma to the anus. As to the absence of other injuries, Dr Xwazi explained that this was unsurprising given that her experience showed that children's cells replicated far quicker than adults, and that other injuries may have healed given the passing of three or four days.

[18] Constable Gqalane testified that he had accompanied the complainant and her mother to the hospital after the incident was reported to him. They proceeded to Mr Yali's residence and found him in a bedroom, which Constable Gqalane was able to identify via the photographs accepted into evidence. At this stage the complainant

and her mother accompanied Constable Gqalane and were together in Mr Yali's presence. They were all in proximity so that Mr Yali could observe them.

Analysis

[19] An accused person may only be convicted if, after proper consideration of all the evidence presented, his guilt has been established beyond reasonable doubt. It follows that an accused person must be acquitted if it is reasonably possible that he might be innocent. Before rejecting an accused's version on the probabilities, the court must be able to find, as a matter of probability, that the accused's version is simply not reasonably possibly true. Where there is a conflict of fact between the evidence of the state witnesses and the version of the accused, the court is required to consider the merits and demerits of the state case, as well as the probabilities of the matter, before concluding whether the accused's guilt has been established beyond reasonable doubt.

[20] It is therefore necessary to adopt a holistic approach to analysing the available evidence:⁴

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper count of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

[21] The evidence of young children may only be accepted with great caution. The imaginativeness and suggestibility of children have been held to be only two of several elements that require their evidence be scrutinised with care to the point of suspicion. A trial court must fully appreciate the inherent dangers in accepting such evidence.

⁴ *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15. Also see *S v Dlamini* 2019 (1) SACR 467 (KZP) para 25.

[22] In this case, the complainant's version of events is strongly supported by LM. That she was penetrated *per vaginam* and *per anum* is also apparent from the evidence of Dr Xwazi and the report of a medico-legal examination accepted into evidence, as well as the evidence of Ms M. As to whether this occurred in the manner alleged by the state is dependent upon the consideration of all the evidence, including the merits and demerits of the testimony of the complainant and LM, and bearing in mind the caution applicable to the testimony of young children. The court is entitled to convict on such evidence if it is satisfied beyond reasonable doubt that such evidence is true, and notwithstanding that the testimony may have been unsatisfactory in some respects.

[23] The identity of the perpetrator requires careful consideration in the circumstances. The correct approach, as per *S v Mthetwa*, requires consideration of the reliability of observation, including factors such as visibility, proximity, opportunity for observation, extent of prior knowledge of the accused, mobility of the scene, corroboration, suggestibility and any evidence by or on behalf of the accused. Considering the relevant factors one against the other, in the light of the totality of evidence, and the probabilities, permits of only one conclusion.

[24] Mr Yali was positively identified by the complainant, who, it must be accepted, had previously visited his place of residence to play, as confirmed by her mother. Ms M was a credible witness who testified clearly and concisely about various aspects within her knowledge. Her evidence corroborated that of the complainant in several respects. In particular, she confirmed that she had known Mr Yali for some time and that her child would visit his home to play with B[...]. It must also be accepted that the complainant had experience discomfort while being washed by her for a few days prior to the incident being reported. That evidence correlates with Dr Xwazi's findings. Ms M's evidence that Mr Yali was a person who typically remained in that residence was unchallenged and the details she was able to provide regarding Mr Yali's altercation with Babalo must be accepted.

[25] The complainant also testified clearly and without hesitation about the incident. She repeatedly, and reliably, identified Mr Yali as the perpetrator. As

counsel pointed out, her evidence was not without blemish. Although she referred to the chips in the possession of Mr Yali, she was unclear as to whether she had responded to his call for that reason. She was unsure whether she had informed her father on the day of the incident or on the same day that she visited the hospital, or whether these dates coincided, and her father did not testify. She was also mistaken in recalling that she was present at the time her mother was told about the incident.

[26] Such matters, including what Mr Yali said to LM, or vice versa, at the time, must be viewed with reference to the fact that she was only seven at the time of the incident. But the crux of her testimony, which on its own was unequivocal, found strong support in the testimony of LM who, despite his tender age, impressed with his ability to recall what he had seen. He provided guileless evidence, aided by the dolls provided to him, and his testimony accorded with that of the complainant in all material respects. His description of the scene and the reason he had peeped around the curtain that served as Mr Yali's room door matched that of the complainant. She had cried out while being raped, albeit softly, and he and B[...] had heard, peeked into the bedroom, observed the complainant being raped before being chased away by Mr Yali. He was equally clear as to events he had not observed, such as the complainant being undressed by Mr Yali, which accords with his evidence that he was only alerted to the incident when the complainant cried out while being raped.

[27] Notwithstanding the caution to be applied to his evidence, considering the factors relevant for purposes of identification, there is simply no doubt that Mr Yali was the person that he had seen, a person known to him and the complainant. As with the complainant, his evidence contained blemishes. In particular, he denied that he was with A[...] when she reported the incident to Ms M. That aspect of his testimony cannot be accepted given Ms M's clear evidence to the contrary. But this was a minor, immaterial inconsistency of the kind to be expected when considering the evidence of a young child testifying about events which occurred more than two years ago. Similarly, the court accepts Ms M's evidence that the incident was only reported a few days after it occurred, and that the complainant was not present at that time. Ms M then understood what had caused her daughter's discomfort, later confirmed by Dr Xwazi's examination.

[28] It is necessary, when evaluating evidence in criminal proceedings, to subject each component to a detailed and critical examination, before considering the entire mosaic from a step back.⁵ Viewed as such, the state has proved beyond reasonable doubt that Mr Yali raped the complainant in the manner she described, and as observed by LM, and that his actions were the cause of what Dr Xwazi observed during her examination, and the pain experienced and described by the complainant. Both children, and Ms M, knew Mr Yali, who lived in the same house as B[...], who was a playmate. The children had visited Mr Yali's home previously. On this occasion, it is accepted that he lured the complainant to his room with the offer of chips, which both children recalled during their testimony, before undressing her and himself and raping her *per anum*. He then turned her over and raped her *per vaginam*. In the process she asked him to desist. He refused to do so and the pain she experienced caused her to cry out, thereby alerting LM, who observed what transpired. The complainant's evidence that she was not raped by anybody else must also be accepted.

[29] Mr Yali chose not to testify and, as a result, his denials could not be tested during cross-examination. Considering the overwhelming evidence presented by the state, it must be concluded that the version offered in his plea explanation is not reasonably possibly true and must be rejected. This conclusion finds further support in the testimony of Constable Gqalane, who confirmed that Mr Yali had encountered the complainant and her mother at the time of his arrest, the complainant having already at that stage confirmed his identity as the perpetrator. In addition, quite how both children would have been able to identify the inside of Mr Yali's room, as they did, had they not seen it previously remained unanswered. In effect, Mr Yali chose to remain silent in the face of overwhelming evidence indicative of his guilt.⁶ Considering the weight of that evidence, Mr Yali must be found guilty as charged.

Order

⁵ *S v Mbuli* 2003 (1) SACR 97 (SCA) para 57.

⁶ *S v Boesak* 2001 (1) SACR 1 (CC) para 24.

1. The accused is found guilty of the crime of rape as charged.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 17–19 February 2025

Delivered: 20 February 2025

Appearances:

For the State: Adv Hendricks

Instructed by: Director of Public Prosecutions
Makhanda

For the Accused: Adv Geldenhuys

Instructed by: Legal Aid South Africa
Makhanda