IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal No: A94/2019

In the appeal between:-

MONNAPULE GILBERT KAIBE **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **MHLAMBI, J *et* MOLITSOANE, J**

JUDGMENT BY: **MOLITSOANE, J**

HEARD ON: **9 SEPTEMBER 2019**

DELIVERED ON: **3 OCTOBER 2019**

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[1] The appellant was convicted in the Regional Court: Bloemfontein on a charge of rape read with the provisions s51 (1) of the Criminal Law Amendment Act 105 of 1997. He was sentenced to life imprisonment.

He has an automatic right of appeal and this appeal is against the conviction and sentence.

[2] The facts of this case are briefly as follows: The complainant was 15 years old at the time of this incident. The appellant is related to her by marriage. On the day of this incident, a Friday, the complainant went to the appellant's place. The purpose was to go and look for the children of the appellant. Upon arrival she found that the appellant's wife and the children were not present. The appellant was, however, present. She could not return to her home due to the fact that there were gang fights outside and the situation was dangerous. At the suggestion of the appellant she decided to sleep over. The appellant gave her a gown belonging to his wife. During the night the appellant came into her bed where she was sleeping, told her that she smelled like her wife, he kissed her on the neck, undressed her and penetrated her vaginally without her consent.

[3] The following day, on Saturday, she went home. Upon confrontation by her grandmother as to where she had slept, she said that she had slept at the appellant's place. She did not indicate that the appellant also had sexual intercourse with her without her consent. She had a key to the house of the appellant when she returned home in the morning. She only reported the rape about six days later.

[4] The onus is on the state to prove its case beyond a reasonable doubt. On the other hand, what is expected of an accused is to give a version which is reasonably possibly true. Where there is doubt, the scale will weigh in favour of the accused. The court in **S v**

Chabalala[1] set out the approach in the evaluation of evidence as follows:

"The correct approach is to weigh up all the elements which point to the guilt of the accused against all those which are indicative of his innocence, taking proper account 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 to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be on an *ex post facto* and the trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture in evidence."

[5] The grounds on which the appellant relies on in this appeal are briefly set out as follows:

AD CONVICTION

(a) The Court erred in finding that the State had proven its case beyond a reasonable doubt;

(b) The Court erred in finding that the complainant and the state witnesses were credible witnesses;

(c) The Court erred in not accepting the version of the Appellant and drew a negative inference against him.

[6] The complainant is a single witness with regard to the act of rape itself. Section 208 of the Criminal Procedure Act provides that a

[1] 2003(1) SACR 134 (SCA) at 140 a-b

conviction may follow on the evidence of a single competent witness. It is trite that the evidence of a single witness must be approached with caution. Over and above the cautionary rule in respect of single witnesses the complainant in this case was a child. This also called for a further cautionary approach to her testimony. In **Woji v Santam Insurance Co Ltd**[2] the court said the following with regard to the evidence of children:

"Trustworthiness….depends on factors such as the child's power of observation, his power of recollection and his power of narration on the specific matter to be testified….His capacity of observation will depend on whether he appears 'intelligent enough to observe'. Whether he had the capacity of recollection will depend again on whether he has sufficient years of discretion 'to remember what occurs' while the capacity of narration or communication raises the question whether the child has capacity to understand the questions put, and to frame and express intelligent answers."

[7] It bears mentioning at the beginning that the court a *quo* made certain favourable credibility findings in respect of the complainant. This court is bound by the credibility findings of the trial court unless such findings are clearly wrong. - See **J v S**[3]

[8] As alluded above, in order to convict an accused person on the basis of the evidence of a single witness, not only must such evidence be credible but it must also be reliable. When the complainant was confronted by her grandmother as to where she had slept the previous night she confirmed that she slept at the appellant's place. When her grandmother further asked where the children she was

[2] 1981(1) SA 1021(A) 1028 B-D
[3] All SA 267(A) 271 C

supposed to have fetched were, she lied to her and said that their mother left with them to Freedom [Square] on the morning of that Saturday[4]. She thus gave an impression to the grandmother that she and the other children slept together. Her undisputed testimony which is corroborated by the appellant was that when she arrived at the appellant's place and until she left the following morning the children were not there.

[9] In her testimony complainant testified that at the time of this incident she was staying with her father and stepmother while the grandmother testified that the complainant was staying with her at the time.[5]It is not clear why she insisted that she was staying with her father while the grandmother is adamant that she had been staying with her since her birth. The complainant testified that when she left the appellant's house in the morning, she went to her father's house where she went to sleep. According to her she only met her grandmother at about 13h00[6]. This differs materially with the testimony of the grandmother that the complainant arrived at home after 8h00, giving an impression that from the appellant's house the complainant went straight home. At no stage did she also tell her grandmother that from the appellant's place she also went to her father's place to sleep. The credibility findings by the trial court cannot be supported in light of these discrepancies.

[4] See page 12 lines11-20 of the record.
[5] See pages 8 and 48 of the record
[6] See pages 54 -55 lines 21 *et seq* of the record

[10] The court *a quo* correctly found that there were two versions which were diametrically opposed to each other in this case. The said court in its judgment said the following[7]:

"*In this instance it is a very difficult situation, it is actually at the end the word of the 15 year old complainant against the word of a 42year old accused person."*

[11] It would seem to me that the court *a quo* accepted the version of the complainant mainly because the appellant gave the complainant her wife's gown. The appellant does not deny that he gave the complainant the sleeping gown of his wife. This in my view does not prove that the appellant had sexual intercourse with the complainant. This fact must be weighed together with all other factors. Section 59 of the Act 32 of 2007 provides as follows:

"In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference **only** (*my emphasis)* from the length of any delay between the alleged commission of such offence and the reporting thereof."

[12] In my view, section 59 above was promulgated for the simple reason of precluding an inference being drawn solely based on the period of delay between the commission of the offence and the reporting thereof. This is understandable in view of the nature of this type of offence. Victims may at times have been threatened. At times they may keep quiet for fear of being humiliated or ridiculed. At times they may feel unworthy and shy to come in the open and report their

[7] See page 132lines 16-18 of the record

cases. In other words, section 59 precludes an inference being drawn only on the basis of the ‘delay’ standing in isolation. This section does not, in my view, preclude that a ‘delay’ be taken into account together with any other relevant factors in the evaluation of the evidence of alleged commission of a sexual offence.

[13] The evidence of the complainant was not honest and reliable. There were contradictions in her testimony and that of the first report, her grandmother. It is her testimony that when she went home she had the keys of the house of the appellant. She did not explain what she was going to do with the keys. What is clear to me is that she only changed her version about what actually happened when she was confronted by her stepmother about the alleged affair with the appellant that she suddenly decided to implicate the appellant with this rape. The fact that she only reported this incident six days after its alleged commission should be weighed together with the fact that she only reported it after being confronted by the stepmother. One even wonders if she would have reported this incident had she not been confronted by the stepmother. The evidence does not show that she was even threatened in any way by the appellant except that she said that the appellant said that the elderly people would not believe her and that his wife would beat her up.

[14] The evidence of the complainant is not supported by any DNA. The medico legal report does not support her evidence. I hasten to add that lack of corroboration of medical or scientific evidence does not necessarily imply that sexual intercourse did not take place. In this

case, it fortifies doubt that the appellant had sexual intercourse with the complainant as alleged.

[15] At the end of the day I agree with the sentiments expressed by the trial court that it is easy to put up a defence of a bare denial. That, however, does not necessarily prove guilt. As to what happened in that bedroom between the parties only differs when it comes on whether sexual intercourse took place or not. In my view the version of the appellant is not far-fetched and it is reasonably possibly true. In view of the testimony of the complainant there is doubt that the complainant was raped. It is trite that where there are two versions as also pointed out by the trial court and where there is doubt, the scales should tip in favour of the appellant. It is not necessary to reject the version of the complainant as the main issue is whether the evidence of the appellant is reasonably possibly true. In my view the trial court should have found in favour of the appellant and acquitted him. This conviction can thus not stand. It stands to reason that if the conviction is set aside the sentence cannot stand. I propose the following orders:

ORDER

(a) The appeal against the conviction and sentence is upheld.

(b) The conviction and the sentence are set aside

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PE MOLITSOANE

I agree

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JJ MHLAMBI

For the Appellant: **Mr PL Van der Merwe**
Instructed by: **Legal Aid South Africa**
BLOEMFONTEIN

For the Respondent: **Adv L Rathaba**
Instructed by: **Deputy Director of Public Prosecutions**
BLOEMFONTEIN