IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
12/04/2017
DATE SIGNATURE

CASE NO: A157/2013
DATE: 12/4/2017

IN THE MATTER BETWEEN:

**WILLIAM RANGATHE MATABANE** **Appellant**

**And**

**THE STATE** **Respondent**

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**JUDGMENT**

**KOLLAPEN J:**

1. The appellant was convicted of two counts of rape in the Regional Court of Mpumalanga, sitting at KwaMhlanga on the 13th of October 2011 and on the same day was sentenced to 20 years' imprisonment, the Court taking both charges together for the purpose of sentence. Leave to appeal against conviction only was granted by the court *a quo*.

**The duration of the proceedings in the Court a quo**

2. Before dealing with the merits of the appeal, we are obliged to record our concern with regard to the long delay that has characterised this matter. The incidents upon which the prosecution was based occurred during late 2005 and early 2006. The appellant's first appearance was on the 10th of October 2016 but the trial in this matter only commenced a year later in October 2007 when the complainant began her testimony. The evidence of the complainant was only concluded in February 2011, almost 3-and-a-half years after it started. The trial was finally concluded in October 2011 – 5 years after the appellant's first appearance and 6 years after the incident.

3. The various delays were attributable to a number of factors including the availability of counsel, witnesses and the presiding magistrate and it is difficult from the record to apportion responsibility for what can only be described as an inordinate delay, however we think it warrants the attention of the Director of Public Prosecutions to ensure an avoidance of this in the future. The administration of justice as well as the interests of accused persons, victims and witnesses and the public at large are not well served when the machinery of justice grinds along as slowly as it did in this matter.

**The merits**

4. The conviction of the appellant arises out of the following factual matrix:

    i) The appellant is a traditional healer and the mother and family of the complainant sought his assistance in order to deal with a health issue the complainant was experiencing in the form of epilepsy as well as to prepare her for her attendance at initiation school. It appears that she started consulting the appellant in about September 2005. An incident occurred during December

2005 along the bank of a river close to where the appellant lived and which gave rise to the charge of indecent assault of which the appellant was acquitted in the court *a quo*. The complainant however testified that as a result of this incident she feared the appellant.

ii) During February 2006 she was required to consult the Appellant again and on the evening of the 26th of February 2006 she was required to stay the night at the appellant's home. Her evidence was that the appellant proposed love to her as he previously did in December 2005. He prepared a basin for her bath, which was part of the healing ritual, and requested her to undress and have a bath. This she did but was informed not to dress again - she covered herself with a blanket. She testified that the appellant then came to her while dressed only in a cloth covering the lower part of his body, removed the blanket which was covering her and proceeded to have sex with her against her will and without her consent. She resisted without success and was crying throughout the ordeal. The alleged rape took place on a sofa in the same room where she had a bath

iii) She says the appellant left her lying on the sofa but came back about an hour later, tied her hands and raped her for a second time after which he gave her a Nokia cell-phone and his bank card and said she could withdraw money from his account using the bank card. In the morning he took back the cell-phone, prepared a bath for her and after bathing she dressed and left. She reported what had happened to her to her mother and police were then approached.

5. During cross-examination however she testified that prior to the rape she was wearing track-suit pants and a panty and that there was a struggle when the appellant tried to remove her clothes. She says he then tied her hands behind her back while she was lying on the sofa and proceeded to undress her. He removed her pants but her panty was only half-removed. There followed some detailed cross-examination as to how if her panty was half removed and she was on the sofa with her legs together it was possible for the appellant to penetrate her . Her response was that she did not know how it happened but that penetration did in fact take place.

6. During further cross-examination she denied that she had testified that the appellant had removed her track-suit pants and had half-removed her panty, while in re-examination she reverted to her original evidence that she had taken a bath and had undressed herself and was only covered with a blanket just prior to the alleged rape taking place.

7. The state also called the mother of the appellant and her testimony largely confirmed that the appellant was engaged as a traditional healer to assist the complainant and that on the night of the 26th of February 2006, the complainant spent the night at the appellant's home. She testified that the following morning the complainant made a report to her about being raped and the matter was then reported to the police.

8. The evidence of the medical doctor who examined the complainant, Dr Bakabama was that after his physical examination of the complainant he was unable to conclude whether any penetration had taken place and that the gynaecological examination revealed that the vagina was normal. He did report on the existence of a bruise on the urethra which was located away from the vagina.

9. The appellant denied raping the complainant and while he admitted that we was engaged by her family to treat her, he persisted that he did not have any sexual intercourse with her.

**The appeal**

10. The appellant in advancing the argument for the intervention of this Court on the conviction, contends that the complainant was a single witness in respect of the rape. Section 208 of the Criminal Procedure Act 51 of 1977 provides that 'an accused may be convicted of any offence on the single evidence of any competent witness'.

11. In ***S v SAULS AND OTHERS*** **1981 (3) SA 172** at 180B-G the following was said:

> 'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility 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 his 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 of common sense'.

12. In ***WOJI v SANTAM INSURANCE CO. LTD*** **1981 (1) SA 1020 (AD)** DIEMONT JA provided a helpful guide to approaching the evidence of young children. The guide highlighted as the focal point, the trustworthiness of evidence. At 1028A-E of the judgment the learned Judge said:

> 'The question which the trial court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his Code of evidence para 568 at 128, 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. In each

> instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears 'intelligent enough to observe'. Whether he has 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 'the capacity to understand the questions put, and to frame and express intelligent answers (Wigmore on *Evidence* vol II para 506 at 596). There are other factors as well which the court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest - is there a consciousness of the duty to speak the truth? Then also 'the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility (per Schreiner JA in *R v Manda*). At the same time the danger of believing a child where evidence stands alone must not be underrated.'

13. Clearly the existence of deficiencies in the evidence of a single witness cannot automatically result in its exclusion. What is called for in each case is for the Court to consider the merits and demerits of the evidence proffered and determine notwithstanding any shortcomings that it is satisfied that the truth has been told. In undertaking this exercise one must be mindful both of the long and protracted time it took for the evidence of the complainant to be led and completed, as well as her relative youthfulness (she was 16 when the incident occurred in 2006 and would have been about 17 when she commenced her testimony, concluding it when she was 20 years old). At the same time the evidentiary burden of proving the appellant's guilt beyond reasonable doubt rests firmly with the State and at the end of the day the Court must be satisfied that the State has discharged this duty. If there is reasonable doubt or if the version of the Appellant can be said to be reasonably possibly true, then he would be entitled to his acquittal.

14. In ***R v DIFFORD*** **1937 AD 370** (at 373) the following remarks of the trial court were approved by the Appellate Division:

'It is not disputed on behalf of the defence that in the absence of some explanation the Court would be entitled to convict the accused. It is not a question of throwing any onus on the accused, but in these circumstances it would be a conclusion which the Court could draw if no explanation were given. It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal...'

15. NUGENT J in ***S v VAN DER MEYDEN*** **1999 (1) SA SACR 447 (W)** elaborated as follows (at 448f-g):

'The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent...these are not separate and independent tests, but the expression of the same test viewed from the opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward may be true. The two are inseparable, each being the logical corollary of the other...in whichever form the test is expressed, it must be satisfied upon consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so ttoo does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true...'

16. Applying those principles to the matter on hand and even if one factors into the assessment the passage of time during which the evidence of the complainant was received as well as the fact that she would have been about 17 when she first testified, then it could hardly be said that the criticism of her evidence could be described as insignificant and immaterial.

17. She offered a particular and relatively precise version in her evidence in chief with regard to how it came that she was naked just prior to the rape – she had

bathed, removed her own clothes and was then told by the appellant not to dress again. In cross-examination there is just not a change to this version but an entirely new version is put forward – namely that there was a struggle, that she was tied and that the appellant then removed her pants and her panty halfway. However in re-examination she distanced herself from the second version of events and reverted to the first version and in doing so denied her own evidence as contained in the second version of the rape.

18. There is also some indication that her own recollection of the incident was not clear where she indicates at some point during cross-examination that she may be able to regain her memories. She comes across as being confused and unclear. This is hardly suggestive of a lying witness and I would be slow and reluctant to call the complainant a liar. However what I am concerned about is the reliability of her evidence. Her different versions of the events leading up to the rape and the clear impression of confusion and uncertainty on her part certainly point in the direction that her reliability and her ability to properly recall and testify to the events relevant to the charges is called into question.

19. In his assessment of the complainant's evidence the learned Magistrate concluded that he found her to be a credible witness and that the contradictions in her evidence were not material. While it is so that a trial court is often best placed to make a determination of credibility, I find it remarkable that the court *a quo* elected to describe the contradictions in the evidence of the complainant as being not material.

20. For the reasons already given the different versions offered and the movement from the one to the other without explanation and her own recanting of her evidence must place the contradictions in the category of being material. It goes to a vital part of the State's case against the appellant. In my view the learned Magistrate misdirected himself on this aspect.

21. When I have regard to the totality of the evidence and in particular the evidence of the single witness, namely the complainant, then it must follow that it cannot be said that the State had proved the guilt of the Appellant beyond reasonable doubt or that the version of the Appellant could not be reasonably possibly true.

22. Under these circumstances this court would be entitled to intervene and set aside the conviction and sentence imposed.

**ORDER**

23. The appeal against conviction is upheld and the conviction and sentence imposed upon the Appellant is set aside.

N KOLLAPEN
JUDGE OF THE HIGHT COURT

I AGREE,

S S MPHAHLELE
JUDGE OF THE HIGHT COURT

A157/2013

HEARD ON: 20 February 2017

DATE OF JUDGMENT:

APPEARANCES:

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| FOR THE APPELLANT: | Adv. R Kriel |
| INSTRUCTED BY: | Mabena Attorneys |

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| FOR THE RESPONDENT: | Adv. J J Kotze |
| INSTRUCTED BY: | The Director of Public Prosecutions |