

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

Case Number. A27/2021

REPORTABLE: NO.

OF INTEREST TO OTHER JUDGES: NO.

REVISED

19/08/21

In the matter between

MOSES SOKITI

APPELLANT

and

THE STATE

RESPONDENT

Coram : BAQWA J AND RANGATA AJ

JUDGMENT

RANGATA AJ

Introduction

[1] On 22 October 2020 In the Oberhoizer Regional Court the appellant, Mr Moses Sokiti, was convicted on one count of sexual assault and one count of rape of a minor child. He was sentenced by the Regional Magistrate JF Steyn to three years for sexual assault .and fifteen years for rape an contravention of

section (3) of Criminal law (Sexual Offenses and Related Matters) Amendment Act 32 of 2007 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act). He has become unfit to possess a firearm in terms of section 103 (1) (g) of the Fire Arms Control Act 60 of 2000. The appellant was legally represented throughout the trial. The appellant sought leave to appeal against the conviction of the Regional Court.

The Facts

[4] The medical expert, Dr. Mabicu, examined the complainant on 4 March 2018 with a history of being sexually assaulted. On examination, he found no obvious bruises and no bleeding. The hymen was found to have perforated, with no signs of vaginal penetrations and no discharge. This was attributed to the fact that the complainant had bathed prior to being examined. He further stated that the perforation was not caused by anything other than penetration and that the swelling could also still occur at a later stage after being examined. His observation of the child was that she was emotional.

[5] Ms. D[....] M[....] (M[....]), the sister to the complaint's mother, Ms M[....]2 S[....] (M[....]2), testified that on 3 March 2017, whilst walking from her cousin's place to her place, she overheard Ms Jabulile Moreke (Jabulile) and other people talking about her sister, M[....]2. She inquired as to why they were talking about her sister as she was in the hospital. Jabulile confirmed to her that she was the one who injured M[....]2, further that they fought about the well-being of the complainant. Jabulile told her that M[....]2 is neglecting the complainant as the appellant continuously rapes her. The complainant confirmed to her that, indeed, the appellant has been doing bad things to her.

[6] Jabulile testified that she was friends with M[....]2. They used to drink together. She confirmed being involved in a fight with M[....]2, which resulted in her injuring M[....]2. She was not aware that M[....]2 was hospitalized from the injuries sustained. On 3 March 2017, she went to M[....]2's house looking

for her. As she entered the house. She overheard the appellant talking to the child inside the house. She found the appellant sleeping in the house. This prompted her to remove the blankets. She found the complainant inside the bed as she removed the blankets, wearing black shorts and blue panties. The complainant was undressed. The appellant was wearing a black trouser, and it was pulled down, still wearing his underwear. She enquired from the appellant as to what he was doing there; he responded that he was sleeping and pleaded with her not to tell anyone.

[7] The complainant testified that on 3 March 2017, she was at her home. preparing to boil the water. She was alone in the house as her mother was hospitalized the previous day from injuries sustained. She was wearing short black pants and blue panty. The appellant entered the house and started beating her. He kicked and threw her onto the ground and put her on top of the bed. She tried to kick him but that appellant overpowered her. He proceeded to undress her, smeared Vaseline over her vagina and penetrated her vagina with his penis through the zip of his trouser. Whilst the appellant was raping her, Jabulile entered the house calling her mother's name. As she entered the house, the appellant tried to flee when Jabulile mentioned that she would call the police. He was at the time standing next to the wardrobe. He pleaded with Jabulile not to tell anyone about what she saw and offered to buy her a beer. At that time, the complainant was standing next to the bed, her trouser and panty by her knees.

[8] The appellant testified that the, M[....]2 was his drinking friend. She had a love relationship with his uncle. He is aware that the relationship had since ended for reasons unknown to him. He used to sleep over at the complainant's place, and when that happens, the complainant and her mother will sleep on the floor allowing him to sleep on the bed. He did not tell his uncle that sometimes he sleeps by M[....]2's place. He recounted being told by M[....]2 on the Friday prior to the rape that Jabulile had hit her with a bottle. He also had a personal encounter with Jabulile as he had previously made an

arrangement to have sex with her and that he would pay her R50.00. He did not honor the agreement and ended up paying her R30. 00 as opposed to R50 00 Jabulile' was upset that he did not pay her the total amount they agreed on. As a result of that, Jabulile had warned him that she would take revenge on him.

[9] On the date of the alleged rape, he went to M[....]2's place. On his arrival, he found the complainant playing outside the house. He told the complainant that he is going inside the house to take a nap. He proceeded to enter the house and slept. Whilst sleeping, he heard Jabulile calling out for M[....]2 and the complainant. The complainant was also sleeping on the same bed, facing the wall. As Jabulile entered the house he woke up and went outside to urinate. By that time, Jabulile started shouting at the complainant, asking her whether he molested her. At this time, Jabulile told him that "one will always remember when somebody had done wrong to you." She told him that she was going to take revenge. She called out other people to gather outside. She told the people that he had raped the complainant and these people did not believe her. When they were dispersing, he walked with one of the people who were gathered outside, one Vincent. Vincent told him that it is Jabulile who is forcing the child to accuse him of raping her.

[10] M[....]2 lived in a shack with her daughter, the complainant. The shack was one big room with no partitioning. She testified that she was hospitalized prior to her daughter being raped. She was only advised of the incident after being released from the hospital. She was also told that the complainant has been living with other family members in Tzaneen since the incident. She confirmed that she was in a love relationship with the appellant's uncle, and the relationship ended in 2007. The relationship ended because the appellants uncle left her when she became ill. She told the appellant as to what happened between her and his uncle. After the appellant's uncle left her, she dated Claude Sedosingwe, a Tshwana speaking man. She denied having had an affair with a Shangaan man. She also denied having had an affair with the appellant. She

testified that the appellant used to work at the farms and when he came to their area he would sleep at her place. She never saw him after the incident.

[11] The appellant submitted that the trial court did not duly apply the cautionary rules applicable to a single child witness in the circumstances requiring a cautionary approach. It is further submitted that the trial court applied a lower standard of proof or a less exacting assessment of the evidence required in criminal cases. Further, the trial court erred in the evaluation of the appellant's version. It did not conclude that the appellant's version is so improbable that it is raised beyond any reasonable doubt.

[12] It is submitted by the respondent that the discrepancies alluded to by the appellant are immaterial. Further that the trial court considered and evaluated all the contradictions and rightly rejected them in line with the principles as set down in *S v Mafaladiso* 2003 (1) SACR 583 (SCA)

The issues

[13] The Court is to deal with the following issues:

- (a) Whether the trial court applied the cautionary rules applicable to a single witness,
- (b) Whether the discrepancies and inconsistencies in the complainant's evidence tainted her evidence to such an extent that it cannot sustain a guilty verdict
- (c) Whether the trial court misdirected itself in finding the appellant guilty of rape.

The Law

[14] In *S v Hanekom* 2011 (1) SACR 430 (WCC) at para 15, the Court held the following:

“[15] So, in evaluating the evidence of a single witness who is also a child, our courts have laid down certain general guidelines which are of assistance when applying the cautionary rules. In such a case:

(a) A court will articulate the warning in the judgment and the reasons for the need for caution in general and with reference to the cases particular circumstances.

(b) A court will examine the evidence to satisfy itself that the evidence given by the witness is clear and substantially satisfactory In all material respects.

(c) Although corroboration is not a prerequisite for a conviction, a court will sometimes, in appropriate circumstances, seek corroboration which implicates the accused before it will convict beyond a reasonable doubt.

(d) Failing corroboration, a court will look for some feature in the evidence that gives the implication by a single child witness enough of a hallmark of trustworthiness to reduce, substantially, the risk of a wrong reliance upon her evidence.”

(15) In S v J 1998(2) SA 984 (SCA), Olivier JA. after analyzing the cautionary rule, its basis, and concerns, came to the conclusion that the very foundation of the rule as it applied to complainants in sexual offenses cases was discriminatory. Olivier JA held the following:

"In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It constantly stereotypes the complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the state to prove the guilt of an accused beyond reasonable doubt - No more and no less. The evidence in particular cases may call for a cautionary approach, but that is a far cry from the application of a

general cautionary rule."

[16] S v Sauls and Others 1981 (3) SA 172 (A) at 180E-G the court stated that *There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether 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 (In R v Mokoena), 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 where 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".*

Analysis

[17] The complainant was 9 years old at the time of the rape. She was 10 years old at the time of the trial. She provided the complete details of what she was doing when the appellant entered her home. She remembered the appellant throwing her on top of the bed and closing her mouth with her mother's T-shirt. She fought the appellant, but she was overpowered. The complainant recounted how the appellant undressed her, covered her with the blanket, smeared Vaseline on her private parts and then raped her by inserting his penis into her vagina. Despite the horrific details of her rape, she gave a full account of what happened young as she was.

[18] The evidence of Jabulile although not as clear as one would expect, corroborated very critical information provided by the complainant. She confirmed that she went to the complainant's place. On her arrival, upon uncovering the blankets, she finds the complainant in bed. She also finds the appellant in the house, in bed, under the blankets, with the complainant. The appellant does not dispute this fact. In fact, the appellant conceded that the

complainant slept on the same bed as he was sleeping, inside the blankets looking the other way. Further, Jabulile could not have guessed the color of the complainant's panty unless she saw it when she uncovered the blankets. These finer details are not the kind of issues you think of when you reconstruct the story.

[19] The dispute arises whether when Jabulile entered the house, she found the appellant in bed with his trousers lowered to his knees and the complainants shorts and panty undressed. Jabulile gives a different account as to that of the complainant with regard to where the appellant was when she entered the room.

[20] Answering the question raised in the case of *Woji v Santam Insurance Company Ltd*, 1981(1) SA 1020 (A) at 1021, Indeed, the evidence of the complainant is trustworthy. In doing so, the court has to look into the evidence of all witnesses in totality. These discrepancies are overridden by the critical concession made by the appellant that he was in bed with the complainant. This fact places only the appellant in the vicinity of the crime. The evidence of Jabulile, to a more significant extent corroborates that of the complainant of critical issues.

[21] The appellant attempts to discredit Jabulile suggesting that she had an old score to settle with him. He later changes this stance when asked if Jabulile had opened a case against him and stated that he only heard from a person known to him as Vincent, that in fact, Jabulile is the one who is forcing the complainant to admit that it is him who is doing bad things to her. In this case, the evidence of the medical practitioner becomes very critical as it clarifies a lot of speculation. His evidence confirms that the complainant's hymen was perforated. This finding is made a day after the appellant was found in bed with the complainant. The one issue that the complainant is not mincing her words on is that the appellant is doing bad things to him. She said this to Jabulile immediately upon her finding them in bed. She also tells her Aunt. M[...].

[22] The critical question becomes, how does the appellant find himself sleeping next to a 9-year-old girl, and this very same girl is examined a day later with a perforated hymen. The appellant attempted to suggest that there were other men who used to visit the complainant's mother. However, there is no evidence of any other person being found in a compromising position as him, particularly a day before finding the perforated hymen of the complainant.

[23] Considering the totality of the evidence in this case, I confirm that the trial court was cautious in approaching the evidence of the complainant. Properly applying the principle outlined in *S v Artman and Another* 1968 (3) SA 339(SCA), wherein Holmes JA stated: *“Single witness required that, her testimony should be clear and satisfactory in all material aspects. The exercise of caution must not be allowed to displace the exercise of common sense”*

[24] The contradictions that existed were immaterial in establishing the truth as to what exactly happened to the complainant on 3 March 2017. I accept that the evidence of the complainant was true and the trial court correctly convicted the appellant

In the circumstances, I propose that the following order be made:

- (a) The appeal against conviction is dismissed.

Rangata AJ
Acting Judge of the High Court Gauteng,
Pretoria

I agree and it is so ordered

BAQWA J

Judge of the High Court Gauteng, Pretoria