IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: A189/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED

DATE: 27 JUNE 2024

SIGNATURE:

In the matter between:

ANDRIES DLAMINI	**FIRST APPELLANT**
JABULANE MABENA	**SECOND APPELLANT**

And

STATE	**RESPONDENT**

Coram: **JUDGE NYATHI AND ACTING JUDGE KEKANA**

Heard on: 18 APRIL 2024

Delivered: 27 JUNE 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system.

JUDGMENT

KEKANA AJ (NYATHI J CONCURRING)

INTRODUCTION

[1] This is an appeal against both conviction and sentence. The appellants, Mr Andries Dlamini and Jabulane Mabena, were convicted in the Regional Court sitting in Benoni on one count of rape of a minor child and one count of assault with intent to do grievous bodily harm.

[2] On November 2022, the appellants were sentenced to life imprisonment for the count of rape, and two years' imprisonment on the count of assault with intent to do grievous bodily harm. Both appellants are serving an effective sentence of life imprisonment.

SUMMARY OF EVIDENCE

[3] The complainant testified that on 18 August 2020, in the evening she went to Richard's Place where they sell alcohol. At this place, she met Andries, (1st appellant), who called and invited her to join him. They together drank beer until it became cold, and Andries invited her to go with him to his place. Jabu, (the 2nd appellant) joined them as well as a third male person known as Griffin. They all drank alcohol while sitting next to the fire. During the evening the 2nd appellant tried to kiss her, but she refused, and she bit him on his lip. The third man (Griffin) tried to reprimand the 2nd Appellant, but Griffin was then assaulted by both Appellants, and he left and went away after the scuffle.

[4] The 1st appellant went to fetch a liquid which the complainant described as paraffin, petrol or thinners. The 2nd appellant poured this liquid over her head while the 1st appellant was in possession of matches. The complainant was threatened that she will be set alight if she refuses to sleep with them. The complainant was forced to undress and then the two appellants took her to the bedroom. The 2nd appellant used a condom and raped her first. While the 2nd appellant was on top of

her, the 1st appellant slapped her on her thighs and told her to open her legs. There after the 1st appellant raped her. The complainant testified that she was raped several times by both appellants.

[5] T[…] M[…] testified that he is the uncle of the complainant. On 19 August 2020 he was sitting outside his house when he saw the complainant arriving home. He testified that while the complainant was still talking, the two appellants arrived at the house. The 1st appellant went down on his knees and begged for forgiveness. The 2nd appellant did not say anything.

[6] Tsheki Sipho Ashleigh Tladi, a medical practitioner who examined the complainant testified that the complainant presented superficial burn wounds underneath her breasts and a secondary burn wound on her right lower leg. He testified that paraffin alone will not cause burn wounds and that a source of fire was needed to cause the burn wounds. He described the abrasion on the posterior fourchette as a superficial erosion, a physical injury that may occur during sexual intercourse in many cases as a result of insufficient lubrication of the area or if there is forceful penetration.

[7] The 1st appellant rents a shack from Linah Malidela. Ms Malidela testified that during the evening under discussion there was an altercation between Griffin and the two accused. Griffin was physically assaulted by the 1st appellant. She further testified that she heard the 1st appellant tell the complainant to rather sit down because she is going to get burned. After the cross examination of Ms Malidela, the State closed its case.

[8] The 1st appellant testified that he never went to Richard's Place on 18 August 2020, instead he went home after work. He was later joined at his place by the 2nd appellant and Griffin and later by the complainant who was holding a bottle of beer. They were drinking alcohol and sitting around the fire. The complainant started dancing around the fire because she was drunk, the 1st appellant told her to stop dancing around the fire because she might get burned. The complainant continued to dance around the fire and as a result burned her leg. The 1st appellant denied raping or assaulting the complainant. He also denied that he went to the uncle of the

complainant and asked for forgiveness.

[9] The 2nd appellant testified that he was in a relationship with the complainant. He testified that a fight started between the 1st appellant and Griffin where after Griffin left. During the evening the complainant danced around the fire and accidently burned herself. The 2nd appellant testified that he had consensual sexual intercourse with the complainant during that evening. He denied that he raped the complainant.

ISSUES

[10] At issue in this appeal in relation to both appellants, is whether despite the contradictions in the evidence of the complainant with that of other state witnesses, was the magistrate correct to rely on the testimony of the complainant as a single witness to arrive at a decision of convicting both appellants. Secondly, whether magistrate erred in rejecting the evidence of the appellants. In my view the learned magistrate incorrectly concluded that the evidence of the complainant was satisfactory in all material respects to convict or reach a conclusion that the state has proved its case beyond reasonable doubt.

MY REASONS INCLUDE:

[11.1] During her evidence in court the complainant's version contradicted with that of Ms Malidela as regards the time she came to 1st appellant's place.

[11.2] Her evidence contradicted again with that of Ms Malidela as regards to the whereabouts of 1st appellant. She stated that she met the 1st appellant at Richard's place while according to the evidence of Ms Malidela the 1st appellant was home.

[11.3] She testified that she was poured with a liquid substance, but no trace of such liquid was found by the medical practitioner upon examination in the morning after the incident.

[11.4] In her evidence she testified that it was the 1st appellant who poured her with the liquid substance but during cross examination she changed her version to say it

was the 2nd appellant. She also changed her version as to whether she was undressed or dressed when she was poured with this liquid substance. I find that there are a lot of contradictions in the evidence of the complainant.

[12] The vexed legal question is whether the state's evidence passed the legal test or threshold of proof beyond reasonable doubt. The issue which this Court has to decide is whether the state's evidence, given its contradictions was of such calibre that it would satisfy the trial court that the guilt of the appellants has been proved beyond reasonable doubt.

[13] It is trite that in a criminal trial, the state bears the onus to prove the guilt of an accused beyond reasonable doubt. There is no onus on the part of the accused to prove his innocence or to convince the court of the truthfulness of any explanation that he or she gives. In *S v Jochems* at 211 E-G it was held that it is not enough or proper to reject an accused's version on the basis that it is improbable only[1]. An accused person's version can only be rejected once the court has found, on credible evidence, that it is false beyond reasonable doubt. In *S v V*[2] at para 3 it was held that if the version of the appellant is reasonably possibly true, the appellants are entitled to an acquittal.[3]

[14] Although the application of cautionary rules on the evidence of complainants in sexual cases was abolished by the Supreme Court of Appeal in *S v Jackson* coupled with the provisions of section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 which provides that the court may not treat the evidence of a complainant in a sexual offence with caution on account of the nature of the offence, in my view the trial court should have applied caution when considering the evidence of the complainant as a sole witness particularly as there were a number of contradictions in her testimony.

[15] As regards violence of children it was stated in the case of *Sphanda v S* at para 20 that the court should not easily convict unless the evidence of the child has

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[1] *S v Jochems* 1991 (1) SACR 208 A at 211.
[2] S v V 2000 (1) SACR 453 (SCA)
[3] *S v V 2000 (1) SACR 453 (SCA).*

been treated with due caution[4]. Where the child is also, a sole witness, the evidence should be recorded with more caution.

[16] In *R v Manda*[5] E -F, the court emphasised that the dangers inherent in reliance on the uncorroborated evidence of a young child should not be underrated.

[17] I am of the view that the consumption of alcohol calls for a cautionary approach towards the complainants' state of sobriety and material contradictions in her evidence should have triggered a further enquiry from the trial court.

[18] The magistrate was faced with a case which has been poorly presented. I can only express my grave disappointment in the manner the alleged rape was investigated and prosecuted particularly as the court was asked to convict and sentence the two appellants to life imprisonment. The stakes were very high, and one would have expected the prosecution to come to the same level, which did not happen.

[19] My reasons for stating that the state case was poorly presented are the following:

> [19.1] Griffin was not called as a witness to testify on the allegation made by the complainant that she bit 2nd appellant on the lips as he was trying to forcefully kiss her. Even the arresting officer should have been able to identify any lip injury on the 2nd appellant.
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> [19.2] There was no shred of evidence from all the witnesses except for the complainant of any liquid being poured on her. This liquid and confirmation thereof would have at least assisted the state and alternatively the trial court particularly as according to the complainant version, it is this liquid that was used to threaten her; hence she had no other option but to co-operate.
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> [19.3] There is still no clarity as to what happened to the clothes she was

[4] *Sphanda v S* 2001 ZACPPHC 186.
[5] *R v Manda* 1951 (3) SA 158 (A) at 163.

wearing. If she was poured with the liquid, the clothes would have, with careful forensic examination, confirmed her testimony.

[19.4] While the liquid is so important and was weaponised to threaten her, thus forcing her to co-operate, the complainant decided to go home to bath first before going to lay charges thereby eradicating the evidence that would have been preserved.

[19.5] According to the complainant's uncle T[...] M[...], both Appellants came to her place of residence where it is alleged that the 1st appellant confessed. While this alleged confession happens, the grandmother and the complainant were around the vicinity but none of them was called upon to confirm first the presence of both appellants at the complainant's residence and secondly the confession itself.

[20] As regards the offence of assault with intent to do grievous bodily harm it was stated in *S v Zwezwe* at 603B-D that for the crime of assault with the intention to cause grievous bodily harm, the offender must have the necessary intention to cause the complainant grievous bodily harm.[6] The enquiry into the existence of such intent requires consideration of the following factors:

(a) the nature of the weapon used and in what manner it was used;

(b) the degree of force used and how such force was used;

(c) the part of the body aimed at; and

(d) the nature of injury, if any, which was sustained.

[21] I had found no evidence submitted in the trial court to prove the commission of this offence. Even the evidence of the medical practitioner who examined the complainants could not establish any bruises on the complainant but only found burn

[6] *S v Zwezwe* 2006 (2) SACR 599 (N) at 603.

wounds which he could conclude may be from fire. This conclusion by the medical practitioner supports the evidence of the appellants that they reprimanded the complainants as she was dancing around the fire that she will get burned.

[22] In *S v Chabalala* at para 15, the Supreme Court of Appeal amplified as follows on the holistic approach required by a trial court in examining the evidence on the question of guilt or innocence of an accused:[7]

> "the correct approach is to weigh up all elements which points towards the guilt of the accused against all those which are indication of his innocence taking proper account of inherent strength and weaknesses, probabilities and improbabilities on both sides and having done so to decide whether the balance weights so heavily of the state as to exclude any reasonable doubt about the accused's guilt."

[23] It is settled law that there is no onus on the part of the accused to prove his innocence and the question remains whether the state proved the offence charged beyond reasonable doubt – See *S v Mbuli*[8].

[24] There was no reason advanced by the trial court to reject the evidence of the appellants as improbable. Contradictions in the evidence of the complainant militates heavily against its acceptance and does not render the evidence of the appellants less probable.

[25] On a conspectus of the evidence on record and the argument and submissions made before the court, I am of the view that the appellants should have been given the benefit of the doubt and acquitted by the trial court, bearing in mind the multiple contradictions of the complainant both in her evidence in chief and under cross-examination and also, the poorly presented state case.

[26] Having proper and due consideration to all circumstances this court finds that the trial court misdirected itself in convicting the appellants for the offence of rape

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[7] *S v Chabalala. 2003 (1) SACR 134 (SCA).*
[8] *S v Mbuli 2003 (1) SACR 97 (SCA) at 110D-F*.

and for assault with intent to do grievous bodily harm.

[27] The view held by this court is that the state has not succeeded in proving its case beyond reasonable doubt, especially in light of the contradictions.

[28] In the circumstances the appeal should succeed, and the convictions are accordingly set aside.

The following order is made:

1. The appeal is upheld.

2. The conviction on both counts of rape and assault with intent to do grievous bodily harm and sentence are set aside.

KEKANA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED

NYATHI J JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

JUDGMENT DELIVERED ON:	27 JUNE 2024
COUNSEL FOR THE APPELLANT:	ADV L AUGUSTYN (LEGAL AID)
COUNSEL FOR THE RESPONDENT:	ADV. E.V SIHLANGU (STATE)