

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. A 135/2022

In the appeal of:

SELLO ABRAM MOLETE

APPELLANT

and

THE STATE

RESPONDENT

CORAM:

MHLAMBI, J *et* VAN RHYN, J

JUDGMENT BY

VAN RHYN, J

HEARD ON:

17 APRIL 2023

DELIVERED ON

12 MAY 2023

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- [1] On 31 May 2021 the appellant was convicted at the Regional Court Bethlehem on a count of contravening section 3 of Act 32 of 2007, read with the provisions of section 51(1) of Act 105 of 1997. The provisions of section 51 (1) of Act 105 of 1997 were duly explained to the appellant at the commencement of the trial.

- [2] Appellant was represented by an attorney during the trial which commenced on 10 May 2021. The appellant pleaded not guilty to the 6 charges of rape levelled against him and did not tender a plea explanation. In respect of 5 of the charges, which relate to incidents which allegedly occurred during 2015, 2016, 2017, 2018 and 2019, the court *a quo* held that due to the complainant's inability to recall the facts relating to the charges, doubt existed in respect of the guilt of the appellant with the result that he was acquitted on these charges. In respect of the 6th charge regarding the rape of the complainant on 22 September 2019, the appellant was sentenced to life imprisonment. Appellant has an automatic right of appeal and filed a Notice of Appeal against his conviction and sentence on 10 June 2021.
- [3] The record reflects that before the complainant, a 16-year-old minor girl, presented her testimony, the trial court made a ruling in terms of Section 170A(1) of the Criminal Procedure Act¹ that her evidence be presented through the assistance of an intermediary. The defence did not raise any objections and after considering the qualifications and experience of the proposed intermediary, an order was duly granted. Complainant gave evidence in camera. The testimony of another minor child, the 16- year old K[...] D[...] T[...] was also presented through the assistance of the intermediary.
- [4] The grounds upon which the appellant's appeal against the conviction rest are that the court *a quo* erred in:
- 4.1 finding that the guilt of the appellant was proved beyond reasonable doubt;
 - 4.2 finding that the complainant was a credible witness;
 - 4.3 drawing a negative inference from the appellant's version and failing to find the appellant to be a credible witness;
 - 4.4 finding that the contradictions in the complainant's testimony and the contradictions between her testimony and the other state witnesses

¹ Act 51 of 1997.

were not material.

- [5] The facts underlying the conviction are briefly as follows: The complainant is the daughter of the appellant. She was born on 15 February 2006. A copy of her birth certificate was handed up as an exhibit. At the time of the trial she was 15 years old. Her mother had passed away and complainant and her brother resided with the appellant at Bethlehem. The complainant testified that the appellant had committed several incidents of rape since 2015. She was able to recall that on 23 December 2015, when she was 8 years old, the appellant picked her up from the kitchen floor where she and her brother were sleeping and carried her to his bed situated in a bedroom where he raped her.
- [6] She did not report the incident to anyone, because she was afraid. Her brother was sleeping at the time. The bedroom where she was raped was separated from the kitchen, where her brother was sleeping, with a curtain. The complainant was unable to recall any of the other incidents which allegedly occurred since 2015 up until the last incident which occurred on 22 September 2019. She testified that she made a mistake when she reported the matter to the police, indicating her statement, that the first incident occurred during 2014.
- [7] In respect of count 6 which count relates to the incident on 22 September 2019, she testified that on the particular day at approximately 20h00 she was sitting on the appellant's bed, in the corrugated iron shack. She, her father and her brother were residing in the shack. She was playing games on the appellant's cell phone while he was taking a bath in her presence. The appellant then asked to have sexual intercourse with her. She refused. He started having sexual intercourse with her on his bed where she was sitting after pulling down her pants to below her knees. He then picked her up and took her to another bed where he had further sexual intercourse with her. He subsequently gave her money. The complainant's brother was not at home and was working at a shop when the incident occurred.

- [8] The complainant did not report any of the incidents because she was afraid that she would not be believed. The following day, she was called by the neighbour, Mrs Tsie who questioned her about what happened inside the house. During cross-examination it was established that the complainant initially did not want to reveal to Mrs Tsie what had occurred, but she later during the discussion, explained that she and her father had a sexual relationship.
- [9] The State presented the testimony of Mamamoiketsi Reginah Tsie ("Mrs Tsie") who confirmed that she received a report from her daughter, who in turn received a report from her brother, K[...] D[...] T[...] ("K[...]") that he witnessed how the complainant was raped by the appellant.
- [10] K[...] was 16 years old when he testified. He befriended the complainant and used to call her to visit him and to watch television. However, since he was reprimanded by the appellant not to visit the complainant, he only called her when he knew that the appellant was not at home. On the particular day, K[...]’s mother requested him to fetch water at the outside tap. He placed the bucket underneath the tap to fill with water and then went to the neighbours’ house where the complainant resided.
- [11] At the shack he peeped through a hole in the corrugated iron and was able to see the bed in the corner of the shack. He saw how the appellant was on the bed and was lying on top of a person, whose identity was unknown to him because he could only see the person’s feet. K[...] only realised that it was the complainant lying underneath the appellant when the appellant stood up and the complainant raised her head. The appellant stood up and he could see his upper body, from his back to his head. He only observed what happened inside the shack for about ten seconds of which about 3 seconds was spent observing the movements made by the appellant while lying on top of the bed. In a state of shock, he ran away, took the bucket filled with water and went back to his home

[12] He reported the incident to Modupi who advised him to tell his sister. He eventually told his sister. During cross-examination K[...] testified that he had been visiting the complainant many times prior to the incident that occurred in September 2019, but he never entered the house, he merely stood at the door to talk to the complainant.

[13] It is not necessary, in my view, to recapitulate all the evidence led at the trial apart from the concise summary already mentioned. It is trite that the onus which rests on the State in criminal cases is to prove the guilt of an accused beyond reasonable doubt. A court does not have to rely upon absolute certainty, but merely upon justifiable and reasonable certainty.² In its ultimate analysis the court must assess the evidence presented during the trial holistically.

[14] In **S v Phallo & Others**³ the Supreme Court of Appeal set out the correct approach to be followed regarding proof in a criminal case as follows::

“On the basis of this evidence it was argued that the State had, at best, proved its case on a balance of probabilities but not beyond reasonable doubt. Where does one draw a line between proof beyond reasonable doubt and proof on a balance of probabilities? In our law, the classic decision is that of Malan JA in *R v Mlambo* 1957 (4) SA 727 (A). The learned Judge deals, at 737F-H, with an argument (popular at the Bar then) that proof beyond reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused's guilt or which, as it is also expressed, is consistent with his innocence. Malan JA rejected this approach, preferring to adhere to the approach which 'at one time found almost universal favour and which has served the purpose so successfully for generations' (at 738A). This approach was then formulated by the learned Judge as follows (at 738A- C):

'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of

² S v Ntsele 1998 (2) SACR 178 (SCA), headnote at 180D.

³ 1999(2) SACR 558 (SCA) at 562 para 10.

probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.'

[15] The approach to be adopted by a court of appeal when it deals with the factual findings of a trial court is trite. In **S v Naidoo & Others**⁴ the applicable principle was explained as follows:

"In the final analysis, a Court of appeal does not overturn a trial Court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong."

[16] The following contradictions in the testimony of the complainant are apparent from the record:

16.1 In her statement to the police the complainant stated that the appellant had first raped her during 2014. At the trial she testified that she had made a mistake in respect of the date and that the first incident occurred on 23 December 2015 when she was 8 years old. However, calculating from 15 February 2006 when she was born to 23 December 2015, she was 9 years and 10 months old and not 8 years old.

16.2 Regarding the incident which occurred on 22 September 2019, the complainant testified that after the appellant had washed, he started raping her on his bed. He then picked her up and moved her to the bed where she and her brother sleep, which is in another room. During cross-examination she testified as follows: "He took me from the bed where we sleep Your Worship, and put me on his bed, Your Worship." This is in contradiction to her testimony in chief.

16.3 During her evidence in chief the complainant testified that she was on the bed when the appellant picked her up. When confronted during

⁴ 2003 (1) SACR 347 at [26].

cross-examination with the fact that she had already been sitting on the bed, playing games on the appellant's cell phone why was it necessary for the appellant to pick her up again, she changed her version and testified that the appellant took her to her bed. This version also contradicts her evidence in chief that the appellant started having sexual intercourse with her on his bed where after he moved her to the other bed where she and her brother sleep.

16.4 When questioned during cross-examination regarding the holes in the corrugated iron of the shack she testified that the inside of the shack was covered but only at the back of the shack where she sleeps. The section where her father sleep was not covered. However, during cross-examination the complainant was asked whether the holes in the corrugated iron sheeting were left open for anyone to look inside, she then testified that the holes in the corrugated iron were covered with plaster or "patch" at the back of the shack where the bedroom of her father is situated.

16.5 During cross-examination the complainant was confronted with the fact that she had told Mrs Tsie that she reported the rape by her father to her aunt, which report the aunt apparently denied. The complainant testified that she did report the rape to her aunt. However, when asked why did she then lie to Mrs Tsie that she had told her aunt if her aunt disputes as much, the complainant testified that she was afraid to tell her aunt. The complainant conceded that she had lied to Mrs Tsie about her report to her aunt for no reason.

[17] The following contradictions in respect of the testimony presented by K[...] are evident from the record:

17.1 When questioned during cross-examination how many times have he been to the complainant's house at night, K[...] testified that it was the first time during the evening. However, when asked how many times has he peeped through the holes in the shack he replied as follows: It

was now the second time when I peeped through, when it was in the evening.”

17.2 K[...] testified that the appellant was wearing an orange T-shirt when he observed him doing up and down movements on the bed. The complainant testified that the appellant was naked when he raped her.

17.3 K[...] testified that he was only able to see the feet of the person who was lying underneath the appellant. He was able to see that the legs were opened. The complainant testified that her pants were pulled down below her knees, which caused her legs to be constricted by the presence of the pants.

[18] Contradictions in respect of the testimony presented by the complainant and Mrs Tsie are as follows:

18.1 The complainant testified that the confrontation by Mrs Tsie followed the day after 22 September 2019 and that is why she told Mrs Tsie: “I told her that my father raped me yesterday night”. According to Mrs Tsie she only confronted the complainant two to three days after she received the report from her daughter about what K[...] had witnessed when he peeped through the hole in the corrugated iron shack.

18.2 During cross-examination it was put to Mrs Tsie that the complainant was unsure to what Mrs Tsie referred to when she asked the complainant what happened to her in the house the night before. Mrs Tsie then replied that the person who asked the Complainant was the landlord. Mrs Tsie furthermore explained that she did not report the crime to the police, the landlord did. No evidence in this regard was placed on record by the State and the role of the so-called “landlord” was not explained.

[19] The appellant denied the allegations of having raped the complainant. He confirmed that he prohibited K[...] from playing with his daughter. Mrs Tsie also

confirmed the version presented by the appellant that her son, K[...], was not allowed to visit the complainant. Apparently neither the complainant, nor K[...] paid any attention to the appellant's instructions. It is evident from the record that K[...] and the accused had previous confrontations regarding the friendship between the complainant and K[...]. The court *a quo* found that there was evidently no bad blood between the complainant and her father but in my view, failed to recognize the fact that K[...] and the appellant certainly had issues between them which renders K[...]’s evidence to be treated with caution.

[20] In my view, the learned magistrate incorrectly concluded that the evidence of the complainant, as corroborated by K[...], was satisfactory in all material respects. I am of the view that the contradictions set out above are indeed material and ought to have affected the reliability and trustworthiness of the evidence presented by the State. A further aspect, especially considering the age of the complainant, is the total lack of any medical evidence presented by the prosecution during the trial.

[21] Having regard to all the evidence presented, I am not persuaded that the State has discharged the onus resting upon it in relation to the conviction of the appellant.

ORDER.

[22] Accordingly, I propose the following order:

- 1.1. The appeal succeeds;
- 1.2. The conviction and sentence of the appellant is set aside.

VAN RHYN, J

I agree and it is so ordered.

MHLAMBI, J

On behalf of the Appellant:
Merwe
Instructed by:

Mr P L van der
BLOEMFONTEIN JUSTICE CENTRE

On behalf of the Respondent:
Komane
Instructed by:

Adv. T E
DIRECTOR PUBLIC PROSECUTIONS
BLOEMFONTEIN