

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: AR 235/2022

In the matter between:

SIBANGANI ZAMA KHOZA

APPELLANT

And

THE STATE

RESPONDENT

ORDER

1. The appeal against conviction is upheld.
2. The conviction and sentence is set aside

APPEAL JUDGMENT

Mngadi J

[1] The appellant appeals as of automatic right against conviction for rape and sentence to life imprisonment by Regional Magistrate sitting at Madadeni (Mr M.I. Ntombela).

[2] The charge alleged contravention of s 3 read with ss 156(1), 57, 58, 59 60 and 61 of Act 32 of 2007, also read with ss256 and 261 of the Criminal Procedure Act 51 of 1977. Further, read with the provisions of s 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended. It alleged that the accused is guilty of the crime of rape in that on or about 2017 the appellant did unlawfully and intentionally commit an act of sexual penetration with [A... N...] a seven (7) year old girl by inserting his penis into her vagina and finger on several occasions without her consent.

[3] The appellant who was legally represented during the trial when the charge was put to him pleaded not guilty. His legal representative placed on record that the appellant makes no admissions in relation to the charge suffice to say the appellant and the complainant knew each other, the complainant was the biological daughter of the appellant.

[4] The state lead evidence from four (4) witnesses, nasmely; Ms S[....] M[....](a school counsellor), [K...V....], (the complainant), F[....] V[....] (the complainant's mother) and Nikeziwe Buthelezi (the medical doctor).

[5] The charge in the appeal record indicates bears the following details: RC 16/2018 as case number, State vs Sibangani Zama Khoza, and then the above-mentioned details of the charge. I will later point out the discrepancies between the averments in the charge and the evidence presented by the State in support of the charge.

[6] Ms S[....] M[....] testified as follows. She was employed as a school counsellor working with children from a number of schools under Eshowe district. She knew the child [K... V...] the complainant. The school principal of K[....] P[....] S[....] where the complainant was schooling asked her to attend to the complainant as an emergency case. The principal told her that the complainant's class teacher suspected something in the form of abuse to the complainant. The principal then on a Friday 8 September 2017 brought the complainant to her. She sat down with the complainant. She explained the

nature of her enquiries to her. She explained that she was there to help children and to protect them, and that the children, if they have problems, discuss their problems with her. She told the complainant that there are issues which are confidential she was going to disclose to her so that she would be able to get help. It was then when the complainant told her that she was encountering a problem with the appellant and told her that her father has a tendency of having sexual intercourse with her. She asked her as to how long that happened. The complainant told her that had happened for about a period of a year. She asked the complainant whether it was still continuing. The complainant agreed and told her that as she was with her on a Friday, he had raped her on a Monday of that week.

[7] Ms M[...] testified that the complainant told her that she was staying at her home with her mother, her father and her younger sister. She told her that it started when her father started chasing away her mother, and when she had remained with him it was then that he raped her. She explained that in some instances her father used to go with her and further raped her in the nearby bushes. The complainant told her that she did report to any person for the whole year because the appellant threatened to kill her and throw her body away, and kill her mother and sister. Ms M[...] testified that she attended to the home of the complainant. She found that they occupied one room. She fetched the complainant's mother and she took the complainant to the hospital. The doctor in her presence and in the presence of her mother examined the complainant. She explained to the doctor why she was there and that the complainant had confessed to her. The doctor told her that there was some indication that the complainant was raped and that she had been sexually penetrated.

[8] Ms M[...] testified that prior to 8 September 2017 she had dealt with the complainant. At that time, she was in Grade 2 as she was then in Grade 7. At that time, the complainant had sexually been abused and the person that abused her was arrested.

[9] Ms M[...] under cross-examination testified as follows. The person involved in the earlier abuse was not the appellant. Asked whether the complainant told her where the sexual intercourse incident did took place, she said the complainant told her that it took place at her home, and that is all. The court then said to her and where else, Ms M[...]

said in a bush and other incidents took place at a certain place known as Ria. She said the complainant told her that it started in July 2016. She said she did not question the complainant about where the last incident of 4 September 2017 took place. She said the complainant told her that it took place in bushes near her homestead. The complainant in her home told her that it took place in the room they occupied. She stated that the complainant when she talked to her was in a confident mood.

[10] The State called [K...V...], the complainant. The Regional Magistrate conducted a competency enquiry. The complainant during the competency enquiry stated that she was 14 years old. She was not schooling. She left school in Grade 8. She was expelled from school because dagga was found in her bag. She attended church. She knew what to take an oath was, It was swearing to abide yourself that all you shall do or tell is the truth or you know what it will be the truth. She knew the consequences of to not telling the truth. A person who takes an oath but not tell the truth is punished. She goes to church and she believes in God.

[11] The complainant after she was sworn in testified as follows. During the year 2016 she resided at Nyaneni area with her mother, father and her younger sister. She was in Grade 6. In July 2016, a date she did not remember, she was at a water tap with the appellant's girlfriend. A boy of Ngcobo family came to her. Her father's girlfriend left her at the water tap and she was the last person. Her father's girlfriend reported to her father that she was with a Ngcobo boy at the water tap, she was in love with him. Her father, after she had returned at her home, asked her about her relationship with the Ngcobo boy and assaulted her when she denied it. He told her to come early from school the following day for him to take her to the Ngcobo family.

[12] She testified that the following day she came back early from school. Her father took her to the Ngcobo family. They reached the road to the Ngcobo family but they passed it, her father told her that they would use another path to avoid dogs. He told her that he loved her and asked her whether she loved him. She said she loved him as a father. He hit her with an open hand accusing her of making a fool of him. He took her along a footpath leading to the bush. They reached a spot with rocks. He undressed her, after he had told her to undress and she refused. He undressed her of her skirt and panty. He instructed her to bend down and hold the ground. He undressed himself of his

trouser and under wear. She refused to bend over and he hit her forcing her. He took out his penis and he inserted it into her vagina. He had sexual intercourse with her until he finished. She saw a whitish discharge from her vagina. He gave her leaves and he told her to wipe herself. They dressed up and left. He called her and showed her a knife. He placed it on her neck. He told her not to report the incident, if she ever reports it, he would kill her and throw her body away where it would not be found.

[13] The complainant testified that the following day when she came back from school, the appellant instructed her to accompany him to a sugar cane farm to collect sugarcane. The farm was close to their home. They reached the sugar cane farm. He instructed her to undress and she refused. He then undressed her, hit her and said there was no reasons for her to refuse. He undressed himself. He put his penis into her vagina and he had sexual intercourse with her until he finished. He collected leaves and gave them to her to wipe herself. On this occasion, he had spread his jacket on the ground and caused her to lie on it when he was having sexual intercourse with her. They dressed up. They cut some sugarcane and they went back home.

[14] The complainant testified that she did not remember the other incidents because he was doing this on many occasions when they were staying at Nyaneni area and they then moved to stay in the township. She stated that she could only remember the two incidents although there were many incidents the appellant had sexual intercourse with her whilst staying at Nyaneni area.

[15] The complainant testified that in grade 7 in 2017 they moved to the township to a one roomed home. In the township, the appellant at about 4 pm took her to maNtuli, a grandmother, to buy pies, on the way he raped her. She testified that on a certain day the appellant caused her to hold a tree that had fallen down. He inserted his penis into her vagina and he had sexual intercourse with her. The complainant was asked to clarify whether they went to maNtuli on one occasion or they used to go to her to buy pies, she said they went there on several occasions and on all those visits or outings he had sexual intercourse with her.

[16] The complainant testified that the last incident before the appellant was arrested happened as follows. The appellant asked her to accompany her to the clinic. In the

clinic they found a long queue. She had to leave school homework. He compelled her to go with him threatening to take her out of school if she refused. They left the clinic to make copies of her mothers' identity document and of her birth certificate. They arrived at the shop and found that it closed, and they then went home. He told her he knew of a certain home where copies are made. They arrived at that homestead but the gate was closed and nobody opened for them. They proceeded to a bush where the appellant wanted to find a herb to induce vomiting. She waited outside the bush and he called her to come into the bush to assist him to look for the herb. She remained outside until he came out. They went back home. When they were about to reach a footpath leading to their home, he then took a footpath leading to the bush. He called her to follow him. They got inside the bush. He called her aside. He entered the part of the bush with thick trees. They got under the trees. He started touching her body and fondling her breast. He undressed her of her skirt and a panty. He undressed himself of his trouser and underpants. He inserted his penis into her vagina and he had sexual intercourse with her until he finished. He gave her the leaves to wipe her vagina. He had sexual intercourse with her in a bend over position. They cleaned up and they went back home.

[17] The complainant testified that what lead to the arrest of the appellant is that she reported to the school principal that the appellant indicated to her that he was going to take her out of school. The principal told her that he was going to take her to a social worker and he took her to the social work the following day. She explained to the social worker what the appellant did that he raped her. The social worker took her to the doctor at the hospital. The doctor examined her and called the police. The complainant testified that prior to the appellant starting to have sexual intercourse with her, and during the time he was having sexual intercourse with her until he was arrested, there was another male person who did a similar thing to her. He did it before the appellant did it to her.

[18] The complainant under cross-examination testified that the four incidents she testified about took place outside her home, but the other incidents she could not recall the appellant did rape her at her home, he had assaulted her mother and chased her away. Asked where in the homestead did it take place, she said she cannot recall. Put to her that the appellant was not told about the Ngcobo boy by his girlfriend but he found a letter in her school bag written by her to the Ngcobo boy, she said she knew

nothing about that, and the appellant did not ask her about the letter. She said there is no letter that the appellant found in her bag. The complainant denied that she was making false accusations against the appellant because he punished her for being naughty and he chastised her for being busy with boys. She denied that he confronted her about sleeping with the Ngcobo boy and she admitted.

[19] F[...] V[...] testified as follows. The complainant was her daughter and the appellant was her father. She stayed with her children at Iland also known as Nyaneni. The appellant did not stay with them but he also stayed at Island. The appellant stayed with his girlfriend. The appellant sometimes came to fetch the complainant to go to town. The appellant eventually fetched her and the children to stay together in his house. Ms V[...] testified that the appellant told her that the complainant was in a love relationship with the Ngcobo boy. It was at the time they had already moved in with the appellant where he previously stayed with his girlfriend. He told her in the presence of the complainant and he beat her. The appellant then said he was taking the complainant to the Ngcobo boy home about 30 minutes away. He refused to let her accompany them. They later at dark returned. She asked how did they go but she did not receive any reply. The appellant used to go away with the complainant, at times visiting farms to fetch crops. They then relocated to Madameni area near Inkanyezi. The appellant continued taking the complainant to accompany him. She asked the complainant why she went away with the appellant. She told her that she just went with him but not willingly. The stay with the appellant was not normal. If she refused to let him go with the complainant he beat them until they ran away to stay at other peoples' houses. She used to run away first and the children followed her.

[20] Ms V[...] testified that the social worker told her of the allegations against the appellant when he was arrested. The doctor told her that the complainant had been sexually abused. She knew that whilst they stayed at Mbongelwane the complainant was repeatedly raped on one day.

[21] Ms V[...] testified that the appellant showed her a letter, he said it was written by the complainant to the Ngcobo boy. It was addressed to the Ngcobo boy. It appeared to her to be in the appellant's handwriting. The appellant showed her the letter when he took the complainant to the Ngcobo home. She testified that she heard that the

complainant had slept with the Ngcobo boy at their home. She heard it from the appellant at the time he showed her the letter. The appellant confronted the complainant about it and he beat her up. She admitted it because he was beating her up. It was not correct that the complainant was naughty and that she was busy with boys. The appellant approached her with the school backpack of the complainant and the letter.

[22] Ms V[...] confirmed that the appellant used to take the children to school and fetch them. He started after there was fear that children are abducted. She confirmed that the complainant admitted writing a letter to the Ngcobo boy. She remembered the appellant going away with the complainant's younger sister to check whether the letter belonged to the girl, the complainant initially said it belonged. The complainant admitted that she slept with the Ngcobo boy as the appellant beat her.

[23] Nikeziwe Buthelezi testified as follows. She was a medical doctor practising since 2000. She examined the complainant at Eshowe Hospital and she completed the prescribed medical examination report (J88). She recorded the following: '13 year old brought in by the department of Social Development, patient gives a history that since July 2017 her father has been sexually penetrating her almost every month – and he has been verbally and physically abusive to her, mother and her younger sister. He doesn't want her to talk to other people. He would take her to the bush and abuse her there sexually, or on the way to clinic or to the neighbours. The last incident was on the 04/09/2017, he asked her to go buy pie with him to the neighbourhood. On the way he took her to the bush and he removed her underwear, and inserted his penis into her vagina'. The doctor in the medical examination form (j88) further recorded the following: Clinically stable. Gunaee exam > cleft on the posterior fourchette, no hymen noted, watery cream discharged noted, 2 fingers inserted in with no discomfort to the patient and also speculum inserted with no discomfort to the patient , noted erosion on the cervix and watery cream discharge on the posterior cervix. Sexually penetrated several times – evidenced by 2 fingers inserted, speculum inserted, no hymen.

[24] Doctor Buthelezi testified that the report where it states 'July 2017' contains a human error, it was July 2016, she thinks her mind was already stuck in 2017. A cleft is a healed laceration. She said to put her two fingers meant putting in a diameter of 2.5cm, whereas a vagina that has never been penetrated cannot even allow one finger

in it. The speculum is 7-8 centimetres and approximately 3 cm in width but the complainant did not feel any discomfort or pain. She said that at seven years age a hymen sexually penetrated grows back although not to its original size and shape if repeatedly opened several times. She testified that she worked since 2013 at the gynaecology and obstetrics department making her to be familiarised with different conditions of vaginas. The doctor when asked whether there had a document recording that it is July 2016 and not July 2017 as recorded in the J88, she responded that she remembered the complainant.

[25] The State closed its case. The legal representative of the appellant closed the defence case without leading any evidence. The appellant confirmed that it was his decision.

[26] The Regional Magistrate indicated, correctly, that notwithstanding the appellant electing not to testify, the State remained with the duty to prove the guilt of the accused beyond reasonable doubt and the onerous burden is not made any easier by the accused electing to exercise his constitutional right to remain silent. He referred to *S v Hlongwane* 2002 (2) SACR 37 TPD as para [51] where it was held that the exercise of the right to remain silent even after the close of the prosecution case does not result in any inference of guilty or admission that he had no answer to the prosecution case. The duty of the court to scrutinise and weigh the prosecution evidence whether it proves the guilt of the accused beyond reasonable doubt is not in any lessened by the accused's election to remain silent. The Regional Magistrate correctly pointed out that the evidence of the complainant is that of a child and a single witness. It required to be approached with caution. He held that if a judicial officer has anxiously scrutinised such evidence with a view to discovering whether there is any reasonable possibility of conscious or unconscious fabrication is satisfied that there is no such possibility the evidence may be safely accepted. The learned Regional Magistrate stated that the complainant created a very good impression to the Court, she was detailed in describing the incidents she remembered. He found that the evidence of the complainant finds corroboration where it overlaps with that of her mother relating to the appellant going away with the complainant. He found that the medical evidence made it clear that the complainant was raped several times.

[27] It is clear that the Regional Magistrate misdirected himself in regarding the medical evidence as establishing that the complainant was raped several times. The said evidence established vaginal penetration. Further, it is one aspect of the exercise of caution to scrutinise the evidence for signs of fabrication but not the only one. To make it the only aspect would require the accused to prove that the evidence against him is fabricated which is not the legal principle. The basic requirement is that the evidence of a single witness is required to be clear and satisfactory in all material respects. In *S v Mokoena* 1932 OPD 79 at 80 : 'Now the uncorroborated evidence of a single witness competent and credible witness is no doubt declared to be sufficient for a conviction by the section, but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistency statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc'.

[28] The evidence of a child must be approached with caution in view of the risks associated with the evidence of children. In *S v Manda* 1951 (3) SA 158 A at 162/3 the court held that discrepancies which in other evidence may be of little importance in the evidence of a child may need to be seriously considered since the principle requires that evidence of young children should be accepted with great caution. The danger inherent in reliance upon the uncorroborated evidence of a young child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps, to suspicion.

[29] The exercise of caution must be evident from the judgment. It entails scrutinising all the evidence with care, taking note of inconsistencies and discrepancies and seeking explanations, and according due weight to unexplained discrepancies and inconsistencies. In my view, the evidence of the complainant exhibited numerous material unsatisfactory features, in particular, the following:

1. She lied in denying knowing anything about the letter addressed to the Ngcobo boy.

2. She told the doctor that the appellant started sexually abusing her after he had chased her mother away but in her evidence sexual abuse started when the appellant said he was taking her to the home of the Ngcobo boy.
3. The complainant told the doctor that the last incident is when the appellant went with her to buy pie but in her evidence, she said the last incident is when the appellant went with her to the clinic.
4. The complainant inexplicable could not remember anything about the incidents of sexual abuse that took place at her home.
5. The doctor wrote in the j88 in three places that the abuse took place in 2017 as stated in the charge, it is an inconsistency in the evidence of the complainant whether the sexual abuse took place in 2016 or in 2017.
6. The evidence reveals that the complainant alleged sexual abuse to stop the appellant from taking her out of school, which shows a motive against the appellant.

[30] The charge alleges that on or about 2017 the appellant did unlawfully and intentionally commit an act of sexual penetration with complainant on several occasions without her consent. The school counsellor interviewing the complainant on 8 September 2017 was told that the appellant for a period of about a year had a tendency of having sexual intercourse with the complainant. The doctor in the J 88 completed on 8 September 2017 stated that since July 2017 the sexual abuse started on three separate parts of the J88. The charge alleged sexual penetration of a vagina by a penis and a finger and that complainant was seven years old. The evidence lead showed that the complainant was 13 years old, there was no evidence of a finger used in the sexual penetration. It was not explained during the trial why it was claimed. Complainant was 7 years old, and why it was claimed that a finger was used in the sexual penetration. The charge, referred to a complainant who is not the complainant. It alleged rape on [A...N....] These discrepancies were never explained during the trial. The State counsel before us had no explanation for this discrepancy between the allegations in the charge and in the evidence adduced in the trial.

[31] The complainant was sworn in by the court after conducting a competency inquiry. But during the competency enquiry there were no questions directed to establishing whether the complainant knew the difference between truth and lies. Further, the complainant said that a person not telling the truth is punished, the complainant except to say that she attended church and she believed in God, she did not state that once she has taken the religious oath it binds her to tell the truth. In my view, the competency enquiry did not establish the main requirements of a witness to be sworn in that she knows the difference between the truth and the lies. She knows the nature and import of a religious oath and she regards it as binding on her conscious. It results in her evidence to be inadmissible.

[32] The evidence was that the class teacher noticed something untoward in the complainant and she reported to the principal who in turn called the school counsellor. The class teacher and the school principal were not called to testify. It is not known whether they had any interaction with the complainant.

[33] In my view, the learned Regional Magistrate failed to approach the evidence with the required caution. The discrepancies in the complainant's evidence constitute material unsatisfactory features rendering unsafe to rely on the evidence to convict the appellant.

[34] I propose the following order.

1. The appeal against conviction is upheld.
2. The conviction and sentence is set aside.

Mngadi J

I agree

Mathenjwa AJ

APPEARANCES

Case Number: AR 235/22

For the Appellant: Adv Andrews

Instructed by: Legal Aid South Africa
PIETERMARITZBURG

For the respondent: Adv Khanyile

Instructed by: Deputy Director of Public Prosecutions
PIETERMARITZBURG

Heard on: 17 March 2023

Judgment delivered on: 28 March 2023