



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: 11/2023

In the matter between:

THE STATE

and

KHAPHAKATI SITHEMBELE

Accused

JUDGMENT

Govindjee J

Background

[1] Mr Khaphakati was charged with raping EJ ('the complainant') *per vaginam* on one occasion on Saturday 31 October 2020 near Stutterheim. He pleaded not guilty and, by way of a plea explanation, denied any sexual penetration of the complainant.

The evidence

[2] Dr Dwyer testified regarding the contents of a report following medico-legal examination completed by another doctor who had since retired. That report, understood in the light of Dr Dwyer's testimony, reflects that the complainant was physically examined at 20h30 on 2 November 2020. The examination revealed a bruised posterior fourchette, two fresh clefts and bruising on an irregular hymen as well as a bloody discharge and inflamed perineum. The examining practitioner had expressed the conclusion that 'sexual penetration has taken place'. Dr Dwyer indicated his clear support for that conclusion, adding that the presence of bruising suggested that the incident had occurred within a period of five days from the date of examination.

[3] The complainant, now 12 years of age, testified in camera with the aid of closed-circuit television, following admonishment and via an intermediary. She had been staying at the two-bedroom home of her aunt ('Jeyi'), who lived in a flat on a farm, on the day in question. Mr Khaphakati was her mother's boyfriend and the couple had one child ('IP') aged five. Jeyi and the adults had cooked a meal during the day before consuming liquor until the evening. Jeyi had slept with her boyfriend in their bedroom that evening. Jeyi's child ('AJ') had slept with the complainant on a bed in the other bedroom. Mr Khaphakati, the complainant's mother and their child had slept on a mattress at the foot of that bed, as confirmed by the complainant with the aid of a photo album.

[4] The complainant alleged that Mr Khaphakati had come to her during the night while she was on the bed, lowered her panties to her feet, instructed her to bend away from him and proceeded to rape her. She had experienced pain when he did so. Her immediate response was to call to her aunt for help, but he had closed her mouth with a blanket and his hand, threatening to bury her alive if she were to disclose to anyone what had happened.

[5] The evidence of the complainant was that the room was dark so that there was no visibility. She had identified Mr Khaphakati when he had spoken to her and threatened to kill her if she told anyone what had happened. The complainant clarified

that her immediate response was not to call her mother, as her mother would always side with Mr Khaphakati. She also testified that her mother was awake at the time.

[6] Mr Khaphakati had been sent to buy liquor the following morning, which was a Sunday, but had returned without the liquor. The complainant did not want to leave with her mother, Mr Khaphakati and their child that day. On the following day, her grandmother had observed her walking strangely and had questioned her. Jeyi had taken her inside the house and made her show her private parts to her. Jeyi had observed redness and the complainant had then told her that Mr Khaphakati had been the cause of that and described that he had raped her. Jeyi had then washed her and accompanied her to the police station, after which she was medically examined.

[7] It was put to the complainant that she had slept in the neighbouring flat, in which her grandmother stayed, together with AJ and another male child aged 16 ('AM') on Friday night, the evening before the incident occurred. The complainant denied that, indicating that she knew AM who was only now 13. He never slept in her aunt's home and was unrelated to their family. He did, however, sometimes sleep in the neighbouring flat where her grandmother slept. It was also put to the complainant that the accused had heard AM invite the complainant and AJ to accompany him to another farm. The complainant was adamant that she had slept in Jeyi's home and denied any invitation to accompany AM on Saturday morning. AM had merely invited AJ and the complainant to accompany him to Jeyi's gate, as he was going to travel to another homestead on his own. Counsel for Mr Khaphakati confirmed the complainant's version that the adults had been drinking after the meal was prepared on the day of the incident.

[8] The complainant testified that she had fallen asleep before being approached by Mr Khaphakati on the bed, and had woken up shocked that he was busy lowering her panties. At that stage she did not know who the person was and had not made any noise. After having lowered her panties, however, Mr Khaphakati threatened to kill her by burying her alive if she made any disclosure. She then recognised his voice. He had been speaking in a different manner than normal, softly and with a 'bass' voice. He then instructed her to bend down and face her behind towards him. When she wanted to cry out, he had closed her mouth before she could make any noise.

[9] The complainant explained that she had heard her mother going to urinate. She added '...and when she comes back and gets under the blankets she does not immediately fall into a deep sleep'. She then testified that it had not been so dark at the time, and that she could see her mother was awake based on her mother's movements while in bed. AJ, sleeping next to her, had not woken throughout the incident. It was, however, too dark to see the organ that had been inserted into her, which she had felt and which had hurt her. She had also been facing away from her assailant at the time. After raping the complainant, Mr Khaphakati had repeated his threat to her. She had not responded and he had returned to the mattress where he had been sleeping until morning.

[10] The complainant described that she had been afraid to disclose what had happened the following day. That disclosure only came after she had been noticed walking with discomfort, on Monday. Nobody had noticed her discomfort on Sunday. The complainant appeared incredulous when the defence version was put to her. That version included the suggestion that AM may have perpetrated the crime. The complainant maintained that she had slept in Jeyi's house on both Friday and Saturday nights and denied any physical relationship with AM. The complainant concluded by indicating that Mr Khaphakati had been drunk at the time of the incident. She had known him for a long period of time and spoken to him before. His voice had not been so low or soft that she could not hear him clearly when he spoke to her that evening. Other than one previous assault that she mentioned, there was no bad blood between the two.

[11] Jeyi testified that she was the complainant's mother's sister and the mother of AJ. She confirmed the Saturday sleeping arrangements detailed by the complainant and that the adults had been drinking earlier that day. The adults had also tried to buy alcohol on Sunday morning, leaving the children behind, but were unsuccessful in their attempts. Thereafter, her sister, Mr Khaphakati and their child had left for their home, which was located at a different farm. The two had been in a relationship for a long period of time.

[12] Jeyi's suspicions had been aroused when the complainant had not been hungry that Monday morning. The child's grandmother had noticed her walking with discomfort, and called her. She had taken the complainant inside the house and asked her what had occurred. The complainant had then explained that Mr Khaphakati had caused the problem and made a full disclosure, including that he had raped her from behind. While doing so, the child was 'not right in the face ... [as if] she was someone who had fever'. Jeyi had questioned her as to how this could have happened while everyone else was present, and the child had explained that she had not called for help because she had been threatened. At some point she had inspected the child's private parts and noticed redness. Without bathing her completely, she had wiped her face and proceeded with her to the police station, and subsequently to the hospital. She had noticed nothing amiss the previous day.

[13] Jeyi testified that AM was only born in 2009 and was 13 years of age. He had never slept at her home. She recalled the complainant sleeping at her home that Friday evening. AM would occasionally sleep at the grandmother's flat during 2020, which was right next door to her flat, but AJ and the complainant never did so.

[14] Mr Khaphakati testified that he was 41 years of age and was completely uneducated and illiterate. He had been raised on a farm where he now worked. He had slept at Jeyi's house on the night in question, with the complainant's mother, as well as the previous evening. The complainant had slept in the room where they had slept on Saturday, but had stayed at her grandmother's homestead the previous evening. He testified that Jeyi and her boyfriend had also slept at that homestead, together with the complainant, AM and AJ on the Friday night.

[15] Mr Khaphakati testified that he had slept through the night on Saturday and denied raping or threatening the complainant. He had noticed nothing untoward with her the following day. He had subsequently been arrested. He had no knowledge of who could have caused her injuries and no suspicions.

[16] This position was maintained during cross-examination. Mr Khaphakati had slept only with the complainant's mother on Friday evening, while the others were sleeping next door at the grandmother's flat. He had omitted to tell his counsel about

that and had waited to place that version before court. He had been arrested for something unknown to him.

[17] He confirmed the Saturday sleeping arrangements as described by the complainant. He testified, however, that neither he, nor anyone else in the household, had been drinking earlier that day because no liquor had been available for purchase. Liquor had only been obtained the following day. He had consumed this before leaving for his home. The evidence was that he had known the complainant for a long period of time and there were no bad feelings between the two. He conceded that she had been sexually penetrated but distanced himself from the version that had been put on his behalf as to the possible involvement of AM, agreeing that placing the blame on a child aged ten at the time was unfathomable.

[18] When it was put to Mr Khaphakati that he had perpetrated the crime, he responded by saying that he did not agree, adding that 'It would have been fine if DNA was present'. Mr Khaphakati also testified, in response to questions from the court, that he had a clear recollection of the events of Saturday evening, including Jeyi joining her sister and him on their mattress and conversing with them before she had left to sleep in her room. He had made a mistake in omitting this evidence during his earlier testimony. Mr Khaphakati felt hurt by the child's accusation and could not understand why she would place the blame upon him.

Analysis

[19] It is trite that the evidence of young children should be accepted with great caution. While no fixed rule in respect of corroboration is applicable, in *S v Manda*, the Appellate Division noted inherent dangers in relying upon the uncorroborated evidence of a young child.¹ The imaginativeness and suggestibility of children have been held to be only two of several elements that require that their evidence be scrutinised with care to the point of suspicion. A trial court must fully appreciate the inherent dangers in accepting such evidence.

¹ *S v Manda* 1951 (3) SA 158 (A) at 162E-163F. See *S v Artman and Another* 1968 (3) SA 339 at 340H.

[20] While her allegations of sexual penetration are supported by the available medical evidence, the complainant in this matter is a single witness in respect of her identification of the accused as her rapist. Section 208 of the Act provides that an accused may be convicted of an offence on the single evidence of any competent witness. There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness.² The evidence must be weighed by considering its merits and demerits before deciding whether, despite shortcomings, defects or contradictions, the truth has been told. The cautionary rule that the evidence of a single witness must be clear and satisfactory in every material respect does not mean that any criticism of that witness' evidence, however slender, precludes a conviction.³ The exercise of caution cannot be allowed to displace the exercise of common sense.⁴ The court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true, and notwithstanding that the testimony was unsatisfactory in some respect.⁵

[21] An accused person may only be convicted if, after proper consideration of all the evidence presented, his guilt has been established beyond reasonable doubt. It follows that an accused person must be acquitted if it is reasonably possible that he might be innocent.⁶ Before rejecting an accused's version on the probabilities, the court must be able to find, as a matter of probability, that the accused's version is simply not reasonably possibly true.⁷ Where there is a conflict of fact between the evidence of the state witnesses and that of the accused, the court is required to consider the merits and demerits of the state and defence witnesses, as well as the probabilities of the case, before concluding whether the guilt of an accused has been established beyond reasonable doubt.⁸

² *S v Weber* 1971 (3) SA 754 (A) at 758.

³ *R v Bellingham* 1955 (2) SA 566 (A) at 569, quoting *R v Nhlapo* (AD 10 November 1952).

⁴ *S v Sauls and Others* [1981] 4 All SA 182 (A) at 187.

⁵ *R v Abdoorham* 1954 (3) SA 163 (N) at 165, as quoted in *S v Sauls* *ibid*.

⁶ *S v Van Aswegen* [2001] JOL 8267 (SCA); *S v Van der Meyden* 1999 (2) SA 79 (W).

⁷ *S v Shackell* 2001 (2) SACR (SCA) 194*g-i*.

⁸ *S v Guess* [1976] 4 All SA 534 (A) at 537-538; *S v Singh* 1975 (1) SA 227 (N) at 228.

[22] It is necessary to adopt a holistic approach to analysing the available evidence in this matter.⁹ In *S v Chabalala*,¹⁰ the Supreme Court of Appeal explained this as follows:

‘The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper count of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.’

[23] Counsel were in agreement that many of the facts were common cause. This includes the sleeping arrangement on the night in question and that Mr Khaphakati and the complainant's mother left for their residence the following day, without the complainant. The medical evidence that the complainant had been sexually penetrated is clear and convincing. This was not placed in dispute and must be accepted. The real issue is the identity of the rapist.

[24] The complainant was a single child witness in addressing that crucial question. Her evidence must be approached with the appropriate level of caution already described. The complainant impressed the court with the manner in which she testified. She was able to do so in a composed, clear manner, during her examination-in-chief and cross-examination. She had no difficulty in displaying appropriate thought and reflection when questions were put to her, bearing in mind her young age. She explained when she did not know an answer or could not remember something, and testified confidently in agreeing or disagreeing with statements put to her, and in the manner in which she explained her view. She conveyed the general impression of a child speaking truthfully about an event that she was able to recall, displaying flashes of emotion when Mr Khaphakati's denial and allegations of another perpetrator were put to her. She was steadfast and clear in her identification of Mr Khaphakati as the perpetrator.

⁹ *Van Aswegen supra*.

¹⁰ *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15. Also see *S v Dlamini* 2019 (1) SACR 467 (KZP) para 25.

[25] This is not to suggest that her testimony was flawless. In one notable instance her testimony appeared to be fanciful and out of kilter with the content of the balance of her testimony and with her otherwise convincing mode of delivery. This related to her testimony that her mother was awake at the time of the incident. In all other respects she provided a coherent, credible recollection of events which accord with the probabilities and was unshaken during cross-examination. In particular, her identification of Mr Khaphakati was duly explained, including the sequence of events as they occurred, the fact that she could not see who had removed her panties and her subsequent identification based on his voice and statements of threat. It is common cause that the child knew Mr Khaphakati for a long period of time given his relationship with her mother. She had conversed with him and it must be accepted that she was able to recognise his voice, even when it was reduced to a whisper. It must also be accepted that there was no reason for her to implicate Mr Khaphakati falsely.

[26] Jeyi was an excellent witness who testified clearly, honestly and without any semblance of malice about the events within her knowledge, providing further clarity as to the events of the day, including confirmation that the adults had been drinking.

[27] By contrast, it is readily apparent that Mr Khaphakati's version was riddled with weaknesses, improbabilities and other elements suggestive of his guilt. In particular, his version changed markedly from the version put on his behalf to his own testimony. Initially taking no issue with the adult consumption of alcohol on the Saturday, he then testified that there was no alcohol available. The complainant's statement that he had been drunk at the time of the incident was also left unchallenged. The allusion to another named perpetrator, AM, allegedly 16 years of age, during cross-examination of the state witnesses, fell by the wayside by time he testified. He conceded, rightly so bearing in mind that AM was only ten years of age at the time, that AM could not have perpetrated the crime. His averments regarding the Friday sleeping arrangements appear to have been designed solely to advance that angle, but may be unequivocally rejected considering the testimony of the complainant and Jeyi on the point. It suffices to say that his version in that respect was completely unaligned with the probabilities, particularly in respect of Jeyi herself, whose home was a few metres away from that of the grandmother. Mr Khaphakati also made mention for the first time, during his

evidence, that Jeyi had been sitting with him and the complainant's mother before they had gone to bed.

[28] Overall, he was a poor witness who appeared to have stretched the boundaries of his imagination in an attempt to conjure a version that could be advanced. I accept that assessing the demeanour of an unsophisticated witness from a different cultural background is an exercise that must be handled with care. Nevertheless, it was readily apparent that Mr Khaphakati's demeanour was not that of a person speaking candidly. As indicated, that assessment is strengthened when considering his credibility, including the obvious motivation for speaking untruthfully, and the probabilities.

[29] Considering the evidence in its entirety, I am satisfied that, in material respects, the complainant's evidence meets the test of being clear and satisfactory in respect of her identification of Mr Khaphakati as the person who raped her. Despite her tender age, and for the reasons described, including that she knew him well, her identification of his voice may safely be relied upon. Her explanation of the nature of the threat she had received was consistently expressed. This is unsurprising when considering the graphic manner in which it had been crafted, and its repetition after the act.

[30] The complainant's failure to report the incident at the first available opportunity does not, on its own necessarily warrant an adverse inference.¹¹ Section 59 of the Sexual Offences Act provides that in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof. The reason for this is that this might unjustifiably ignore due consideration of psychological and other factors that might have contributed to any delay, so that s 59 should not be unduly interpreted as still requiring that the complaint be made at the first reasonable opportunity. The present circumstances provide a clear illustration of the point. It must be accepted that the complainant was scared, following the repeated manner in which she had been threatened, and that she may not have reported the incident at all had her manner of walking not been observed, which was only on the

¹¹ See PJ Schwikkard 'Sections 58-60 and amendments in terms of s 68(2): Matters pertaining to evidence in D Smythe and B Pithey *Sexual Offences Commentary* (Rev Service 3, 2021) (Juta) 23-5.

Monday. She then made a seemingly full and frank disclosure to Jeyi. No adverse inference is warranted considering the circumstances of the matter in their entirety. Confirming this approach, in *S v Vilakazi Dambuza JA*, on behalf of the majority of the court, held as follows:¹²

'Firstly, as Milton states, reluctance on the part of rape survivors, or some of them, to report the rape at the first opportunity is a firmly recognised fact. It is also generally accepted that with young children the reluctance is compounded. In this case the complainant testified that she was afraid of the appellant. I am persuaded that the prospect of accusing her mother's friend who used to assist her in her studies must have compounded the fear.'

[31] Similar considerations would have been applicable in the present circumstances. The totality of evidence, including the medical evidence, the testimony of the complainant and her aunt, and the assessment of the accused's denial and evaluation of the probabilities of the matter, provides a clear picture of the events that unfolded. The suggestion that her mother may have been awake at the time is fanciful and must be rejected. But that flaw in her evidence is insufficient, on its own, to conclude that the state has failed to prove its case.

[32] *Mr Geldenhuys*, counsel for the accused, rightly confirmed that aspects of Mr Khaphakati's version were problematic and that there were certain discrepancies in his evidence, particularly in respect of whether he had been drinking on the Saturday. As for the actual rape, it was argued that his version was reasonably possibly true. Leaving aside the complainant's statement regarding the state of consciousness of her mother at the time, it was submitted that it was improbable that Mr Khaphakati would have taken the risk of raping the child in front of her mother, bearing in mind that another child was sleeping on the bed, so that the complainant's version was improbable. Added to this was the fact that the complainant had failed to report the complaint the following day, at the first available opportunity. It was counsel's submission that these factors cumulatively created sufficient doubt for this court to reject the complainant's version and to find that the state had failed to prove Mr Khaphakati's guilt beyond reasonable doubt.

¹² *S v Vilakazi* 2016 (2) SACR 365 (SCA) para 19.

[33] These arguments have already been addressed during the course of this judgment. The accused's denial is, on my analysis, simply not reasonably possibly true given the overall analysis of the merits and demerits of the available evidence adduced. In coming to this decision, it might be added that I reject Mr Khaphakati's version in respect of his own alcohol consumption. The probabilities favour the finding that he was under the influence of alcohol at the time of the incident, and that this reduced his inhibitions to the extent that he was prepared to risk perpetrating the crime despite the presence of other sleeping people in the room. Notwithstanding due consideration of the dangers associated with a single child witness testifying about events from some time ago, I am satisfied that the complainant's identification of the accused may be safely relied upon so that the state has proved beyond reasonable doubt that Mr Khaphakati is guilty of rape as charged. It is not in dispute that Mr Khaphakati knew that he had the acquired immune deficiency syndrome or the human immunodeficiency virus at the time.

Order

1. The accused is found guilty of the crime of rape as charged.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard:24-26 April 2023

Delivered:28 April 2023

Appearances:

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