

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Appeal no. **A8/2022**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

SESHUPO PHILLIP PHENYANE

Appellant

and

THE STATE

Respondent

HEARD ON: 16 MAY 2022

QUORUM: REINDERS, ADJP et DE KOCK, AJ

DELIVERED ON: 31 MAY 2022

INTRODUCTION:

[1] The Appellant was charged with the crime of contravening the provisions of Section 3 read with Sections 1, 56(1), 57, 58, 59, 60 and 61 of Act 32/2007, also read with the provisions of Section 256 and 261 of the Criminal Procedure Act, 51 of 1977 – rape. The Appellant was found guilty as charged.

[2] The Appellant appeals against his conviction as imposed by the Regional Court Magistrate, Mrs Jacobs on the 22 March 2017. The Appellant's application for leave to appeal was dismissed by the Court *a quo* on the 23 June 2021. Leave to appeal against the conviction and sentence was granted by the Honourable Justice

Molitswane et Honourable Acting Justice Mzana on 9 September 2021. The legal representative on behalf of the Appellant indicated that although leave to appeal against both the conviction and sentence was granted that the Appellant is only proceeding with an appeal against the conviction.

[3] The Appellant relies on the following grounds of appeal:

3.1 The Court *a quo* erred in finding that the State had proved its case beyond a reasonable doubt.

3.2 That the Appellant's version before the Court *a quo* was reasonably possibly true and thus that another Court would have come to a different finding.

3.3 The Complainant claimed that she was raped by the Appellant however she did not see whether penetration took place.

3.4 The Complainant also conceded that no attempt was made to scream or get attention of anyone who may have been nearby at the time of the alleged incident.

3.5 The second State witness explained to the Court that the Complainant claimed that she had a dream where she was raped only to later say that it wasn't a dream and that she was almost raped without clarifying what was meant with rape or "*almost raped*". The Complainant was a 12-year-old and a single witness, and her evidence should have been treated with more caution especially given the fact that she was unclear as to whether it was a dream or whether it was real.

3.6 The doctor who examined the Complainant concluded that the Complainant sustained injuries but that those injuries at most may have been an attempt to rape and had there been penetration more damage would have been visible. The doctor also conceded that the tear may have been caused by an oversized tampon.

3.7 The doctor also testified that the nature of the injuries the Complainant exhibited may also have been caused by something else entirely.

3.8 There was no DNA evidence linking the Appellant to the offence that along with the conclusion of the doctor mentioned would be sufficient cause for another Court to find that the State didn't prove its case beyond a reasonable doubt.

[4] The legal representative on behalf of the Appellant correctly conceded that the record does not determine that the injuries may have been caused by something else or by an oversized tampon. This concession was correctly made as it is apparent from the record that the cause for the swollen entrance of the vagina was an attempted penetration as the edema is circular not a bump causing it and it was swollen all around. Further doctor Victor Mayo (Dr Mayo) explicitly testified that it was not likely that an oversized tampon caused the laceration.

RELEVANT LEGAL PRINCIPLES:

[5] Bearing in mind the advantages which a Trial Court has of seeing, hearing and appraising a witness the powers of a Court of Appeal to interfere with the findings of fact of a Trial Court are limited (*S v Francis 1991 (1) SACR 198 (A).*)

[6] In the absence of a demonstrable and material misdirection by the Trial Court its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows it to be clearly wrong (*S v Hadebe and Others 1997 (2) SACR 641 (SCA).*)

[7] In order to succeed on appeal, the Appellant must therefore convince the Court of Appeal on adequate grounds that the Trial Court was wrong in either accepting or rejecting the witness' evidence. Bearing in mind the advantages which a Trial Court has seeing, hearing and appraising a witness, it is only in exceptional

circumstances that the Appeal Court will be entitled to interfere with a trial Court's evaluation of oral testimony. (S v Latha and Another 1994 (1) SACR 447 (A).)

ANALYSIS:

[8] It is evident from the judgment of the Court *a quo* that the Court *a quo* was cautious in the consideration of the testimony of the Complainant and was alive to the fact that the Court *a quo* should look for corroborative factors in support of the Complainant's testimony. This Court agrees with the Court *a quo* that the evidence of Dr Moya supports the version of the Complainant. Dr Moya testified that there is a clinical finding of a bruise on the Complainant's posterior fourchette and a tear about 4 mm with mild bleeding and the entrance to the vagina was also swollen. Dr Mayo stated that based on the findings it is probable that the Complainant was raped, and it is consistent with the history given. Dr Mayo testified that there was a bruise that was over the tear and that the likely cause of this injury was most probably an attempt at forced penetration. Dr Moya stated that it was an attempt due to the nature of the wound if there was full penetration the injuries would most probably have been more severe. He further testified that the injury would fit in with the timespan as it was still a fresh wound. He evenly testified that the Complainant's history seems to be consistent with his findings. This Court further agrees with the Court *a quo* that the report that the Complainant made to her friend Malefu Potsane is indicative of consistency on the part of the Complainant although the report is not corroboration for her version.

[9] Malefu Potsane further testified that the Complainant cried when she made the report to her. This Court agrees with the Court *a quo* that this can be indicative that the Complainant experienced some form of trauma before making the report.

[10] The following points of criticism are raised against the evidence of the Complainant, evenly form part of the Appellant's grounds of appeal and form the basis on which it is submitted that the Complainant's evidence cannot be said to be clear and satisfactory in every material aspect:

10.1 It is submitted that the Complainant testified that a certain Paul was present in the storeroom at the time of the incident and that he was not far away. The Complainant testified that when she was pushed to the bed she did not scream for help. She did not do anything to attract attention for someone to help her.

10.2 It is also submitted that the Complainant further testified that she told her friend Malefu that she had a dream about the Appellant attempting to rape her. The Complainant then changed her version and told Malefu that she was raped by the Appellant. It is submitted that the Complainant claimed that she was raped by the Appellant however she did not see whether penetration took place.

[11] The Complainant in answer to the question why she did not scream did answer that when she is angry, she is unable to speak aloud and the Complainant testified that she felt the penetration. The fact of the matter is that the Complainant did have gynaecological injuries fitting in with her version and the Appellant was well-known to the Complainant. The Complainant testified that the Appellant was at the time of the offence employed at Moroka High School. She testified that the Appellant was a house master someone who looks after children and tends to workers. The Complainant pointed only to the Appellant who was well-known to her. The criticism against the Complainant's evidence as well as the accompanying grounds of appeal therefore stands to fail.

[12] This Court further agrees with the Court *a quo* that there was a measure of penetration into the vagina of the Complainant for the injuries to have been caused as depicted by Dr Moya. Dr Moya did not exclude penetration but explicitly stated that he stated an attempt due to the nature of the wound if there was full penetration the injuries would most probably have been more severe.

12.1 Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 Of 2007 ("the Act") reads as follows:

“Any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B) without the consent of (b) is guilty of the offence of rape”

12.2 In terms of Section 1 of the Act “sexual penetration” is defined as including “... any act which causes penetration to any extent whatsoever by (a) the genital organs of one person into or beyond the genital organs, anus or mouth of another person...” Genital organs are defined in Section 1 of the Act as” ...the whole or part of the male and female genital organs....” (My own emphasis)

12.2 With due regard to the aforesaid a person can thus commit the offence of rape without the person committing the act of full penetration.

[13] The Appellant cannot give any explanation why the Complainant would out of the blue point a finger at him as the rapist except that he suspects that he is used by the personnel at the school who wish to get rid of him. This Court agrees with the Court *a quo* that the latter version is not only highly improbable, but the version is on the absurd. The Appellant wanted the Court *a quo* to believe that the young Complainant being 12 years old at that stage of the incident was in cahoots with other adults to falsely implicate the Appellant to get rid of him. This Court agrees with the Court *a quo* that it was clear from the evidence of the Complainant that she had no idea what the situation was between the Appellant and the headmaster or the other personnel.

[14] The witnesses called to corroborate the Appellant’s alibi does not assist a conclusion that the Appellant’s version is reasonably possibly true. The Appellant testified he was at the shop between 15h00 and 18h00. The Appellant further testified that the person that he was with on the day is the shopkeeper. He further testified that Mr Molutsi was on the way to get a bus on the other side of the street and waived at him. Although it was put to the Complainant that Shuping was also there with the Appellant but that he had to leave at 17h00 to feed the children, the Appellant did not testify about Mr Shuping in examination in chief. During cross-examination he testified that Mr Shuping was there and had discussions with them

while he drank a cooldrink until he was called and had to go and feed the children. The Appellant testified during cross-examination that he was with the shop owner and people whose vehicles he repaired.

[15] Mr Nyudo the owner of the shop however testified that the Appellant and Mr Shuping came to the shop together but that he cannot recall who left first and who last. He further testified that the Appellant was there from 12h00 and left 18h00. Mr Molutsi on the other hand could not testify as to the exact date when he saw the Appellant. He testified that it could be on the **25th** and not the **27th November 2015** but that it was on a Friday.

[16] On evaluation of the evidence as a whole this Court can find no misdirection either on fact or on law in the evaluation of the evidence by the Court *a quo*. In this Court's view the Court correctly rejected the Appellant's version as false and not reasonably possibly true and finding that the Court is satisfied beyond a reasonable doubt that the Appellant did rape the Complainant on the date in question.

[17] Thus, the Appellant's appeal stands to be dismissed on all the grounds set forth in the Notice of Appeal.

[18] Therefore the following order is granted:

1. The appeal is dismissed.

DE KOCK, AJ

I concur:

REINDERS, ADJP

APPEARANCES:

Counsel on behalf of Appellant:

Instructed by:

Adv. S Kruger, Bloemfontein

Bloemfontein Justice Centre

Legal Aid SA

BLOEMFONTEIN

Counsel on behalf of Respondent:

Adv. M Strauss.

Instructed by:

The Director of Public Prosecutions

BLOEMFONTEIN