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

Case no: A120/2019

Reportable: **NO**

Of Interest to other Judges: **NO**

Circulate to Magistrates: **NO**

In the matter between:

MPHO ANDRIES MOHONO

Appellant

and

THE STATE

Respondent

CORAM: LOUBSER, J *et* MTHIMUNYE, AJ

HEARD ON: 08 AUGUST 2022

DELIVERED ON: 20 OCTOBER 2022

JUDGMENT BY: MTHIMUNYE, AJ

[1] The Appellant, Mpho Andries Mohono, was convicted for rape in contravention of Section 3 of the Criminal Law (Sexual Offences and Related

Matters) Amendment Act 32 of 2007, read with the provisions of Sections 51(1) of the Criminal Law Amendment Act 105 of 1997, as amended, and sentenced to 15 years' imprisonment on 10 November 2015. The appeal stands only against the conviction.

[2] In proving its case against the appellant, the state called five witnesses *viz* Ms. M[....] M[....]2 ("the complainant"), Mr Patrick Kapoko Twala ("Kapoko"), Officer Modise Soko, Ms Feikie Julia Khunathu and officer Thabang Solomon Mia.

[3] The complainant testified through an intermediary and told the court that on 01 January 2013, she was by the shopping centre walking up the complex road with her friends Keneiwe, Puleng and Lerato, and later joined by their male friends Tebogo and Kapoko. Puleng was smoking and Kapoko started slapping her since he did not like it when she smoked. As they walked, they came across the appellant, who at the time was talking to some unidentified person. The appellant was wearing a long jersey normally worn by police officers and a blue and yellow police tracksuit top.

[4] The appellant then followed them until they stopped by the post office. Seeing that Kapoko was beating Puleng, the appellant tried to catch him and both Kapoko and Tebogo ran away. The four girls remained and the appellant asked Puleng why does she not report Kapoko to the police for beating her. At that moment the appellant's phone rang and he pretended to be talking to a detective whom he told he had just arrested some young people walking around at night. When he ended the call, he asked what the complainant and her friends were doing walking around at night and the complainant responded that they were just at the shops looking around.

[5] His phone rang again and he said he has arrested the young people. He then held the complainant and Puleng by hand and told them to come with him to look for Kapoko and Tebogo whilst the other two remained. They walked towards the police station and just before they got there, he asked them if they want to get arrested and whether he should get inside with them and they said no. He then said he wants to take them to some detective. When they reached his house, he asked if they should

get in and they said no. His phone rang again and he told whoever he was talking to that he had the two girls and then asked, as if confirming an instruction, if he should check if they had slept with boys. He then told both girls to undress so he can check them and the complainant told him that his friend was menstruating so she would not be able to undress. He then told the complainant to undress and he, using a cellphone torch for illumination, inspected her private parts. When he finished, he told the complainant to dress up as he was satisfied that she had not slept with boys. His phone rang again and he told the 'detective' that the girls had not slept with boys.

[6] Thereafter he told Puleng to go look for Keneiwe and Lerato whilst he accompanies the complainant. He took the complainant to the mountain and told her to undress so he can check again. When the complainant resisted and told him he had already checked, he said he wanted to have a good look. He undressed her, told her to lie down, opened his trousers and put his penis inside her vagina and did the up and down movement three times before the complainant pushed him away. He then pulled her up and told her to dress up as she was not cooperating. After she put on her clothes, Kapoko and Tebogo emerged and the appellant told them he had been looking for them and gave chase as they ran away. At that moment, the complainant ran back home.

[7] At about 1am Kapoko came to her home and asked what happened, she first told him nothing happened but when he insisted, she told him what happened. Kapoko told her parents and a case of rape was opened the following day.

[8] A day or so later, Kapoko came to her house and told her that the appellant was around the court building. The complainant and her friend Puleng went to the court building to ascertain this. On arrival, Kapoko asked the complainant if she could see him and the complainant confirmed that it was him and they told the police and that is when he was arrested. She testified that she heard that his name was Mpho for the first time when the police were questioning him and that she was there when the appellant was taken to the cells.

[9] Kapoko Twala testified that on the date of the incident he had just come back from church and was with his friend Tebogo by the shopping centre where they met

up with the complainant, and her three friends Keneiwe, Puleng and Lerato smoking and drinking. He caught Puleng, who was his girlfriend and the complainant and slapped them. At that moment, the appellant appeared wearing a police top and the brown jacket. He asked them why they were hitting girls and chased them as they ran towards the shopping centre.

[10] After a little while Kapoko and Tebogo decided to turn back and follow the girls. They walked towards the post office and found the girls with the appellant. The appellant asked Kapoko where he stays and his phone rang. He answered the phone and said "*Detective Warrant, here are the children at the complex, they are drunk and under age*". After the call the appellant told them he was from the Beret unit and the unit will fetch Kapoko as the girls knew where he was staying. His phone rang again and he instructed all others to remain behind whilst he takes the complainant and Puleng to the police station. At that time Kapoko told his friends that he does not believe that the appellant was a police officer and asked that they follow them. His friend did not want to go with him so he followed the appellant and the two girls alone from a distance of about 12 metres. The appellant was holding the girls' hands, the complainant on the one side and her friend on the other. When they reached the police station they stood outside for about 5 seconds and then crossed to the left and kept walking and turned towards the house of another gentleman who was working at the police station. They stood outside for a short while whilst the appellant was talking on the phone and then walked for a longer distance towards Tseke Court.

[11] They stopped by the court and he also stopped about 20 metres away not to be seen but he could see them as there were street lights by the court. They then looked like they were coming his way and he ran away for a minute but when he looked back they were not there. He then walked back towards the court. By the court he met up with a friend and asked him to help look for the girls as the court yard is surrounded by mountains.

[12] They looked for the girls for about 40 minutes and when they were about to leave, they met the appellant with complainant by the dongas and he was still holding the complainant by the hand. When the appellant saw them, he let go of the

complainant's hand and chased them. They ran in different directions and the appellant gave up after a short distance and went back to the direction from which he came. They then went back and found the complainant standing there in a state of shock. When they asked her what happened, she did not tell them the truth at that stage and only asked them not to tell her dad. They accompanied her home.

[13] When they left, Kapoko then told Tebogo that they should go back and talk to the complainant as he thinks something happened to her and they may be blamed for it as they were with her. Tebogo refused to go back as he was afraid of the complainant's parents but Kapoko went back. He explained to her family what had happened up until the point where she disappeared with the appellant and asked them to ask her what happened thereafter. When her father asked her what happened, she cried and told them that the appellant had raped her. The complainant's father asked Kapoko if he knew the appellant and he said he did not as it was the first time, he saw him but could point him out. They went to the police and opened a case.

[14] Two days later as he was coming out of a shop, he saw the appellant carrying plastic bag and smoking a cigarette, on seeing him the appellant dropped his head. He recognised him by his physique and face. He found Tebogo at the shop and told him to go to the Police Station and tell them they have found the perpetrator. He followed the appellant so he does not lose him. When the appellant entered the court building, he ran to the complainant's home and told her father. The complainant's father and the complainant went with him to the court building. On arrival the complainant saw the appellant talking to police officers and pointed him out to her father. The police were called and arrested him.

[15] Mr Modise Soko, the police officer who effected arrest, testified that on 02 January 2013 whilst at the gate of the court waiting for court to start, a certain Mr L[....] M[....]2, the complainant's father, came to him and informed him that the man who had just entered the court yard wearing the clothes he described had raped his daughter. He pointed the appellant out to him and he went in, arrested him and took him to a holding cell and called Warrant Officer Mia whom he had been informed by Mr M[....]2 was the Investigating Officer.

[16] Under cross examination, the contradictory versions between the complainant and Kapoko in respect of who pointed the appellant out before arrest were highlighted.

[17] Ms Feikie Julia Khunathu, the appellant's 65-year-old aunt, was the state's fourth witness and testified that the appellant was her sister's son. On 2 January 2013 she had sent the appellant to take cosmetics to her son who had been arrested. On return, he was accompanied by Warrant Officer Mia who, on arrival asked her to point out the appellant's bedroom. Therein he collected the appellant's ID and a bag, inside of which was a bluish-yellowish tracksuit resembling those worn by members of the defence force. When asked when she had last seen the appellant wearing the same tracksuit she could not remember how recently but only referred to a date when he was being chased by some boys. Officer Mia took the tracksuit and left.

[18] The fifth and the last witness for the state was Officer Thabang Solomon Mia who corroborated Ms Khunathu's version and stated that she gave him a bag and a blue and yellow tracksuit top bearing the police emblem. He showed the tracksuit to the court and handed it up as Exhibit 1. He said he asked the appellant where he had gotten the tracksuit and he told him that it was given to him by a relative who is a member of SAPS.

[19] He also took the appellant to Elizabeth Ross Hospital for blood samples to be drawn. On arrival he handed him over to a blood expert to draw blood and conduct DNA testing. Everything was explained to the appellant after which he gave consent for bloods to be drawn from him and signed the consent form. He gave him one sealed blood kit. After the blood was drawn, it was put in the bag and sealed in the presence of the appellant. The experts then registered the sample in the register which Mr Mia signed to confirm that he had received a sealed sample. If a seal is broken, the sample gets rejected. Mr Mia then took the sample to the police station's store room until they were taken to the forensic laboratory for testing. A D4 Collection Form for collection of blood samples was read into record and handed up

as Exhibit B. A section 212 affidavit with DNA results was read into record and handed up as Exhibit C.

[20] It was noted that the date that appears on the DNA results as the date on which samples were taken as well as case numbers are depicted as 2012, a year before the complainant was raped. For this reason, the appellant's Counsel argued that it could be that samples belonging to a different case were depicted to be those of the appellant. Mr Mia explained that the date should be 2013 and his assumption was that the doctor had made a mistake when recording the year. In respect of the depiction of the year 2012, the court was asked to take judicial notice of the fact that it was at the beginning of the year and it happens that people would write the previous year when recording dates.

[21] It was further pointed out that usually there are two serial numbers on the blood kit, one is used by the doctor to close the blood kit before the blood is drawn. Mr Mia clarified that there is no serial number before the seal is opened. Only after it has been opened in the appellant's presence is the seal number revealed on the blood kit.

[22] Exhibits handed up in court were the appointment of an intermediary (Exhibit A1), the Medical report or J88 (Exhibit A2), the D4 Form used for the collection of forensic blood samples (Exhibit B), the Section 212 Affidavit from the blood sample analysis (DNA expert) with conclusions (Exhibit C), the statement taken by Mr Mia's was also handed up as Exhibit D, and the tracksuit that was worn by the Appellant on the day of the rape (Exhibit E).

[23] In his defence, the appellant placed his identity and the chain of custody of the evidence in dispute. His version was that he was never with the complainant and / or the witnesses on the said day and time, neither was he wearing the police clothes as described by the witnesses. He said on 2 January 2013, whilst on his way to give his elder brother clothes he was called by two police officials who told him that a certain Mr M[....]² said he had raped his child. He asked the father if he knew him and he responded that his daughter does. Thinking it a joke, he asked that the daughter be brought to point him out as she may have made a mistake. Mr Soke

then asked that they go talk about this matter at the cells. Mr Soke then called Mr Mia who was said to be the one handling the case. On arrival, Mr Mia placed the appellant under arrest. No Identity Parade was held.

[24] He was then taken to the hospital and whilst sitting in the back seat he noticed two crime kits with his name on them. He asked why these had his name and Mr Mia threatened to slap him for talking too much. For this reason, he argued that his blood samples were tampered with. This was denied by Officer Mia. Under cross-examination, when asked how many times the blood was drawn from him he confirmed that it was only once. He confirmed that the blue and yellow tracksuit was indeed his and he got it because, although he was employed as a security officer in East London, when he was home, he would work as a police reservist in Winburg Police station however, he was not wearing it on the day the rape was said to have happened. Under cross examination he conceded that reservists are never supplied with the official police tracksuit.

[25] He further pointed out that the following day in court he was pointed out by Kapoko and not the complainant and after his arrest, when the police were questioning him and taking him to the cells, the complainant had left. They even had to wait for Warrant Officer Mia to bring the complainant

[26] The basis of the appeal is that the court *a quo* erred in accepting the evidence of the complainant who was a single witness and that the *court a quo* did not account for the evidence which affected the credibility and reliability of a single witness. That she was 13 years old at the time of the incident, had taken liquor and it was dark, rendering her evidence unreliable. Further that the court erred in accepting Kapoko and Mr Soke's evidence in respect of the first two's observation of the appellant and that Mr Soke's evidence was contrary to that of the complainant and Kapoko in respect of the complainant's presence when the appellant was taken to the cells during arrest and how she got to know the Appellant's name. The defence also raised issue that evidence was led to the effect that it was Kapoko who identified the appellant in court for the complainant by pointing at him with his eyes.

[27] I now deal with the law applicable to the issues placed in dispute hereunder, which are the basis of this appeal i.e. identity and the chain of custody.

[28] In convicting the appellant the court relied on the evidence of the complainant who is a single witness. It is settled law that the evidence of a single witness must be approached with caution. **Section 208 of the Criminal Procedure Act, 51 of 1977** provides that a conviction may follow on the evidence of a single witness. Such evidence must however be reliable and credible.

[29] *In Stevens v S 2005(1) SA 1 (SCA)* at para 17 the court said: “It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility.”

[30] The correct approach in the application of the cautionary rule was laid down in **S v Sauls and others 1981(3) SA 172 (A) at 180 E-G**, as follows:

“There is no rule of thumb or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758. The trial judge will weigh his evidence, will consider the merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.”

[31] Where identity is in dispute, the *locus classicus* as correctly cited by the learned Magistrate, is **S v Mthethwa 1972 (3) SA 766 (A)**, where Holmes JA set out the proper approach as follows:

“Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest. The reliability of his observation must also be tested. This depends on various factors such as **lighting**, visibility and eyesight, **the proximity of the witness**, his opportunity for observation, both as to time and situation; **the extent of his prior knowledge of the**

appellant, the mobility of the scene; **corroboration**; suggestibility; the **appellant's face**, voice, built, gait and dress; **the result of identification parades**, if any, and of course evidence by or on behalf of the appellant. The list is not exhaustive, these factors or such of them as are applicable in a particular case, are not individually decisive, but **must be weighed one against the other, in the light of the totality of evidence and the probabilities**”

[32] In assessing the evidence of the State's witnesses, I have considered all the factors listed in the test as laid out in this case. Although the complainant's evidence was that of a single witness, she was corroborated by Kapoko and they both placed the appellant on the scene not only in respect of his bodily structure but also on the basis of the track suit top he was wearing, which top was later recovered by Warrant Officer Mia at the appellant's place of residence. Further, the complainant testified that there was lighting next to the complex, the post office and outside the police station which enabled her to see his face. The evidence that there was lighting at different spots was also corroborated by Kapoko.

[33] The DNA evidence statement made by Warrant Officer Mia positively linked the Appellant to the offence. The argument about there having been two bottles or kits in the car and about Mr Mia not being able to tell the court what seal numbers were used to close the kit before and after the blood was drawn is in my view, inconsequential since the appellant confirmed that his blood was drawn only once and the DNA results were positive, which corroborated the evidence.

[34] The court a quo also correctly assessed and found that the contradictions between the complainant and Kapoko in respect of whether he ran away when the appellant approached them or was moving one point to the other; and the amount of time they stood at the police station; the amount of lighting at the police stations as well as the identification of the appellant when he was arrested and who was at the cells were immaterial. Further that the contradictions between Mr Soko and the complainant in respect of the arrest of the appellant and who was at the cells were, when weighed against the totality of the evidence against the appellant, also found to

be immaterial. Their evidence not only corroborated each other's in material aspects but was also corroborated at great length by the Exhibits handed up in court.

[35] In this regard the court a quo made favourable credibility findings in respect of the complainant, and looking at the totality of evidence before it, correctly dismissed the appellant's contention that the complainant and Kapoko made a mistake regarding the appellant's identity.

Consequently, I make the following order:

1. The conviction of rape is upheld and the appeal is dismissed.

D. P MTHIMUNYE, AJ

I concur:

P. J LOUBSER, J

Appearances:

For the Appellant: Ms V Abrahams
Legal Aid South Africa
Bloemfontein

For the State: Ms A Bester
Director of Public Prosecutions
Bloemfontein