

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

Not Reportable

Case no: 50/2021

In the matter between

THE STATE

and

LM

ACCUSED

JUDGMENT

Govindjee J

Background

[1] The accused was charged with rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.¹ It was alleged that he had, between October 2019 and 8 February 2020, unlawfully and intentionally committed acts of sexual penetration with LB, the complainant. LB was aged 11 at the time. It was further alleged that the sexual intercourse occurred *per vaginam* without LB's consent and against her will.

The State's case

¹ Act 32 of 2007.

[2] The complainant testified through an intermediary. She and her sister ('AB') had been placed in the foster care of Mrs Ngcofe (Ngcofe) during 2019. Ngcofe, who was married to the accused, had not been at home on 8 February 2020. The accused was the grandfather of that household and was known by the complainant as 'Malume'.

[3] The complainant had been with AB and Gift, the young child of [A..] Ntsiba (Ntsiba) around the time of the incident. The accused had summoned them. The complainant went into the house while the other children played in the garage. The accused had pulled the complainant by the wrist towards his bedroom. She had resisted. Once in the room he had placed her on her back on the bed. He forcibly held her hands, lowered his pants and underpants, lifted her dress and lowered her panties. He then inserted his penis into her vagina, repeatedly thrusting himself into the complainant. The complainant felt pain, tried to resist by moving side to side while lying on the bed and also cried out. Her cries were unheard.

[4] After they had both dressed, the accused had again held the complainant by the wrists. She knelt, holding the bed. He again lowered his trousers to his knees while lifting her dress from behind and standing behind her. The complainant believed he wanted to have sexual intercourse with her again. Ntsiba had peeked through the window at some point. She had called two men, who had knocked on the door. The accused told the complainant not to report what had occurred. He pretended to be sleeping on the bed, then stood up and opened the door. He denied that he had done anything to the complainant. The complainant had departed the house with Ntsiba and had been taken by the police for medical examination.

[5] The complainant also testified about a previous sexual encounter with the accused. She had been absent from school on a Friday sometime during July 2019 and was preparing to take a bath. The accused had entered the bathroom whilst she was undressed. He had taken her to his bedroom, placed her on the bed on her back and inserted his penis into her vagina, thrusting himself into her. The complainant had cried out but nobody had heard. The accused had threatened the complainant to maintain her silence about the incident; he would hit or assault her if

she told anybody. She had completed her bath and had, out of fear, not told anybody about this sexual encounter at the time.

[6] According to the complainant, the accused had also winked at her occasionally, even before the first sexual encounter, and made kissing sounds to her. She had been afraid to report this to Ngcofe.

[7] Ngcofe had refused to believe the complainant when she was informed about the 8 February 2020 incident. Their relationship was not good and Ngcofe would frequently chastise the complainant and her sister. She would also administer corporal punishment with a stick. It was the accused who would prevent her from doing so. By contrast, the complainant's relationship with Ntsiba had been good. She had nevertheless not reported Ngcofe's conduct to Ntsiba. She had also not reported the 2019 incident to Ntsiba and indicated that this was because Ntsiba was not always present.

[8] During cross-examination, the complainant denied knowing about money missing from the accused's wallet. Ngcofe had asked her about this on 7 February 2020 and she denied any knowledge at the time. She also denied that a pastor had been with her on Friday 7 February 2020. She had never slept at the pastor's house and had only slept at the church, with a number of other people including AB, once. This was some time before 8 February 2020 and Ngcofe had hit her for doing so. The accused's version of the events of 8 February 2020 and July 2019 was refuted.

[9] Sister [V...] Magwaza (Magwaza), a clinical forensic nurse with 13 years' experience, had examined the complainant at 11:30pm on 8 February 2020. The complainant had informed her that the accused had sexually assaulted her at 19h00 that evening. Following a vaginal examination, Magwaza had noted 'bumps' that served as an indication of fresh injuries, as well as a fresh tear and grossly bruised fascia. These injuries could not have been caused by poor hygiene. There were also 'clefts' present, which were signs of previous penetration. Her conclusion was that the complainant had been penetrated by a blunt object on more than one occasion, both recently and previously. This was consistent with the complainant's

version that she had been raped by the accused on more than one occasion, also during 2019.

[10] Ntsiba testified that her boyfriend lived in a shack at the back of the accused's home. She visited her boyfriend occasionally, and also stayed over for a few days at a time. Her relationship with Ngcofe was good, but she did not know the accused very well.

[11] The complainant, AB, Likhanye and her child, Gift, had been inside her shack on the afternoon of 8 February 2020. The accused had called them, indicating that Ngcofe was looking for them. She had subsequently been called by AB, who told her that Likhanye was feeding chillies to Gift. She left her shack and walked to the home of the accused. The children were playing in the accused's garage. She had noticed that the complainant was absent, and found this strange given that the children always played together. AB had told her that the complainant was locked inside the house with the accused, who had closed the door leading from the garage into the house.

[12] Ntsiba knocked on that door. When there was no response, she peeped through the key hole and noticed that there was a key on the inside. She tried to open the door, which was locked. She then went out of the garage to the front door of the house and knocked. Again there was no response. She peeped through the keyhole and noticed that there was nobody sitting on the sofas, but did not test whether the door was locked. Moving to the bedroom window, Ntsiba was able to peep through a gap between the curtains. She saw the accused standing behind the complainant, who was kneeling on the floor. They were both dressed. The complainant's arms were moving in a running motion. It appeared to Ntsiba that she was fighting against the accused, who was putting his arms around her and trying to hold her.

[13] Ntsiba did not want to be disbelieved. She went to a neighbouring house and called a man, Armando, to witness what she had seen. Armando, accompanied by two young men, peeped through the window and knocked. They told the accused to open the door, which he did. Ntsiba and the men then questioned the accused's

conduct and shouted at him. He had denied any wrongdoing, even when told that his conduct had been witnessed, and said he had been sitting in the other bedroom of the house. She denied ever asking the accused if he had raped the complainant.

[14] The complainant was shaking, crying and covering her face with both hands. She was emotional and embarrassed and never spoke to Ntsiba about rape. She had indicated, however, that the accused had pulled her and pushed her onto the bed. Ntsiba took the complainant to her shack and Ngcofe had been called. She refused to believe the complainant when her story was told, indicating that the child was a liar and wasting her time. Members of the community had called the police, who had taken the complainant for medical examination and arrested the accused.

[15] During cross-examination, Ntsiba indicated that she had never witnessed Ngcofe assaulting the complainant or shouting at her and had never interfered in disciplinary affairs of the child.

The defence

[16] The accused testified that he had a good relationship with the complainant and her sister. He had worked five days per week prior to his arrest, leaving home at 06h45 and returning after 17h00 each day. He had never been at home with the children during a weekday.

[17] On Friday 7 February 2020, a pastor had visited his home. The accused had offered him a drink, taken money from a wallet in his bag, and left the premises to purchase the drink. He then went to visit his sister. The children were present when he returned. The bag was open and money was missing from the wallet. The complainant had left with the pastor and she had spent the night with him.

[18] The accused had spoken to the complainant about the money the following day. She was sitting on the armrest of the sofa at the time and denied knowing anything about the missing money. As they were discussing this, there was a knock on the window. The accused stood up and opened the door. Ntsiba and a young man entered and accused him of raping the complainant, which he denied. Once

they had left with the complainant, he had slept in his bed until woken by Ngcofe, his sister and the police, who arrested him.

[19] The accused cut a forlorn figure in the witness box, even prior to cross-examination. He looked down and spoke softly when answering questions from his own counsel about the alleged rapes. His denials were framed on many occasions as if he did not remember what had occurred. When asked by his own counsel if it was possible that he had raped the complainant, he appeared uncertain. He shook his head slowly from side to side and indicated that it was not possible, but that he did not know.

[20] He was more comfortable addressing the issue of the missing money. He had addressed that issue with Ngcofe, who had accosted the complainant in the garage around midday on 8 February 2020. The accused had heard the complainant's cries in the garage and questioned Ngcofe about her conduct. Ngcofe would occasionally hit the complainant with a stick when she failed to wash dishes or her school shirts and he had intervened on more than one occasion.

[21] During cross-examination, the accused struggled to explain why Ntsiba would, on his version, approach his home and accuse him of rape. He offered the version that Ntsiba was in cahoots with the children, and kept the money they stole with her. This version was never put to Ntsiba and emanated from his discussions with Ngcofe, who was never called to testify. He also vacillated as to the complainant's presence in the room at the time of Ntsiba's arrival that afternoon. The accused was also evasive at times, avoiding answers to simple questions such as why Ntsiba would have knocked on the window at all. When asked specifically if he accepted that she had seen him through the bedroom window, he only admitted that she had knocked on the window and that he had opened the door. He nodded with some understanding when it was put to him that the complainant had been very upset at the time Ntsiba had entered. That fact must be accepted, considering this response, Ntsiba's evidence and that of the complainant. The following extracts of the cross-examination, coupled with my observations, are insightful:

‘Adv Obermeyer: “Amanda intimated that the child was hysterical...it is clear from Amanda’s testimony that something bad happened.’

Accused: “Yes, I heard that.”

Adv Obermeyer: “She began to explain that you pulled her and put her on the bed and then she couldn’t speak further because she was crying too much.”

Accused: “I heard her saying that.”

Adv Obermeyer: “LB testified that you raped her and not for the first time. She fought and that is what Amanda saw.”

Accused: “I heard her say that” (while nodding)

Adv Obermeyer: “Amanda said she saw that the child was trying to free herself – why did that happen?”

Accused: (shaking head, speaking softly) “They can both say the same thing but I don’t know that. They are lying...They can do that because they are defending themselves in the case of my lost money.”

...

Adv Obermeyer: “I put it to you that there was another incident in 2019 – the first that you raped her when she was taking a bath.”

Accused: (No answer. Nods).

Adv Obermeyer: “There was no reason to falsely implicate you – it was corroborated by the nurse.”

Accused: (nodding) “I hear you.”

...

Adv Obermeyer: “I put it to you that you raped this child twice.”

Accused: “I have no knowledge of that.”

[22] The accused suggested that the complainant had previously been suspected of stealing by his wife. He stopped short of blaming the pastor for the rapes, given that the pastor stayed in church and not in his own house. He denied winking at the complainant and making inappropriate gestures.

Applicable law and analysis

[23] There is no dispute that the medical report reveals that the complainant had been the victim of sexual penetration. Her gynaecological examination late on 8 February revealed fresh signs of penetration via a blunt object and Sister Magwaza confirmed this during her testimony. It must therefore be accepted that the

complainant was sexually penetrated on or about 8 February 2020. The real issue for determination is the identity of the perpetrator.

[24] Ntsiba had no reason to falsely implicate the accused. While she had a good relationship with the complainant, she had not interfered in the child's upbringing and had no reason to do so by contriving to support allegations of rape on the part of the accused. She was a good witness and I accept her testimony as being credible and reliable. That testimony confirms that the accused and the complainant were alone in a bedroom on 8 February 2020. The accused was standing behind the complainant, who was kneeling on the floor and trying to fight against the accused, who was trying to hold her by putting his arms around her. Both were dressed. While Ntsiba's testimony reveals suspicious behaviour on the part of the accused, she is not a witness to the accused raping the complainant.

[25] The complainant was a single, child witness in that respect. 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.² 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.³ A trial court must fully appreciate the inherent dangers in accepting such evidence.

[26] Section 208 of the Criminal Procedure Act, 1977⁴ 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.⁵ 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

² 1951 (3) SA 158 (A) at 162E-163F. See *S v Artman and Another* 1968 (3) SA 339 at 340H.

³ *Ibid.*

⁴ Act 51 of 1977.

⁵ *S v Weber* 1971 (3) SA 754 (A) at 758.

slender, precludes a conviction.⁶ It has repeatedly been said that the exercise of caution cannot be allowed to displace the exercise of common sense.⁷ 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.⁸

[27] While emotional at times, the complainant provided clear testimony regarding the events of 8 February 2020, even though she testified many months after the incident. She was able to describe what had happened to her in some detail, explaining the pain she had felt and her efforts to prevent the accused from thrusting himself into her. While I am uncertain whether the complainant really observed Ntsiba peeking through the window, or whether this was information she gleaned after the event, this does not detract from the crux of her testimony. In any event, I accept that Ntsiba did not observe the accused without his clothes on or raping the complainant and treat the complainant's evidence with the caution necessary for a single child witness.

[28] The complainant had no hesitation in identifying the accused as her attacker, also providing details of another encounter that had occurred during July 2019. She also explained that she had not told anybody about that incident out of fear that the accused would make good on his threat to hit her. She had no difficulty in confirming evidence that supported the accused, notably that he had been the one to offer her some protection from Ngcofe's administration of corporal punishment. Her response to questioning was that of an honest child rape survivor, emotional at times but speaking the truth as she recalled it. There appears to be absolutely no reason why she would falsely implicate the accused, the husband of her foster mother and a person who had previously offered her some protection, in order to protect a mysterious, unnamed assailant

[29] By contrast, the accused was an exceedingly poor witness, as already indicated. While he demurred when directly accused of rape, he prevaricated on a

⁶ *R v Bellingham* 1955 (2) SA 566 (A) at 569, quoting *R v Nhlapo* 1955 (3) SA 290 (A).

⁷ *S v Sauls and Others* [1981] 4 All SA 182 (A) at 187.

⁸ *R v Abdoorham* 1954 (3) SA 163 (N) at 165, as quoted in *S v Sauls supra*.

number of occasions during cross-examination. The impression created was of a person who vaguely recalled some unfortunate event in which he had participated, but who did not wish to engage with all the details in order to avoid the reality of what had transpired. I have no hesitation in rejecting much of his version as being wholly improbable and not reasonably possibly true.

[30] As counsel for the state argued, the vague, unsubstantiated notion that it may have been the pastor who had raped the complainant, was contrived. I accept that the complainant had spent a night at the church, together with AB and other children, only once. This was some time before 8 February 2020. That visit appears to have been a convenient peg for the accused to hang the unfounded suggestion that the complainant may have been penetrated by the pastor. The untested idea that Ntsiba was working with the children to steal money from him, somehow linked to a false rape allegation, is preposterous.

[31] 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.⁹ 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.¹⁰ 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.¹¹

[32] It is necessary to adopt a holistic approach to analysing the available evidence in this matter.¹² In *S v Chabalala*,¹³ the Supreme Court of Appeal explained this as follows:

⁹ *S v Van Aswegen* [2001] JOL 8267 (SCA); *S v Van der Meyden* 1999 (2) SA 79 (W).

¹⁰ *S v Shackell* 2001 (2) SACR (SCA) 194*g-i*.

¹¹ *S v Guess* [1976] 4 All SA 534 (A) at 537-538; *S v Singh* 1975 (1) SA 227 (N) at 228.

¹² *Van Aswegen supra*.

¹³ 2003 (1) SACR 134 (SCA) para 15. Also see *S v Dlamini* 2019 (1) SACR 467 (KZP) para 25.

‘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.’

[33] A ‘Biology DNA Report’ was requested and provided by a chief forensic analyst. That report indicated that no DNA result could be obtained from the swabs marked ‘Vestibule’ and ‘Vulva’ that had been submitted for examination. There may have been various reasons for this, and I accept this evidence as neutral.

[34] I am also mindful that the complainant failed to report the first occasion she alleges she was raped to anyone. This, on its own, does not necessarily warrant an adverse inference.¹⁴ 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.¹⁵ The reason for this statutory provision is to ensure that presiding officers do not unjustifiably draw an adverse inference only due to a reporting delay, and without proper consideration of psychological and other factors that might have contributed to this.¹⁶ Section 59 should not be unduly interpreted as still requiring that the complaint be made at the first reasonable opportunity.¹⁷ The complainant in this instance testified about her fear of reporting the incident and I accept her evidence in that regard, also when considering the family dynamic at play and the evidence of Ngcofe’s conduct towards her.

¹⁴ See PJ Schwikkard ‘Sections 58-60 and amendment 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.

¹⁵ *Cf S v Dyira* 2010 (1) SACR 78 (E), dealing with an appeal against conviction in a matter heard by the trial court prior to the enactment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007) (‘Sexual Offences Act’), and with earlier authorities. The judgment has been criticised for overlooking or misapplying the Sexual Offences Act: Schwikkard 23-5, fn 5.

¹⁶ DT Zeffertt and AP Paizes *The South African Law of Evidence* (3rd Ed) (LexisNexis) (2017) 483. See *Hotzhausen v Roodt* 1997 (4) SA 766 (W) at 778E. Also see Schwikkard ch 23-2-3.

¹⁷ Schwikkard 23-5.

[35] Confirming this approach, in *S v Vilakazi Dambuza* JA, on behalf of the majority of the court, held as follows:¹⁸

‘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.’

[36] The reality is that the accused was firmly identified by the complainant in respect of her rape on 8 February 2020. I have considered any possible reasons for the complainant to have been mistaken in this respect, or to have falsely implicated the accused in order to strike at Ngcofe, treating her evidence with scrutiny bordering on suspicion given her age and because she is a single witness to the rape. Those cautions notwithstanding, and having considered the merits and demerits of the complainant and accused’s testimony, the latter providing a version that is not reasonably possibly true, I am satisfied that the state has proved beyond reasonable doubt that the complainant was raped by the accused on 8 February 2020. While Ntsiba may not have viewed the actual rape, her evidence cannot be ignored and supports this conclusion, as does the accepted medical evidence. The evidence does not support any other instances of rape perpetrated by the accused between October 2019 and February 2020.

Order

¹⁸ *S v Vilakazi* 2016 (2) SACR 365 (SCA) para 19.

[37] The accused is guilty of the crime of rape in that he unlawfully and intentionally committed an act of sexual penetration of the complainant on 8 February 2020.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 07 February 2022

Delivered: 28 February 2022

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