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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

*CASE NO.: CA&R 32/2020
Date heard: 22-02-2021
Date delivered: 24-01-2021*

In the matter between:

Themba Nyati

Appellant

and

The State

Respondent

CORAM: WILLIAMS J et EILLERT AJ

JUDGMENT

WILLIAMS J:

1. The appellant, Mr Themba Nyati, was convicted on a charge of the contravention of s 3 of Act 32 of 2007 (rape, vaginal penetration), in the Regional Court, Kimberley and was sentenced to 17 years imprisonment. He now appeals against his conviction.
2. It was common cause at the trial that the appellant had on the evening of 2 October 2015 come across Mrs TL on her way home with her 4 year old granddaughter (the complainant), her

mentally disabled 15 year old child, and her inebriated adult son Manneljie. The appellant who was well known to Mrs TL, being friends with her children and often helping with yard work, offered to assist with the complainant. He carried the complainant on his shoulders to the house of Mrs TL.

3. While Mrs TL was struggling to open the front door which had jammed, the appellant walked around the house towards the back door with the complainant. In the meantime Mrs TL had her hands full with her drunken son who had fallen down on the veranda. When she eventually managed to open the front door, the appellant returned with the complainant from the back of the house. The appellant helped to get Mrs TL's son into the house and left after about 15 minutes.
4. A while later Mrs TL, with the complainant in tow, confronted the appellant at his parental home and accused him of penetrating the complainant's anus (sterre) with his hands. The appellant denied the allegation. The above is the extent of the common cause facts.
5. Mrs TL testified that when the appellant returned from the back of the house he was busy pulling up his pants zipper and told Mrs TL that he had gone to urinate at the back of the house.
6. Her evidence was further that after the appellant had left her home that particular evening she had noticed that the complainant appeared to be very angry. When she enquired as

to the reason for her being angry the complainant responded by saying that the appellant had put his hands deep into her anus. Mrs TL had then pulled down her panty slightly to check it for wetness. She explained that she was looking for signs of semen. She then felt the complainant's vaginal area. She demonstrated in court how she had done that by rubbing the palm of one hand over the back of the other hand. She stated during cross-examination that she did not penetrate the complainant's genitalia with her fingers since that was the doctor's work. She testified that she only felt in the area of the vagina but did not detect any wetness or notice any injuries.

7. It also transpired during cross-examination that Mrs TL had fallen in front of the appellant's house while she had the complainant on her back. In the process she had fallen off the back of Mrs TL. Mrs TL denied that the complainant had been injured during the fall.
8. The complainant was examined by a medical practitioner, Dr Egnasi, during the early hours of 3 October 2015. She was very agitated and unco-operative and did not want the doctor to touch her genitalia. After several hours of trying to calm her down in order for her to be examined, it was deemed best that the examination be done in theatre under anaesthesia. The doctor testified that on examination he noticed a 5mm tear on the right labia and a 2mm tear on the left labia, both superficial and not bleeding. On the hymen he noted tears at the 2 o'clock and 10 o'clock position which were superficial and not bleeding.

These tears were all fresh. There was no evidence of anal penetration. His conclusion was sexual assault with the tears as noted on the J88 medical form.

9. During cross-examination the doctor considered it improbable that the complainant had incurred the injuries to her genitalia as a result of a fall unless she had fallen, with her legs open, directly onto something which had impaled the genitalia. He conceded however that it was possible that the injuries could have been caused by an examination by a person with no medical background.
10. Ms L Raymond, a captain in the South African Police Service, who works as a forensic social worker within the Family Violence, Child Protection and Sexual Offences Unit also testified in the State case. She had been tasked with obtaining a statement from the complainant.
11. Ms Raymond's evidence was that she had two sessions with the complainant. On the first occasion which was on 21 October 2015 the complainant was clingy and did not want to participate or let go of her mother. On the following occasion on 16 November 2015 she was more at ease and participated during the process. According to Ms Raymond, the complainant could not distinguish between colours but she could distinguish between the truth and a lie and reality and fantasy. She also gave the names she used for boys' and girls' private parts. She informed Ms Raymond that the appellant

touched her by her "pupenasi" with one finger and made movements with his finger. The incident occurred, according to the complainant, at the back of the house while her grandmother was inside. Ms Raymond testified that with the aid of gingerbread figures, the complainant identified her pupenasi to be her vagina.

12. The complainant testified through an intermediary. At the time she was 6 years old. The crux of her evidence was that the appellant had carried her on his shoulders to her grandmother's house. When they got there he walked with her to the back of the house. He laid her face down on a chair and put his hand on her buttocks. When asked to demonstrate with the male and female dolls available to child witnesses, she repeatedly demonstrated by placing a finger of the male doll in the anus of the female doll. The complainant also denied that her grandmother had examined her genital area after the incident.
13. The appellant's version was simply that he had assisted Mrs TL to get home by carrying the complainant on his shoulders. That when they got to Mrs TL's house he noticed a light shining from inside at the back of the house and proceeded with the complainant towards the back door where he normally entered when visiting with Mannetjie. Before he could reach the backdoor he heard Mannetjie fall and went to the front door to assist Mrs TL with Mannetjie.

14. He denied that he had in any way sexually assaulted the complainant or that he had been pulling up his zipper when he approached Mrs TL as testified by her.
15. The trial court rejected the version of the appellant as improbable. The trial court found in essence that certain discrepancies between the evidence of the complainant and Mrs TL could be expected, regard being had to the age and level of maturity of the complainant. That the complainant's behaviour immediately after the incident and her report to her grandmother showed consistency. The trial court also found that given the fact that the complainant was lying face down when fingered from behind, she could have easily been confused in differentiating between her anus and her vagina. The fact that the appellant was the last person to be with the complainant before the report and the fact that the injuries to the complainant's genitalia were still fresh were found to be further corroboration for the complainant's version that it was the appellant who had sexually assaulted her.
16. The only real issue in dispute on appeal was whether the State had proven beyond reasonable doubt that the appellant inserted his finger into the vagina of the complainant.
17. Mr Steynberg who appeared for the appellant argued that the trial court had erred in not properly applying the cautionary rule relating to the evidence of young children. That the complainant's evidence and the first report to Mrs TL negate

the allegation in the charge sheet that the complainant was penetrated vaginally. Further that the complainant herself testified during cross-examination that the appellant had never taken her from his neck until he put her down to assist Manneljie who had fallen in front of the house. That this evidence of the complainant contradicts and is incompatible with her earlier testimony that the appellant laid her down on a chair at the back of the house. Further that it cannot be discounted that Mrs TL had inflicted the injuries to the complainant's vagina when she examined the complainant after the report. Therefore the argument is that if all the evidence was evaluated in totality, the trial court would not have come to the conclusion that the appellant had inserted his finger into the vagina of the complainant.

18. The contention is furthermore that the charge appears to be contrived to conform with the medical evidence and not the evidence of the complainant and that it was not open to the trial court to seek justification for this contradiction.
19. In my view the above argument could have been compelling had the complainant been an adult or even an older child who would be presumed to have a better understanding or experience of the subject matter. I am satisfied that the trial court was alive to the cautionary rule applicable to the evidence of young children. The judgment of the trial court is indicative thereof wherein it is stated *inter alia* that: "*Evidence (of child complainants) must be considered carefully*" and "*Relevant*

considerations include the age and capacity of the child.” (own insertion)

20. The trial court was also aware of the fact that contradictions in the evidence of a young complainant does not necessarily mean that the complainant is unreliable. In her judgment the trial court refers to the matter of *S v Vilakazi* 2016 (2) SACR 365 (SCA) in this regard. The trial court's judgment contains the wrong reference to this matter but the gist of the reasoning is found in paragraph 18 of *Vilakazi* which states the following:

*“[18] The fact that there were contradictions in the evidence of the complainant does not necessarily mean that her evidence is unreliable. In *Woji v Sanlam Insurance Co Ltd* 1981 (1) SA 1020 (A) Diemont JA Dambuza JA (Shongwe JA, Theron JA and Mathopo JA concurring) provided a helpful guide to approaching the evidence of young children. The guide highlights, as the focal point, the trustworthiness of the evidence. At 1028A – E of the judgment the learned judge said:*

‘The question which the trial Court must ask itself is whether the young witness’ evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his Code of Evidence para 568 at 128, depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears “intelligent enough to observe. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion “to remember what occurs” while the capacity of narration or communication raises the question whether the child has “the capacity to understand the questions put, and to frame and express intelligent answers” (Wigmore on Evidence vol II para 506 at 596). There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest — is there a consciousness of the duty to speak the truth? Then also “the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility”

(per SCHREINER JA in R v Manda (supra)). At the same time the danger of believing a child where evidence stands alone must not be underrated.'

21. On the topic of discrepancies in the complainant's evidence, one of the main inconsistencies in the complainant's evidence (other than that between her evidence and the charge sheet) which was alluded to during argument, is her "*confirmation*" during cross-examination that the appellant had never taken her off his neck after entering the yard of Mrs TL until he assisted Mrs TL to pick Manneljie up from the porch where he had fallen. Based on this concession, the argument is that the complainant's allegation of anal penetration by the appellant cannot be true.
22. This "*concession*" by the complainant needs some scrutiny. She testified over the course of four days between 14 July 2017 and 24 October 2017. I glean from the record that these were not full court days since the complainant had difficulty concentrating for long periods and would appear drowsy during her testimony, resulting in her eventually responding to questions during examination-in-chief and later during cross-examination with answers such as "*I do not know*" or "*I do not remember*". The trial court correctly, taking into account the age of the complainant, adjourned the proceedings on these occasions, at times at the behest of the appellant's legal representative, since no meaningful evidence was forthcoming.

23. On three occasions prior to the '*concession*' under discussion, the legal representative had put the version of the appellant to the complainant as being that he had not taken her off his shoulders on the premises of Mrs TL until he had eventually put her down on the porch to assist Mannetjie. On the first occasion the complainant denied this version of the appellant. On the second and third occasions that this question was put to her, her response was that she could not remember. When the version was put to her on the final day of cross-examination she agreed that the appellant had never taken her off his shoulders until he put her down on the porch. More importantly, in my view, she even agreed to an incorrect and misleading question by the appellant's legal representative that, in terms of her evidence, besides putting his finger on her back ("*by u rug*"), which was never the evidence of the complainant, the appellant did nothing further to her.
24. In these circumstances and in the context as described above, I am of the view that very little, if any, reliance can properly be placed on the '*concession*' made by the complainant. Mrs TL in any event testified during cross-examination that the complainant was no longer on the appellant's shoulders when he came from the back of the house to assist with Mannetjie.
25. Another issue which needs some discussion is the argument by appellant's legal representative that it cannot be ruled out that the injuries to the complainant's genitalia were caused by the examination performed by Mrs TL. This argument is based on

the concession by the doctor that the injuries of the complainant could possibly have been caused by an examination of the genitalia performed by a layperson. The fallacy of this argument lies in the fact that Dr Egnasi was never informed of the extent of the examination as testified to and demonstrated by Mrs TL. The result is that the concession was made in a vacuum and for the appellant to be allowed to use this baseless concession to thwart the State's case would be untenable.

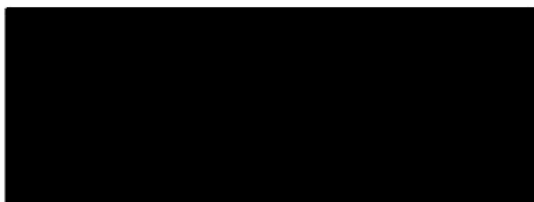
26. Whilst it is so that the complainant's report to Mrs TL and her evidence in court refer to penetration of the anus and not the vagina as contained in the charge sheet and that the evidence of young children should be treated with caution, one must be mindful not to throw all common sense and reason out of the window by taking an over-cautious approach to such evidence.
27. The main consideration is the reliability or trustworthiness of the complainant's evidence. In this regard safeguards for her evidence can be found in the following factors: (i) the appellant was the last person with her before the report was made and there is not even a suggestion that the injuries to the complainant's genitalia were present before her interaction with the appellant; (ii) according to the medical evidence the tears to the complainant's genitalia were fresh; (iii) there is no apparent reason why either the complainant or Mrs TL would falsely implicate the appellant, had that been the case one would have expected their evidence to have been tailored to accord with

the charge sheet; (iv) there is no evidence that the complainant's report to Mrs TL had been induced by either suggestion or intimidation; and (v) the likelihood of the complainant taking to flights of fancy regarding an incident which would normally be outside of the realm of experience of such a young child is very slim.

28. In my view the trial court correctly found on an evaluation of all the evidence that it was the appellant who had caused the injuries to the complainant's genitalia and that the State had proved its case in that regard beyond reasonable doubt.

In the circumstances the following order is made:

The appeal against conviction is dismissed.



CC WILLIAMS
JUDGE

I concur



A. EILLERT
ACTING JUDGE

For Appellant:

Mr. H Steynberg
Legal Aid

For Respondent:

Adv. K M Kgatwe
Office of the Director of Public Prosecutions