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**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE.**

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED

DATE: 30/09/2021

CASE NO: REV 03/2021

In the matter between:

THE STATE

and

T[...] M[...]

JUDGMENT

SEMENYA DJP:

[1] This matter came before us on automatic review in accordance with the provisions of section 85 of the Child Justice Act¹ (the Act), read with section 304 of the Criminal Procedure Act² (the CPA). The child offender was convicted in the Regional Court, Mokopane, on a charge of robbery with aggravating circumstances as intended in section 1 of the CPA pursuant to a guilty plea. He was subsequently sentenced to three (3) years' imprisonment which was wholly suspended for a period of five (5) years on condition he is

¹ 75 of 2008

² 51 of 1977

not convicted of robbery with aggravating circumstances, robbery or assault with intent to do grievous bodily harm, committed during the period of suspension. The child offender was acquitted on a further charge of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act³.

[2] I forwarded the record of the proceedings to the Office of the Director of Public Prosecution (the OPP) and the Legal Aid South Africa (LASA) for their comments. I am indebted to the remarks of Advocates Chauke and Mohlala of the OPP and Ms Mohlaka from the LASA. I am in agreement with the view that the conviction of the child offender on the charge of robbery with aggravating circumstances and the resultant sentence are in accordance with justice and should be confirmed. I am however concerned with the acquittal of the child offender for the reasons that follow hereunder.

[3] The child offender pleaded not guilty to a rape charge and raised a defence that the complainant consented to the act of sexual penetration. The following was stated in a statement tendered in terms of section 112(2) of the CPA on the robbery charge:

"I admit that I was with 3 friends, Pandas, Maleven, and Benny when we met the complainant Itumeleng Maluleke along the street. I admit that Bandas hit him with a beer bottle and he fell down. I searched him and took the R320, 00 while Bandas took the phones, shoes and the jersey and we left.

The prosecutor accepted the plea and Court thereafter convicted him in accordance with his plea. The prosecutor proceeded to call witnesses inan endeavour to prove the charge of rape.

[4] K[...] C[...] S[...], the complainant in the rape count, testified that on the 27 August 2020 at about 21:00 she was in the street at Mookgopong with her

³ 32 of 2007

boyfriend Itumeleng Maluleke, her namesake K[...] and Thabo. A group of about six boys emerged and walked past them. She identified Pangas amongst the boys. The said Pangas pointed at her and said "*this one is M[...]s sister*". The boys continued to walk up to a certain corner and returned to them. They grabbed Itumeleng and attacked him. K[...] and Thabo ran away. The child offender in this matter, whom she only knew by sight, grabbed her when she was trying to run away and told her that he is leaving with her. The other boys were hitting Itumeleng at that stage. They also robbed Itumeleng of two cellphones, a jersey and a watch. One of the phones was hers. Itumeleng eventually managed to break loose and ran away, leaving her behind with the child offender and his companions.

[5] The child offender took her to an empty yard where he hit her and ordered her to obey his instructions. He ordered her to undress and she did so out of fright because she had witnessed the others when they were hitting Itumeleng. This was exacerbated by the fact that the child offender was also armed with a knife. She stated that the child offender sexually penetrated her in that empty stand. He refused to let her go even after she knelt down, begging him to set her free. She had to fight with him in vain in an endeavour to free herself. The other boys were simply watching the event as it was unfolding. The child offender told her that he is taking her to his home.

[6] The entire group proceeded to the child offender's home. Upon their arrival there the other boys remained in the street whilst the child offender took her inside the house. The complainant stated that the child offender undressed her and had an act of sexual penetration with her again without her consent. When they heard somebody opening the door from the main house, the child offender threatened her and told her to keep quiet. He left the room and went out to the toilet. Seeing that the child offender was outside, she grabbed the key to the gate, put on her cycling shorts, grabbed her other clothes and ran out of the house. She threw the gate keys back into the house before running away on the basis that they were not the child offender's property. The child offender pursued her up to the street of her home. He turned back when he heard her

screaming calling her mother. It was already 23:00 by then. Her mother opened for her and she reported to her that she was raped. Her mother told her that K[...] was at her house and reported that they were robbed. She reported the matter to the police the following day and took the police to the child offender's home.

[7] The complainant's mother, P[...] A[...] S[...], testified that K[...] P[...] (the complainant's namesake), came to her house to inform her that she has been robbed. She proceeded to the toilet to look for the complainant but could not find her. She went to look for her in the street but she still could not find her. The complainant returned home at about 23:15. She was terrified, crying and her clothes were dirty. She reported that she was raped. She told her that they will go and report to the police later as it was in the middle of the night. She advised her not to take a bath.

[8] Whilst the defence did not cross-examine the witness, the Court asked her questions about the clothes that the complainant was wearing upon arrival and the state in which they were. The mother replied that the complainant was wearing a T-shirt and a jean without a bra when she arrived. She stated that she would have noticed if she came in wearing a bra and tights (cycling shorts) only.

[9] The State handed in form J88 as exhibit with the consent of the defence. Forensic nurse Selwana (Selwana) had recorded the following injuries on it:

Swelling around the urethral orifice, fresh abrasions on the labia minora, bleeding from the vagina, the cervix was eroded and bleeding, the hymen was swollen at 12 O'clock, fresh abrasions in the left vestibule."

The State closed its case after placing it on record that other potential State witnesses cannot be traced.

[10] The Court called the investigating officer in the matter and brought the anomalies between what was recorded on the J88 form and the section 212 (4) affidavit. According to the section 212 (4) affidavit, the commissioning thereof was done at Modimolle, whilst the deponent, Selwane, examined the complainant at Voortrekker hospital in Mokopane. The investigating officer stated that the section 212(4) affidavit was commissioned by Warrant Officer van der Bergh whereas the typed full names under the signature are those of Warrant Officer van der Merwe.

[11] The application for the discharge of the accused at the close of the State case was dismissed. The child offender elected to testify under oath and stated that he met with the complainant at a tavern at around 20:00 on the night of the incident. They agreed that they will keep each other company and enjoy liquor together. They went to his house together when the tavern closed at 2:00. Upon their arrival he proceeded to the toilet and found the complainant busy undressing when he came back to the bedroom. They thereafter engaged in an act of sexual penetration once. He accompanied her to her home at about 5:00. He denied that he was in possession of a knife and that the complainant ran away. He maintained that the sexual intercourse was with the complainant's consent.

[12] During cross-examination the child offender stated that he left the tavern in the company of the complainant, Maleven, Pandasi and Benny. The prosecutor referred the child offender to paragraph 10 of the section 112(2) statement when he denied that he knew the complainant's boyfriend, Itumeleng. It was put to him that he admitted in that statement that he met with the complainant (in the robbery charge) Itumeleng Maluleke along the street. He answered that the police are the ones who told them about the name Itumeleng. The prosecutor showed the child offender the consistencies between the version of the complainant and that of the child offender as contained in the section 112 (2) statement. Among the said consistencies are that the complainant knew that the child offender and his companions

assaulted Itumeleng, robbed him of money, two cellphones and shoes. The child offender agreed that the complainant's version, which is compatible with what he has stated in the section 112(2) statement, is indeed inconsistent with his evidence in chief. It was put to him that it could not be correct that he met with the complainant at a tavern. It was further put to him that it is incorrect that he accompanied the complainant home at 5:00 on the basis that her mother confirmed that she returned home in the middle of the night, hence the advice that they will report the matter to the police the next day.

[13] The last question that the prosecutor put to the child offender in cross-examination was that he had an act of sexual penetration with the complainant without her consent. In answer the child offender stated that the complainant agreed to go with him to his house. The prosecutor reminded him that the question that he asked was whether the complainant agreed to have an act of sexual penetration with him and not whether she agreed to go with him to his house. The child offender responded by saying the complainant **did not agree** (my own emphasis) to engage in acts of sexual penetration with him. During re-examination the child offender's legal representative asked him whether the complainant consented to the act of sexual penetration with him and he repeated that **she did not consent**. The question was repeated twice and the answer remained the same.

[14] The Court invoked the provisions of section 186 of the Act to call forensic nurse Selwana. Selwana testified that she has an advanced Diploma in General Nursing and a Diploma in Forensic Nursing which she obtained from the University of the Free State. She confirmed that she is the person who completed form J88 which was handed in as an exhibit and the signature thereon. The trial Court took sister Selwana through the contents of the J88, in particular, the history section and the injuries noted on it. It was noted in the history part that the complainant was lured into an empty yard by an unknown man who threatened her with a knife, pushed her to the ground, undressed her and raped her once without a condom. After the rape the unknown man took her to his home but that upon their arrival she fought the man and ran

away. The Court questioned her about the absence of injuries on the complainant's face despite having been slapped across the face with open hands. Selwana explained that the complainant visited the hospital after twelve hours and this explains why injuries were no longer visible. She confirmed the entries on the J88 regarding the genital injuries that she observed on the complainant.

[15] The Court correctly identified the issues between the parties as being whether the act of sexual penetration between the child offender and the complainant was with or without consent. This was in view of the common cause facts that an act of sexual penetration did take place between the two. The Court correctly stated that the evidence of the complainant was to be approached with caution in that she was the only State witness who deposed to the events as they unfolded at the scene of the incident. It appears from the judgment that the trial Court acquitted the child offender solely on the basis of the contradictions in the complainant and her mother's versions as well as the inconsistencies between her evidence- in- chief and what was recorded in the J88. The trial Court further took issue with the prosecution's failure to call Itumeleng as a witness.

[16] Ms Mohlaka of the LASA contended strongly in her written heads of argument that the trial court was correct in taking issue with the fact that the complainant's version regarding the events as they unfolded in the street, where she allegedly met with the child offender and his companions, remained uncorroborated. She further contended that the trial Court correctly found that the discrepancies in the evidence of the complainant, that of her mother and the forensic nurse are material and render the State's version unbelievable. It is Ms Mohlaka's submission that there is no consistency between the version of the complainant and the admissions made in section 112(2) statement. The basis for the submission is said to be that there is no evidence to suggest a connection between the complainants in the rape and the robbery charges. Furthermore, that there is no evidence regarding the specific time frames as to when either of the offences took place.

[17] It seems to me that the trial Court ignored the principle laid down in **S v Van Der Meyden**⁴ and all other cases that followed it in its evaluation of the evidence presented before it. In that case, Nugent J stated the following:

'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of the test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[18] The criticism levelled against the prosecution's failure to lead the evidence of Itumeleng is without merit. It was the Court's view that the evidence of Itumeleng was necessary to provide corroboration to the complainant's version that he was with her when they came across the child offender and his companions. The evidence of Itumeleng was not crucial and was unnecessary in my view. The complainant's version was shown to be consistent with what the child offender had stated in his section 112(2) statement. He admitted that the person whom he and his companion robbed on the date on which the complainant was raped was Itumeleng Maluleka. The complainant testified that she was with her boyfriend Itumeleng Maluleke when he was robbed and that one of the two cellphones he was robbed of was hers. Despite the fact that he admitted that he robbed Itumeleng in his section 112(2) statement, he omitted to mention this fact in his evidence in chief. He instead stated that he went straight to his home with the complainant after

they left the tavern. It seems as if he had forgotten about the robbery when he was testifying in chief. The argument that there is no correlation between the rape and the robbery is without merit. There is evidence that the offences were committed on the same date and during the night. The child offender and the complainant could not have been at two different places at the same time, that is, at the tavern and in the street where the Itumeleng was robbed.

[19] Advocate Chauke argued, with reference to **S v Mafaladiso en Andere**,⁵ that the contradictions in this matter do not go to the core of the dispute between the parties. It was submitted that the main issue was whether the act of sexual penetration was with or without consent. This submission is correct in my view. The child offender admitted on three occasions that it was not consensual. To my mind this admission is tantamount to a change of plea from one of not guilty to one of guilty. In so doing, the child offender has in effect simply abandoned his basis of defence. The absence of consent is further consistent with the injuries observed by the Selwana on the complainant's genitalia. The complainant was never cross-examined with regard to what the Court regarded as inconsistencies between her version in court and what she told Selwana. She was therefore denied the opportunity to explain the differences in the two statements. I find the adverse inference drawn by the Court to be unwarranted.

[20] One purpose of cross-examination is "to elicit facts favourable or advantageous to the cross-examiner's side. The results of examination in chief is often that a one-sided or incomplete picture of events is provided. As already shown, cross-examination, then, is expected to indicate that certain points have been omitted or underemphasize⁶" Furthermore, the purpose of re-examination is to clear up any point or misunderstanding which might have occurred during cross-examination; to correct wrong impressions or false perceptions which might have been created in the course of cross-

⁴ 1999(1) SACR 447 (W)

⁵ 2003 (1) SACR 583 at 593E-594H

⁶ Dr PJ Pretorius: Cross-examination in South African Law, page 90-91

examination; to give a witness a fair opportunity to explain answers given by him under cross- examination, which, if unexplained, may create a wrong impression or be used to arrive at false deductions⁷.

[21] The child offender's version was completely destroyed during cross-examination. The prosecutor must be commended for using cross- examination for the purpose for which it was intended , namely, to sift the truth out of the lies. The absence of consent was repeated during re- examination. This in itself rules out any possibility that the child offender may have mistakenly admitted the absence of consent during cross- examination. The trial Court misdirected itself in ignoring this fact contrary to the principle laid down Van Der Meyden above.

[22] The contradictions in the complainant's version, which relate to the number of times she was penetrated by the child offender is immaterial when viewed against the backdrop that the child offender admitted at the end that she did not consent to the act. The issue whether she was fully clad or not on her arrival at home does not make the complainant a liar. Advocate Chauke correctly argued that it relates to what happened after the rape. The complainant's mother corroborates her version that she arrived home at 23:00 and not at 5:00 as deposed to by the child offender. The mother's version that the complainant's namesake came to her house and reported to her that they were robbed is consistent with the complainant's version that they were together when they met with the child offender.

[23] The Court in the present case was at pains to find grounds on which it can rely to acquit the child offender. This is concerning if one has regard to the prevalence of the gender based violent crimes in this country. It is quite disheartening to find presiding officers, who are expected to play a substantial role in reducing this level of crime through judicial activism, to instead try and find unconvincing reasons to disbelieve complainants in rape cases.

⁷ Principles of Evidence by PJ Schwikkard and SE Van Der Merwe at 188.

[24] Having said that, I am nonetheless alive to numerous court decisions⁸ in which it was held that the High Court has neither statutory nor inherent review powers to set aside an acquittal of an accused person by the magistrate and to substitute it with a conviction. In **S v Chauke**⁹ it was held that:

"[15] Indeed, s 35(3)(m) of the Constitution of the Republic of South Africa, 1996, provides:

"(3) Every accused person has a right to a fair trial, which includes the right -

(m) not to be tried for an offence in respect of an act or omission which that person was previously either acquitted or convicted'.

In *S v Basson* **[2004] ZACC 13; 2005 (1) SA 171** (CC), the Constitutional Court had the opportunity to consider, inter alia, this right. At para [66] Ackerman J said: 'In *McIntyre en Andere v Pietersen en 'n Ander* it was held that the purpose of the right contained in s 35(3)(m) was to protect citizens against the possibility of repeated prosecutions for the same conduct. The Court held that such protection was necessary in the interests of fairness and also because of the public interest in the finality of judgments.'

[25] The Court in *Chauke* went further to state that the setting aside of the acquittal and the replacement thereof with a conviction will vitiate the principle of *audi alteram partem* rule. I am in agreement with this statement. It would not do any justice to remit the matter back to the Regional Court for a trial *de nova* in that it will go against the provisions of section 35 (3) (m) of the Constitution. Section 310 of the CPA has expressly created a mechanism in

⁸ *S v Aronstam* 1966 (3) SA 780 (T); *S v Masia* 1983 (4) SA 242; *S v Makriel and Others* 1986(3) SA 932

⁹ 2010 (1) SACR 287 (GSJ) at [15]

which the prosecution may correct judicial misdirection which may have resulted in an acquittal. It is on this basis that I find that my jurisdiction to set aside an acquittal on review is, by implication, excluded. On the other hand, section 302, 303 and 304 are, in my view, designed to cater for convictions and sentences only.

[21] In the result the following order is made.

- i. The conviction on robbery with aggravating circumstances and the resultant sentence is confirmed.

M V SEMENYA
DEPUTY JUDGE PRESIDENT;
LIMPOPO DIVISION;
POLOKWANE.

EM MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT; LIMPOPO DIVISION;
POLOKWANE.