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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: RC2/135/2015

APPEAL CASE NO: A372/2017

- | | |
|-----|---------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / NO |
| (3) | REVISED |

...3-2-2021.....	
DATE	SIGNATURE

GIDEON LESESE

Appellant

and

THE STATE

Respondent

Coram: Avvakoumides AJ and J.E. Dlamini AJ

JUDGMENT

AVVAKOUMIDES AJ

1. The appellant was convicted on 27 February 2017 in the Regional Court at Springs of a contravention of section 3 of the Sexual Offences Act, 2007 (Act 32 of 2007), namely, committing an act of sexual penetration with a female person, R[....] M[....], a 5-year-old girl at the time. On 18 May 2017, the appellant was sentenced to life imprisonment by the Regional Magistrate.
2. The appeal lies against both the conviction and the sentence. The appellant submitted that the Regional Magistrate committed an irregularity in admonishing the complainant to tell the truth without conducting the necessary investigation as to whether the complainant understood the difference between the truth and a lie together with ensuring whether the complainant understood the dangers inherent in telling lies. The complainant was not warned to tell the whole truth. This is common cause in the record and the respondent conceded that this was indeed the position.
3. In *S v L* 1973 SA (1) 344 (K), the Court of Appeal (Van Winsen & Van Heerden JJ) held that if the judicial officer is not convinced that a juvenile has the ability to distinguish between the truth and a lie, the juvenile is not competent to give evidence. It is therefore the judicial officer's duty to enquire into the juvenile's standard of intelligence in order to ascertain whether he can draw a distinction between the truth and a lie and whether he understands the dangers of telling lies. In *S v T* 1973 (3) SA 794 (A) at 794 C - D the full court (Botha JA, Holmes JA and Muller JA) held, inter alia,

that the trial court must be convinced that the complainant had the ability to tell the difference between the truth and a false-hood.

4. The appellant submitted that the State's case against him was primarily based on the evidence of a single witness, namely that of the complainant and although the Regional Magistrate made mention in the judgment of the complainant being a single witness, it is not clear from the record whether the Regional Magistrate in fact acquainted herself with the cautionary rule and applied such rule. Consequently, the appellant argued that this constitutes a serious irregularity which justifies setting aside the proceedings.
5. In *S v Sauls and Others* 1981 SA (3) at 179G-H the court took cognisance of the well-known passage from the judgment of De Villiers JP in *R v Mokoena* 1932 OPD 79 at 80 in which it was stated that *"the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by s284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect"*.
6. The appellant argued that the Regional Magistrate did not make any mention whatsoever in her judgment, that she had considered or found that the complainant's evidence was clear and satisfactory in all material respects. In support hereof the appellant submitted that the evidence of the

complainant is not clear as to what sexual act was committed upon her and how the sexual act was perpetrated.

7. The record shows that the evidence of the complainant was that: *"My daddy put his goggo on my vagina"*. The record does not show that there was any penetration whatsoever. The prosecutor in the trial clouded this issue by asking the complainant: *"when your daddy put the goggo in your vagina did you feel any pain"*. The Regional Magistrate in her judgment referred to this evidence by stating that: *"She testified that her father held his goggo in his hand and put it on her vagina"*.
8. The appellant submitted, and this is borne out by the record, there is absolutely no indication in which way the sexual act, if any, was perpetrated. The complainant testified that she was sleeping on the bed, lying down and the appellant was standing next to the bed when he put his "goggo" on her vagina. There was some demonstration with dolls, but nothing thereof was placed on record. The evidence showed that both the complainant and the accused and the appellant were fully clothed at that stage.
9. This notwithstanding, the Regional Magistrate, in her judgment, stated that: *"The fact that she said they were fully dressed cannot mean that sexual intercourse did not happen. Who said people must always undress for sexual intercourse to take place?"*. The appellant argued that the State would have had to show, at least, how the sexual assault took place. The

appellant submitted that the State would have at least to have shown that the complainant's underwear had been pulled down or aside particularly in the light of her evidence that the appellant had put his "*goggo*" on her vagina.

10. The appellant argued that although there is no general cautionary rule regarding the evidence of complainants in sexual offences, the Regional Magistrate erred by losing sight of the fact that the circumstances in this case were of such a nature that it required a cautious approach towards the complainant's evidence. It was put to the complainant by the defence that she was told by her mother to come and say that her father sexually assaulted her, and she replied in the affirmative.
11. Furthermore, so the appellant argued, it is improbable that her father would rape the complainant inside the house whilst her mother was just outside busy doing the washing. The appellant further argued that the Regional Magistrate erred in finding that the complainant was a reliable witness and failed to appreciate and carefully consider the unsatisfactory aspects in the complainant's evidence. For example, when the complainant was asked in court where the "*goggo*" is, she showed her left hand.
12. The appellant argued further that the Regional Magistrate failed to take note and attach appropriate weight to the serious contradiction and discrepancy between the evidence of the complainant and her mother, relating to

whether the complainant had reported the sexual assault to her mother. According to the complainant she reported the assault to her mother after the appellant had left the house, whilst the mother testified that the complainant never reported it.

13. The appellant argued that the Regional Magistrate misdirected herself regarding the evidence led before her, by finding that it is not in dispute that the child was raped or sexually abused during that period. In this regard the Regional Magistrate misdirected herself materially by permitting a nurse, Vincentia Ngobese, who did not conduct the medical examination on the plaintiff, to testify on the contents of the J88 medical form on the findings and opinion of Dr Riester who in fact conducted the medical examination in terms of section 3(1)(c) of Act 45 of 1988.
14. The appellant submitted that he was severely prejudiced because the correctness of the findings and the opinion could not be tested under cross-examination. Doctor Riester had relocated abroad. The respondent could not submit any reason why Dr Riester's attendance in the Court *a quo* could not have been secured.
15. The appellant submitted that there is no onus on him to convince the court that his version is true and what is required of him is to show that his version may be reasonably possibly true and even if his conduct appears to be suspicious, he would still have the benefit of the doubt even if his version

appears improbable. See: *S v Munyai* 1986 (4) SA 712 (V) at 714 J - 715 G and *S v Ipeleng* 1993 (2) SACR 185 (T) at 189 a – b.

16. The appellant submitted that it is significant to note that the trial court did not find that the appellant and his witnesses were unsatisfactory witnesses either resultant from their conduct in the witness box or the nature and content of their evidence. All questions posed to the appellant and his witnesses were answered satisfactorily and no questions were evaded, and his version could not be branded as intrinsically improbable. Consequently, the appellant argued that it could not be found that the appellant's denial is beyond reasonable doubt, false. See: *S v Artman* 1968 (3) SA 339 (A) at 341B and *S v Malopane and Another* 1979 (1) SA 1009 (W).
17. The trial court was essentially faced with two directly conflicting versions. Consequently, it was argued that the appellant's version could only have been rejected if the trial court was satisfied that such version was incorrect and false and not only because it appeared to be improbable. The appellant argued that the trial court was not entitled to convict unless it was satisfied not only that the appellant's explanation was improbable but that, beyond any reasonable doubt, it is false. The appellant relied on *S v Mafiri* 2003 (2) SACR 121 (SCA) at 121.
18. The appellant argued further that the Regional Magistrate erred by finding that the appellant was an unsatisfactory witness. The magistrate, so argued

the appellant, in fact misunderstood the evidence and made incorrect statements to the appellant when she questioned him. The Regional Magistrate put to the appellant that his attorney had submitted that the first time the appellant heard about the rape was from Inspector Shai. Regard being had to the record; this statement is incorrect.

19. The appellant testified that he had heard for the first time from Inspector Shai that there was a case of rape against him. This is borne out by the record. The Appellant argued that the Regional Magistrate then, having misunderstood the evidence, found that the appellant had contradicted himself and wrongly rejected his evidence. The Regional Magistrate went further to find that there are inherent improbabilities in the evidence of the appellant without identifying or evaluating any improbabilities at all. Thus, the appellant argued that the Regional Magistrate misdirected herself in this regard and relied on *S v M* 1999 (2) SACR 548 (SCA), as authority.
20. Of concern is that the learned magistrate, on at least two occasions, curtailed the cross-examination by the defence and then put leading questions to the appellant and questioned him by virtually cross-examining him. The questioning by the Regional Magistrate comprises some 5 pages of the record and, in my view, the nature and manner of the questioning certainly creates the impression that the Regional Magistrate had made up her mind before considering all the evidence.

21. Relying on the submissions made and the authorities cited, the appellant submitted that the State had failed to prove its case against the appellant beyond reasonable doubt and the conviction should be set aside. Counsel for the State did not make any submissions other than that she agreed the trial court had “erred in many instances”. I requested both counsel to provide the court with a timeline of events. The timeline is as follows:

21.1 In December 2014, the complainant’s mother noticed that something was wrong with her daughter. She was losing weight and had suffered nightmares. The complainant’s mother went on holiday with her children and family in December 2014.

21.2 On 19 February 2015, the complainant was taken to Dr A H Karim. There was no complaint of any sexual molestation and the complainant complained of abdominal pain and vomiting. She was treated for a urinary tract infection. Dr Karim’s report does not contain any mention of sexual molestation or assault or any findings thereof.

21.3 On 14 March 2015, the complainant was taken to Dr A Mahomed and she complained of vaginal discharge. She was treated for infection. Dr Mahomed’s report does not contain any mention of sexual molestation or assault or any findings thereof.

- 21.4 On 17 March 2015 the complainant was seen and examined by Dr Riester. Dr Riester is the doctor who completed the J88 medical form and had relocated to Germany. Dr Riester found bruises on the complainant's inner thigh which may heal in 3 days. I reiterate that she did not testify neither did the State to make any effort to secure her attendance at the trial.
- 21.5 On 3 July 2015 the complainant was seen by a social worker Zandile Vilakazi.
- 21.6 On 17 July 2015 the complainant's mother stated that she had heard of the molestation for the first time on that day. The record shows that Ms Vilakazi had asked the complainant questions about the alleged incident.
- 21.7 On 10 November 2015 the appellant appeared for the first time in court.
22. In wishing to rely upon the J88 form the respondent made application in terms of section 3 (1) (c) of Act 45 of 1988 to lead the evidence of Ms Vincentia Ngobese. As I have stated the form was completed and signed by Dr Riester who conducted the medical examination. The State submitted that the factors to be taken into account in order to allow the evidence of Ms Ngobese are the following:

- 22.1 The nature of the proceedings – in this regard the State submitted that this is a criminal case where the court has wide discretion when it comes to admit hearsay evidence. The State relied on Sv Mpofo 1993 (2) SACR 109 at 115C-D.
- 22.2 The nature of the evidence – the State submitted that the evidence sought to be led is oral evidence accompanied by the J88 for that was completed by Dr Riester and that Dr Riester had relocated to Germany.
- 22.3 The purpose of the evidence – the State submitted that the purpose of tendering the hearsay evidence is to prove the injuries sustained by the complainant.
- 22.4 The probative value of the evidence – the State submitted that the probative value of the evidence is “*high*”, because the source of the hearsay evidence is direct evidence from the doctor who examined the child.
- 22.5 The absence of the person whose evidence is sought to be led – “*the reason why the person whose credibility to probate the value of the statement depends on does not testify is that he has relocated to another country*” (sic).

23. In argument the State submitted that the accused will not suffer any prejudice because in *S v Ndlovu and Others* 2002 (2) SACR 325 (SCA), the court held that:

“The prejudice in section 31 (c) clearly means procedural prejudice to the party against whom the hearsay evidence is tendered”.

24. The State submitted further that it had laid the basis for Ms Ngobese to testify on hearsay evidence in respect of the J88 completed by Dr Riester who was no longer in the employ of the Boksburg Clinic. The accused’s representative objected to the admissibility of this evidence and submitted that the State had not shown whether any efforts to secure Dr Riester’s attendance at trial. The accused’s representative submitted that the accused would suffer procedural prejudice in that he would not be able to defend himself against the contents of the J88 form if the author thereof was not going to testify on such document.

25. The trial court, in ruling that the J88 form could be admitted into evidence and that Ms Ngobese could testify on the findings on the J88 form, held that there is compelling justification for admitting the evidence of Ms Ngobese because Dr Riester has relocated to Germany. The trial court held further that, taking into account that the accused’s defence is that he did not commit the crime as charged, *“the court does not found (sic) that the accused will be prejudiced in any way.”* The court held that it is in the

interests of justice that the evidence be permitted.

26. In *Ndlovu supra*, the Supreme Court of Appeal held that a trial court, in applying the hearsay provisions of the Act, must be scrupulous to ensure respect for the accused's fundamental right to a fair trial. Safeguards, including the following, are important:

26.1 Firstly, a presiding officer is generally under a duty to prevent a witness heedlessly giving vent to hearsay evidence. More specifically, under the Act, it is the duty of a trial judge to keep inadmissible evidence out, and not to listen passively as the record is turned into a papery sump of "*evidence*".

26.2 Secondly, the Act cannot be applied against an unrepresented accused to whom significance of its provisions have not been explained.

26.3 Thirdly, an accused cannot be ambushed by the late of unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. Furthermore, the Supreme Court of Appeal held that a further consideration bearing on the constitutionality of the

statement is that a decision on the admissibility of evidence is, in general, one of law, not discretion, and a court on appeal is, in general entitled to overrule such a decision by a lower court if it considers it wrong.

27. Notwithstanding my view that the trial court erred in permitting the hearsay evidence, and despite the conclusions contained in the J88 form, the State failed to prove that the Appellant who is guilty of the charges against him. This brings me to the conclusions reached in the J88 medical form. I quote: *"The conclusions show that the complainant's hymen is irregular, redundant posterior edge, cleft at 06, wide vaginal opening. Findings point to frequent episodes of vaginal penetration by object such a finger or penis."*
28. During debate, both counsel agreed that in the light of the conclusions reached in the J88 medical form, despite the legal technicalities in regard thereto, the child was indeed molested. Regretful as it may be that a child of such tender age be subjected to the most despicable abuse, I cannot in good conscience, ignore the fact that the State did not discharge the onus resting upon it. Accordingly, the appeal must succeed.
29. I make the following order:
 - 29.1 The appeal against the conviction is upheld and the sentence is

set aside.

- 29.2 The order declaring the appellant unfit to possess a firearm in terms of section 103 of Act No. 60 of 2000, be set aside.
- 29.3 The order in terms of section 50(2) of Act 32 of 2007 requiring that the name of the appellant be entered into the National Register for Sex Offenders and that, in terms of section 120(4) of Act 38 of 2005, the appellant is unsuitable to work with children, is set aside. The name of the appellant must be deleted from the National Register forthwith.
- 29.4 The Registrar of this court is directed to notify the prison authorities, where the Appellant is currently held, of this judgment and to provide such authorities with a copy of the judgment. The Appellant must be released forthwith.

G.T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree

J.E. DLAMINI

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE OF HEARING : 26 AUGUST 2020

DATE OF JUDGMENT : 03 FEBRUARY 2021

Representation for parties:

On behalf of Appellant

M. Kilian

Instructed by

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On behalf of the State

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