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REPUBLIC SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

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

Review case NO: 32/2019

Magistrate serial NO: RR 105/2014

13/2/2020

In the matter between:

THE STATE

: APPELLANT

And

T[....] N[...] and Others

: RESPONDENT

JUDGMENT

SEMENYA J:

[1] This matter came before me on automatic review in terms of section 85(1) of the Child Justice Act 75 of 2008 (the Act) read with chapter 30 of the Criminal Procedure Act 51 of 1977 (the CPA). The invocation of these provisions is necessitated by the ages of offender number 1, 2 and 4 who were children as defined in the Act, and who were sentenced to five (5) years' imprisonment in terms of section 276(1)(i) of the CPA. The four accused were convicted of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. In line with the spirit of the Act, No1, 2 and 3 will be referred to as child offenders while no.4 will be referred to as the accused.

[2] Upon consideration of the proceedings, and having formulated an opinion that the proceedings appears not to be accordance with justice, I directed the following queries to the regional magistrate who presided over the trial as well as the Office of the Director of Public Prosecutions (the DPP) as provided for in section 304(2) of the CPA:

"1.1 From the answers to questions asked during cross-examination, can it be said that the complainant was a truthful, honest and credible witness;

1.2 Are the inconsistencies in the evidence of the complainant and that of the eye witnesses indeed immaterial;

1.3 From the complainant's answers and the evidence of other state witnesses, can it be concluded that the act of sexual penetration between her and the accused was without her consent;

1.4 It is trite that inferences must be drawn from proven facts. Is there any evidence from which an inference that the complainant was the influence of intoxicating substance can be drawn. Did she concede that she was intoxicated (taking cognisance of the fact that the evidence –in-chief of the complainant is not part of the record);

1.5 Taking into account that mens rea is an element of this offence, what value should be attached to the evidence of the complainant with regard to the 'weird behaviour' of the accused and the effect of the substance that they were taking during the commission of the offence;

2. Should it be agreed that the State failed to prove the element of consent:

2.1 What would be the position with regard to accused No. 1, 2 and 3 who were below the age of 18 years as at the date of the incident;

2.2 Will the facts of this case not call for the invocation of section 15(2) (a) of the Act?

[3] It was brought to the attention of the trial regional magistrate that the complainant's evidence-in chief did not form part of the record. Due to the sensitivity of the matter and the response received from the regional magistrate and the DPP, I directed that the matter should be argued before two judges in terms of section 304(3) of the CPA. It was eventually argued on the 30 January 2020 by advocate Mashiane from the DPP's office and Mr Legodi from the Legal Aid South Africa, to whom I am indebted. I deem it prudent to state the version of the complainant in detail in view of the startling discrepancies that appear in her evidence-in-chief and her answers to questions put to her during cross-examination and the contradiction between her version and that of other state witnesses.

[4] The complainant in this matter was 13 years old as at the date of the incident. She testified that she and her friend went to church on the evening of the date of the incident. Her friend left her outside the premises of the church and returned to her home. Child offender No. 2, who was once her boyfriend, arrived and asked her to accompany her to his home. She agreed. Along the way she informed child offender No. 2 that she wants to go back to the church. He convinced her that he is not going to be long and that they will both return there shortly thereafter. About four of the child offender No. 2's friends, two of whom testified on behalf of the State, were found at his home. Shortly thereafter child offender No. 1 entered into the house whilst in possession of dagga which he offered child offender No.2 to smoke. Child offender No. 2 ordered her to lie on the bed and slapped her several times across her face when she refused. It was at that stage that the other boys who were inside the house playing a game of monopoly left the room. Child offender No.1 and 2 were doing funny things and laughing as if they were mentally unsound. Child offender No. 2 grabbed her by her neck, forcefully undressed her, put her between her legs and kissed her. He then had an act of sexual penetration with her. She was crying and trying to push the 2nd child offender him away from her in the process.

[5] After the act of sexual penetration, the 2nd child offender told her to do the same with the 1st child offender. The complainant did not respond. She instead continued to cry. The 2nd child offender snatched her pants from her as she was putting it on. The 1st child offender ordered her to have an act of sexual penetration with him and she refused. He then penetrated her sexually nonetheless. As he was doing so, child offender No.3, No.4 and one F[...] entered the room and switched on the light. F[...] said shame as if he was feeling pity for her. Child offender No.1 jumped from her and covered her with a duvet. Accused No. 4 told the others that he will accompany the

complainant home and that he will go first to his home to change his torn T-shirt. She left with child offender No.3 and accused No.4.

[6] Upon their arrival at accused No.4's house, which was approximately 500 meters away from child offender No.2's house, accused no. 4 asked her if she thought he could accompany her for nothing. Accused No.4 went out and whistled. He told her that those other boys who were at child offender No.2 were coming. Accused No.4 told her that he is begging her to do what he was asking her to do. At that stage, child offender No.1 arrived and undressed her. He ordered her to engage in an act of sexual penetration with accused No.4. Accused No.4 then engaged in an act of sexual penetration with her followed by child offender No.3. She stated that she just accepted everything that was happening to her at that stage because she was tired. At a later stage she, accused No.4 and child offender No.3 proceeded back to the 2nd child offender's house. She ran to her friend N[...]'s house after the offenders had entered into the 2nd child offender's house. She reported to her friend that she had been with Phillip who chased her away. She was embarrassed to tell the truth because her friend's boyfriend was present. She left her friend's place in the morning.

[7] The complainant stated that she did not tell her mother about what happened upon arrival at home. Her mother sent her on an errand to Tshosene. The next day which was a Sunday, she and her mother were at the mealie fields when N[....] came. N[....] confronted her about what she heard had happened to her. She narrated to N[....] about what had happened to her. She further told N[....] that she was ashamed of going to school the next day as other school children are going to laugh at her. N[....] advised her to arrive earlier than all other children and to report

the incident to the teachers. It is her teachers who brought the incident to her mother's attention.

[8] When cross-examination commenced, the complainant stated that she no longer wish to proceed with the matter because it was affecting her studies. The trial proceeded nonetheless and the matter was postponed when she answered most of the questions with either 'I do not know' or 'I cannot remember', seemingly because the regional magistrate formulated a view that she was not in good form. When cross-examination resumed on the next sitting, she initially stated that she willingly left the church with child offender No. 2 and proceeded with him to his house. When asked why she decided to go with him when their love relationship had ended she said it is because he throttled her, something that she never said in her evidence-in-chief. When asked as to why she did not scream when child offender's No. 1 and 2 were raping her, she stated that it was because the 2nd child offender was pointing a knife at her. She further stated that she was afraid to report to her mother because she always told her to stop walking around at night because she will not be able to deal with what may happen to her. She stated that the only reason she decided to inform her friend about what happened was because she, N[....], had already heard about the incident.

[9] What follows is in short what transpired when the version of child offender No.2 was put to the complainant:

"... Accused No2 proceeded with you to his neighbour's house... He did not proceed with me.

Nis neighbour's name is one Trinity Munyela...No

Accused No. 2 then requested a room at trinity Munyela's homestead to be with you. ...I do not know.

The keys were given to accused No. 2...I do not know.

You had sexual intercourse with accused 2 on the date in question as per your agreement before your arrival at trinity's homestead. ...I do not know.

After having sexual intercourse, you then left Timothy's homestead and proceeded back to accused 2's homestead. ... I do not know.

You then proceeded to accused 2's homestead. ... I do not know.

After a while, one Jaftha Mabunda and Matimu Mhlongo came to accused 2's homestead. I cannot recall the names of the people who came there but there are people who came there. ...

Yourself, you remained inside the house while accused 2 and others were playing the game of monopoly. ... Correct.

Accused 1 then proceeded to enter inside where you were. ...Correct.

After a while, accused 2 came inside the house and found you having sexual intercourse with accused 1 on the floor. ...I cannot remember as to what is it which I was doing or what was happening.

When the two of you saw accused 2, you then stopped to have sexual intercourse. ...I do not know.

Accused two, as he was your boyfriend, asked you as to why you were having sexual intercourse with accused 1. You said you are also in love with him. He did not ask me that. I do not know". ...

The version of accused No.3 and 4 was put to the complainant and she proceeded to respond to it in a similar manner.

[10] Hope Malatji testified that on the date of the incident he was one of the boys who were playing monopoly at child offender 2's house. He stated that upon his arrival there he found that somebody was lying naked on top of a woman. He stated that child offenders 1 and 2 were alternately engaging in acts of sexual intercourse with the said woman. This was happening in the presence of child offender 3 and accused 4 were also in the house playing a game of monopoly. The complainant was silent and not crying during the process and never asked for help.

[11] Jafta Mabunda testified that he too was at child offender No.2's house on the date of the incident. His version is almost identical to that of Malatji. During questioning by the court he stated that the complainant was a participant in that she was fondling child offender 1's naked body while the latter was lying on top of her. He conceded during re-examination that he never told the prosecutor that he saw the complainant fondling the child offender during consultation.

[12] N[....] P[....] M[....] (N[....]), the complainant's friend, stated that the complainant arrived at her boyfriend's house at about 1 am. She reported to her that she was from a tavern which is known as White House. Her boyfriend was fast asleep and could not hear them when they were talking. The next day she went to the complainant after a certain boy had told her that the complainant has been behaving in an abhorring manner which resulted in her being raped. The complainant confirmed that she was indeed raped by the four accused persons. She advised her to report the incident to the teacher as she, the complainant was concerned that

other school children are going to laugh at her. She further told her that she could not tell her mother because she had warned her on numerous occasions not to move around at night.

[13] The complainant's mother, M[....] M[....], testified that she took the complainant to the police station and the clinic after she received a report about the rape from her teachers. The complainant reported to her that three of the boys raped her at the same place. She stated that the complainant did not find her at home because she had already gone to the mealie fields. She had told her father to tell her to follow her there whenever she arrives back home. She confirmed that she has always been warning the complainant not to come back home late because of the prevalence of rapes, murders and robberies that are occurring in that area.

[14] Forensic nurse Molleth Munene Houmu examined the complainant and found no visible injuries.

[15] The four accused elected to testify in their defence. They all admitted that they were at child offender 2's house and that they engaged in acts of sexual penetration with the complainant. Child offender 1 stated that he did this at child offender 2's place. Child offender No.2 on the other hand stated that with him it happened at one Trinity's house. This Trinity is one of the boys who were playing monopoly. Child offender No. 3 and accused No.4 admitted that the acts of sexual penetration between them and the complainant happened at accused 4's house. All four testified that these acts of sexual penetration were with the complainant's consent.

[16] Convictions of persons accused of committing offences always has the potential of encroaching on fundamental human rights, in particular the right to freedom, that every person should enjoy in terms of the Constitution, albeit reasonable and

justifiable under section 36 of the Constitution. It is a well-established principle of democratic constitutions throughout the world, inclusive of South Africa, that the limitation of these rights shall occur only where the State has proved its case against the accused beyond a reasonable doubt. In **S v Van der Meyden 1999(1) SACR 447 (W) at 448f-i** Nugent J, as he then was, stated as follows:

*“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see for example. **R v Difford 1937 AD 370 at 373 and 378**). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at explanatory in isolation in order to determine whether it is reasonably possible that he might be innocent.”*

[17] Advocate Mashiane, who represented the DPP, and the regional magistrate both submitted that the conviction should be confirmed in that it is highly improbable that the complainant, a 13 years old girl, could consent to an act of sexual penetration with four boys in the presence of one another. Conversely, another proposition proffered was that, it is highly improbable for child offenders 1 and 2, who have testified that they had a love relationship with the complainant, to allow the

others to have sexual intercourse with the complainant. It is evident that these submissions go against the established principle that a verdict, be it a conviction or an acquittal, must be based on the evidence, direct or circumstantial, that has been presented before the court. It is further a well-established principle that conjecture has no role to play in the evaluation of the evidence. I fail to find any evidence in this case which supports the submissions by the regional magistrate and advocate Mashiane in this regard. Advocate Mashiane was unable to say with conviction that such incidences, where people do engage in such activities with consent of all involved, never occur in this world.

[18] Mr Legodi submitted that this is one of those rare rape cases that occur in the presence of eye witnesses. Mr Legodi contended that some of the eye witnesses' versions contradict that of the complainant while corroborating the accused persons' version that sexual intercourse took place with the complainant's consent. This, the argument continued, appear from the version that she neither cried nor complained about what was happening to her to those who were present and further that she was actively involved. Mr Legodi further contended that the regional magistrate failed to deal with the startling contradictions and weaknesses in the testimony of all State witnesses in his judgment. He further submitted that had he done so, he would have found that the contradictions are so material as to justify a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977.

[19] The correct manner of evaluation of the factual disputes has been enunciated as follows in **Stellenbosch farmers' Winery Group Ltd. And Another v Martell & Cie SA and Others (427/01) [2002] ZASCA 98 (6 September 2002)** at [5]:

[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which

may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.

Although the above principle was applied in a civil case, I find it useful in the evaluation of the evidence presented in a criminal case as well.

[20] The absence of consent is one of the elements that the State must prove in a criminal case. Ordinarily, evidence of the use of force in the form of violence or threats of violence directed at the victim will assist the court in arriving at a conclusion that there was no consent. In this case the complainant initially testified that she walked with child offender 2 freely and voluntarily from the church up to his house. When asked why she would go to his house with him at that time of the night when she had testified that she was no longer in a relationship with him, she changed and said he throttled her when she told him that she does not want to go with him. This was clearly an afterthought. Her version that child offender No.2 slapped her several times across her face when she refused to engage in acts of sexual penetration is not corroborated by other state witnesses. Mabunda testified that the complainant was an active participant who was busy fondling the child offender. He further stated that she did not cry nor ask for help despite the presence of the boys who were there to play a game of monopoly. The regional magistrate and advocate Mashiane's submissions that the complainant's silence should not be misconstrued as consent but that she simply submitted to the accused's demands. It is unfortunate that there is no evidence to support this conclusion.

[21] A conviction of an accused person must follow on the evidence of truthful, reliable, trustworthy and credible witnesses. On the contradictions in the complainant's evidence, the regional magistrate submitted, in line with **S v Mkhohle 1990 (1) SACR 95 (A) at 98e-f**, that the court must not reject a witness' evidence simply because he/she has self-contradicted. It should rather look at the number of such contradictions, their nature and importance. However, it cannot be overlooked that the complainant's evidence-in-chief differs materially with what she said during cross-examination. During argument I stated that it appears to me that the evidence-

in-chief goes to the East whilst answer to cross-examination go to the West. On evaluation of contradictions and inconsistencies see also **S v Mafaladiso en Andere 2003 (1) SACR 583 (HHA) at 584h -j**. The extract of what transpired during cross-examination as quoted above is evidence to the above reasoning. When taken through what she stated in-chief she simply avoided the question by either stating that she does not know anything about what she is being asked or could not remember what she had stated or what had transpired. She continued in that way with regard to crucial questions relating to who had an act of sexual penetration with her and where. I am of the view that these are the sort of inconsistencies which according to Mkhohle, should persuade the court into rejecting a witness' evidence in its totality. More so after evaluating in the light of other evidence presented before it.

[22] The regional magistrate submitted that this court should remind itself that Mabunda and Malatji were the offenders' friends and that they were inclined to protect them. The best person to know about this would, in my view, be the prosecutor. He or she would make use of the mechanisms at his/her disposal in the CPA in order to avoid any adverse effect on the State's case. The State failed to show, by way of re-examination that the two witnesses were lying or that they have fabricated a story in order to exonerate the accused. All the prosecutor did was to state that the witness did not bring certain facts to her attention during the interview.

[23] The accused's attorney dwelt much on the complainant's failure to report the incident to N[...] and to her mother. The regional magistrate and advocate Mashiane submitted that this court should accept the explanation that she was too embarrassed to report to N[...] in the presence of her boyfriend. With the mother, the submission was that the explanation that she could not tell her mother because she, the mother, has been warning her that such a thing will happen to her if she

continues to come back home late is reasonable. Mr Legodi on the other hand argued that the complainant was not embarrassed by what the accused allegedly did to her, but by her abominable conduct as alluded to by the boy who reported to N[....]. Be that as it may, the lies that the complainant told are what concerns me in this matter. She stated that she told N[....] that she was with Phillip. On the contrary, N[....] testified that she informed her that she was coming from the White House tavern. Mr Legodi contended that the court should accept the version of N[....] particularly because she testified that her boyfriend was fast asleep and could not hear what they were saying. I agree with this submission. With regard to the mother, the complainant testified that her mother was at home when she arrived in the morning and that she further sent her on an errand. The mother's version was that she was already at the mealie fields when the complainant arrived and had informed her father to tell her to follow her there. These contradictions negatively impact on the credibility of the complainant.

[24] Section 58 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides as follows:

“58 Evidence of previous consistent statements

Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such consistent statements.

This section is stated in a way that grants courts discretion to draw an adverse inference in certain instances, depending on the reasons furnished by the witness for his/her failure to report and the circumstances of each case. I agree with Mr Legodi's

submission that the complainant was ashamed of her behaviour and reported the matter only because many other people were already aware of it. The lies in her version, that I have alluded to above, are such that any court would be justified in drawing an adverse inference against her. She simply did not want her friend and her mother to know the truth.

[25] The advocate Mashiane submitted, on the basis of **S v B 1996(2) SACR 543 (C)** that it is improbable that the complainant would have ran away if she consented to the sexual encounters. Mr Legodi contended that this submission should be rejected in that had she intended to run away she would have done so when she realised that accused 4 was lying to her and would not have proceeded with them back to child offender No.2's house. I am of the view that the complainant's version on this aspect did not take the matter further.

[26] In application of the principle laid down in **Stellenbosch Farmers Wineries** above, it is evident that the complainant is not a truthful, reliable and trustworthy witness. Her evidence differs vastly from that of other witnesses and is self-contradictory. The version of other state witnesses corroborates that of the accused persons. It cannot be said that the State has discharged its onus of proving the guilt of the accused/ child offenders beyond reasonable doubt. I tend to agree that this case should not have gone beyond section 174 of the CPA. It would appear that the regional magistrate convicted the offenders in this matter simply because he did not believe their version. This aspect was dealt with as follows in **R v Difford** (see paragraph 16 above):

"...It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the Court is not entitled to convict unless it is satisfied, not only that

the explanation is improbable, but that beyond any doubt it is false. If there is a reasonable possibility of his explanation being true, then he is entitled to his acquittal..."

I am unable to find that the explanation given by the offenders in this matter is not reasonably possibly true when it is corroborated by the version of other State witnesses and further in the light of the finding that I have already made with regard to the complainant's credibility.

[27] It is indeed desirable that sexual offence cases in general, and where victims are children in particular, should be prioritised and be accorded the sensitivity that they deserve. It is equally established that courts should play an active role in curbing their escalation. However, in doing so, courts should guard against going beyond what is legally acceptable and established principles governing evaluation of the evidence presented before them. Doing so will undeniably bring the administration of justice into disrepute. I am alive to the fact that there is a thin line between what is legally wrong and what is morally unacceptable. The conduct of the accused and the complainant in this matter is clearly abominable, however, I find it to be discriminatory to punish the offenders alone, who themselves are children, when the complainant was also a willing party in what had happened. The moral blameworthiness of the offenders in this matter does not necessarily translate into criminality.

[28] One other aspect that I raised with the regional magistrate is whether section 15 (2) of the Sexual Offences Act is not applicable. I agree with the submissions made

by the regional magistrate, advocate Mashiane and Mr Legodi that it is not applicable. I will leave it at that. Furthermore, although the complainant testified that child offenders were smoking dagga which made them to behave as if they were insane, the trial court as well as the parties did not take this version further. The issue of *mens rea* was therefore not dealt with. The submissions by the advocate Mashiane that the defence did not raise this issue as a defence and as such the court has no basis on which to find that the accused were not criminally liable.

[29] It is my finding that the regional magistrate misdirected himself with regard to his factual findings. It is further my view that the facts of this case do not support the legal conclusions arrived at by the trial court. The proceedings in the trial court are resultantly not in accordance with justice and stands to be set aside.

[30] In the result I make the following order:

The conviction of the four accused / child offenders and the sentences imposed pursuant thereto by the trial court are set aside.

M.V SEMENYA

JUDGE OF THE HIGH COURT

I agree

M.F KGANYAGO

**JUDGE OF THE HIGH COURT; LIMPOPO
DIVISION.**

APPEARANCES

ATTORNEYS FOR THE CHILD OFFENDERS : LEGAL AID SOUTH AFRICA

COUNSEL FOR THE CHILD OFFENDERS : MP LEGODI

ATTORNEY FOR THE STATE : DPP

COUNSEL FOR THE STATE : ADV. L MASHIANE

DATE OF HEARING : 30 JANUARY 2020

DATE OF JUDGMENT : 13 FEBRUARY 2020