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REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: A26/2019

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

JOHN SHITLHANGU

APPELLANT

And

THE STATE

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] On the 3rd October 2020 and upon hearing the appeal, the court pronounced an order that the appeal against conviction and sentence is upheld. The conviction and sentence was set-aside and it was ordered that the appellant be immediately released from prison. What follows are the reasons for the order.
- [2] The appellant appeared in the Regional Court Nkowankowa before Kganyago MT on two counts of rape read with the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. He was found guilty as charged on both counts and sentenced to serve an effective term of 20 years' imprisonment after the court *a quo* found substantial and compelling circumstances to exist which justify a deviation from the prescribed minimum sentences. The appellant has appealed against both conviction and sentence. The appeal is with the leave of the trial court.
- [3] The backgrounds facts are as follows. As per the charge sheet it is alleged that the appellant had raped the complainant who was 12 years' of age as at the 6th January 2015 and 16 March 2015. The first State witness to testify was P[....] N[....] M[....] the complainant's aunt. She proved the age of the complainant by handing in the complainant's birth certificate.
- [4] She testified that on 16th March 2015 Precious who was of the same age as the complainant reported to her grandmother that whilst at school the complainant was in possession of money. The grandmother

reported that to their neighbour. After that the grandmother and the neighbour called the police. Before the police could arrive, the grandmother asked the complainant where she got the money and she denied ever having money whilst at school. The mother of the complainant then told her that she was going to call the police if she did not tell them where he got the money. The complainant told her grandmother that if her mother was going to call the police, she will tell them where she got the money. She then told them that she was given money by the appellant who was working at their school as a security guard.

- [5] They asked the complainant how it happened that the appellant gave her money and she told them that she was followed by the appellant as she was going to school. As she was passing the bushes, the appellant grabbed her. She fought with the appellant, but the appellant overpowered her and raped her. After raping her he gave her R30-00. The appellant when he saw a herd boy coming to their direction left the complainant. After that the complainant went to school. The complainant only started explaining to them how she got the R30-00 after they threatened her that they were going to call the police. That the complainant further told them that it was not the first time that such an incident happened to her by the appellant, and that it started in January.
- [6] S[....] M[....] was the State second witness to testify. She testified that she is the complainant's neighbour. On 16th March 2015 she was called to the complainant's homestead. When they called her, she thought they wanted her to assist them in phoning an ambulance as the complainant's mother was very sick. On arrival at the complainant's homestead she found the complainant's mother and grandmother seated under a tree. The complainant's mother told her that she saw the

complainant having R20-00 and she suspect that the complainant was being abused. The complainant's mother further told her that when she asks the complainant where she got the money, she did not respond to them. The complainant's mother requested her to call the police so that the police can interrogate her. The complainant was present when her mother made a report to her and also requested her to call the police.

[7] The complainant was the third witness to testify for the State. She testified that she was 15 years old and staying with her grandmother. On the 16th March 2015 she was walking to school. As she was walking the appellant called her but she did not accede to his demand. The appellant followed her and chased her. The appellant caught her in the bushes where he tripped her and she fell to the ground. After falling the appellant pulled her by the school bag which she was carrying on her back. He then laid her by her back. The appellant pulled her panty and inserted his penis into her vagina. She started kicking the appellant and also crying loud. The appellant told her that if she tells anyone, he will cut off her head and throw it into a toilet. After he had finished raping her, the appellant gave her R20-00. She used that R20-00 to buy food at school.

[8] She walked to school even though she could not walk properly. She arrived late at school. She did not tell anyone about what had happened to her as the appellant had threatened her.

[9] On arrival at home Precious reported to her grandmother that she was having money at school. When her mother asked her about the money she did not respond. Her mother started crying. Her grandmother pretended to be calling the police on her cell phone, and that is when

she told them that she was raped. Her grandmother requested their neighbour to call the police.

[10] It was not for the first time that the appellant raped her. The first time was in January 2015 and she was coming from drawing water. On the first occasion the appellant pulled her into the bushes where he forced her to lie on the ground by tripping her, took off her panty and raped her. After raping her, he gave her R30-00.

[11] Under cross examination it was put to the complainant that it was impossible for her to have met the appellant at his place of employment around 8h00 as that night he had worked night shift and had knocked off at 6h00 and at 8h00 he was at his home with Flora Mafumo. The complainant conceded that she was not willing to tell her mother and grandmother where she got the money, and only did so after being threatened with the calling of the police. She further conceded that the reason why she told her mother and grandmother that it was the appellant who gave her money, was that she did not want them to call the police.

[12] The State called Monene Homu as its fourth witness. She testified that she is forensic nurse who had examined the complainant. After examining the complainant, she completed a J88. Her observation and conclusion was that there was an old cleft at 3 O'clock position of the hymen and a bump at 5 O'clock position of the hymen supporting history given of sexual assault. She had examined the complainant on 17th March 2015 at 10h30. She took the forensic specimen and handed them to the policeman. Under cross examination she conceded that the

injuries that she had observed on the complainant were no longer fresh but old.

- [13] The appellant testified and denied raping the complainant. On the first count he stated that he did not remember anything about January 2015. With regard to the second count he testified that on 15th March 2015 he was working night shift and he knocked off in the morning of the 16th March 2015 at 6h00. After knocking off he went home. On arrival at his homestead, his neighbour Flora Mafumo came to his homestead and requested him to insert a sim card into her cell phone. After inserting the sim card, it showed on the screen that there was no sim card inserted. He then started cleaning the cell phone, but it still did not function. His neighbour then told him that he had tried and should hand her back her cell phone. That exercise took him a long time and he finished doing that after 8h00. He testified further that blood was taken from him for DNA testing.
- [14] The appellant called Flora Mafumo as his witness. She testified that there was no bad blood between her, the complainant and the complainant's family. The appellant is her neighbour. On the 16th March 2016 from 6h30 to 8h00 in the morning she was at the appellant's homestead. She went to the appellant's homestead so that he can assist her by inserting a sim card into her phone.
- [15] The issue in this appeal is whether the appellant had raped the complainant in both counts. The complainant in both counts in relation to the actual rape was a single witness. It is trite that the court must apply the cautionary rule on the evidence of a single witness. Further the evidence of a single witness should be clear, reliable and satisfactory. (See **S v Sauls and Others**¹). It is also trite that the State bears the onus of establishing the guilt of the accused beyond reasonable doubt. An accused is entitled to be acquitted if there is a

¹ 1981(3) SA 172 (A)

reasonable possibility that he might be innocent. (See **S v Van Answagen**²).

- [16] In convicting the appellant on both counts, the trial court found that the evidence of the State witnesses was clear, coherent and straight forward. It also found that the evidence of the complainant to a certain extent has been corroborated by medical or forensic evidence. The trial court concluded that logic dictates that the injuries observed by the forensic nurse could not have been sustained on 16th March 2015 and that they were as a result of prior rape by the appellant on the complainant. The trial court found that despite the complainant having only disclosed that she was raped by the appellant after her grandmother had threatened to call the police, it was never suggested to the complainant to say she was given the money by the appellant.
- [17] The trial court in concluding that the complainant could not have sustained her injuries on her vagina on 16th March 2015 and that the injuries were consistent with the complainant's evidence that she was previously raped by the appellant, overlooked the evidence of the incident of 16th March 2015 by the complainant that after she was raped, she was injured, could not walk properly and was walking with her legs apart. By walking with legs apart means she was seriously injured. However, when the complainant was examined by the forensic nurse on 17th March 2015 the forensic nurse observed only old injuries. This piece of evidence defies logic and leaves the suspicion that the complainant was not telling the truth.
- [18] The trial court in concluding that the complainant despite disclosing that she was raped by the appellant only after she was threatened with calling of the police, and that it was never suggested to her to say that she was given money by the appellant, overlooked the fact that the complainant under cross examination has stated that the reason why

² [2001] ZASCA 61 (17 May 2001)

she had told her mother and grandmother that it was the appellant who gave her money was that she did not want them to call the police.

[19] In **S v GS**³ Leach JA said:

“[24] Precisely how she had come to make the report was not explored in the evidence, but the fact remains that the complainant’s allegation of rape appears only to have emerged after a confrontation with her mother about her having been at a hotel on a school night. In the circumstances that prevailed, there is a very real suspicion that the complainant’s report of rape was made in an attempt to deflect her mother’s anger.

“[25] In the light of all these factors, I have grave reservations about the credibility of the complainant and in turn her reliability. I am thus not persuaded that the state discharged the onus of proving beyond a reasonable doubt that the appellant’s version of the material events was false”.

[20] The complainant at no stage reported the alleged rapes of January 2015 and 16th March 2015. It was only after she was threatened with the calling of the police that she implicated the appellant. Even out of her own volition she has testified that she had implicated the appellant as she did not want her mother and grandmother to call the police. That in my view affect the credibility and reliability of the complainant’s evidence. It cannot be said that her evidence was clear, coherent and straight forward as found by the trial court.

[21] The appellant on the other hand has raised a defence of *alibi*. However, the trial court has found that defence to be false and rejected it. The basis of rejecting it was that the person who was supposed to have corroborated the appellant was Mr Manabe and not Ms Mafumo, as Mr Manabe was the person who had allegedly relieved the appellant from night shift at 6h00. The trial court found that Ms Mafumo was not an independent witness as she could not explain succinctly why she checked time on arrival at the appellant’s homestead and also when she left, but failed to check the time when she left her homestead.

³ 2010(2) SACR 467(SCA) paras 24 & 25

[22] The appellant has raised his *alibi* defence from the beginning of the trial. It is trite that once an accused raises the *alibi* defence, that *alibi* has to be accepted unless it was proved to be false beyond reasonable doubt (**See S v Musiker⁴**). In my view there was no basis for the trial court to have found that it was only Mr Manabe and not Ms Mafumo who could have corroborated the appellant on his *alibi* defence. There were no inconsistencies between the evidence of the appellant and his witness Ms Mafumo. In my view the State has failed to prove that the appellant's *alibi* was false beyond reasonable doubt.

[23] Taking into consideration that the complainant disclosed that she was raped in January 2015 and 16th March 2015 after being threatened with the calling of the police and that the forensic nurse on examining the complainant on 17th March 2015 found old injuries despite the complainant having testified that she was seriously injured and was walking with her legs apart, I am thus not satisfied that the guilt of the appellant was proved beyond reasonable doubt. The evidence of the State witnesses was unsatisfactory and unreliable. The appeal must be upheld and the appellant must be acquitted.

[24] **In the result I make the following order.**

24.1 The appeal is upheld

24.2 The appellant's conviction and sentence is set aside and substituted with the following.

"The accused is found not guilty and discharged".

MF. KGANYAGO J

⁴ 2013(1) SACR 517 (SCA) at para 15

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

I agree

**E.M MAKGOBA JP
JUDGE PRESIDENT OF THE HIGH COURT
OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE**

APPEARENCES

FOR THE APPELLANT	: MR MANZINI LM
BRIEFED BY	: POLOKWANE JUSTICE
CENTRE	
FOR THE RESPONDENT	: ADV KOTZE JJ
BRIEFED BY	: DPP POLOKWANE
DATE OF HEARING	: 23RD OCTOBER 2020
DATE OF JUDGMENT	: 3RD DECEMBER 2020