

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal No.: A112/2019

In the matter between:-

ZUKILE NUNWANA

Appellant

And

THE STATE

Respondent

JUDGMENT BY: C. J. MUSI, JP *et* N.M. MBHELE, J

HEARD ON: 4 NOVEMBER 2019

DELIVERED ON: 7 NOVEMBER 2019

- [1] The appellant was convicted by the Regional Magistrate, Bloemfontein, of raping the complainant more than once, whilst she was 16 years old, and sentenced to life imprisonment. He appeals against conviction and sentence.

- [2] The complainant is the appellant's stepdaughter. During October 2014 the complainant's mother was hospitalized. She stayed with the appellant and her grandmother, whilst her mother was in hospital.
- [3] On the evening of 2 October 2014, the complainant was sleeping on a couch in the living room. Her grandmother was sleeping in one of the bedrooms and the appellant in the other bedroom. In the course of the evening the appellant approached her and asked her to sleep with him in the bedroom. She refused. During the course of the evening the appellant approached her and undressed her. She asked him what he was doing and he told her not to scream or tell anyone and if she does he would kill everyone in the house. He had sexual intercourse with her without her consent.
- [4] The next day she went to school as if nothing happened. The evening she prepared food for the family whereafter they went to bed. The appellant approached her again and had sexual intercourse with her. Approximately one week after this incident the appellant asked her whether she wanted to sleep with him and she said no. On another occasion the appellant was wielding a knife and threatened to kill her if she reported to her grandmother that he had sexual intercourse with her. She could not recall how many times he had sexual intercourse with her.
- [5] Her mother was discharged from hospital and asked her who was abusing her, she said no one. Her mother told her that someone called her and informed her that she is being abused. Her grandmother told her not to say anything until all the family members were there. When her family members arrived her grandmother asked her what happened. She said nothing happened. Her grandmother told her to speak the truth and she then reported that her stepfather raped her.
- [6] The complainant's grandmother testified that while her daughter was in hospital the complainant made a report to her about the fact that the appellant was having sexual intercourse with her, without her consent. Complainant informed her that this happened on three occasions. The complainant

informed her that she screamed but that the appellant threatened to kill her. She called Bongiwe and the complainant's mother and requested the complainant to repeat what she told her. The complainant was crying while she told them about the incidents. She reported the matter to the police.

- [7] The complainant was examined by a forensic nurse and no visual or genital injuries were noted.
- [8] The appellant testified and denied the allegations against him. According to him the probable motive behind the charge is that he wanted the children to relocate to the Eastern Cape. He further testified that he and the complainant got along very well and during 2013 the complainant kissed him on his penis. According to him, he slept in the outside room whilst the complainant's mother was hospitalized. He did not sleep in the house during that time.
- [9] It is trite that a Court of Appeal will not easily interfere with the trial court's factual findings unless such findings are clearly wrong. It is also trite that the State must prove the guilt of the appellant beyond reasonable doubt.
- [10] Mr. Steyn initially supported the trial court's factual findings but he was constrained to concede that those factual findings are not supported by the evidence.
- [11] The Regional Magistrate paid lip service to the cautionary rule relating to evaluating the evidence of a single witness. Although he stated that he must look at all the evidence, he clearly did not do that.
- [12] He found that the contradictions between the complainant's testimony and her statement were not material. In the statement she stated that on the morning of 3 October 2014, the appellant touched her breasts and she told him that she was going to tell her mother. In her statement she stated that she tried to scream but the appellant closed her mouth. She did not mention this whilst testifying. She did not mention that he threatened her with a knife. She also

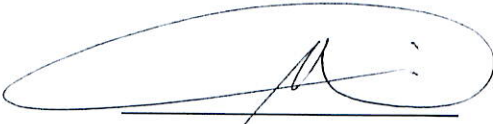
did not mention, in her statement, that he promised to give her money. These are indeed material contradictions.

- [13] The Regional Magistrate found that it is unlikely that the complainant would “consistently repeat a fabricated story”. There was no consistency at all, as the discrepancies between her testimony and her statement clearly show.
- [14] He found that her recollection of the events was good. Unfortunately the complainant, who was 18 years old when she testified, could not remember on how many occasions the incidents happened and mentioned as an afterthought that the appellant had a knife at one stage.
- [15] The Regional Magistrate also found that the complainant is “corroborated in the fact that she indeed reported the incident to her grandmother and that at the time of reporting she was emotionally disturbed, crying and shivering”. First, the report is not a first report. It was not done voluntarily at the first reasonable opportunity. When the complainant was asked by her mother she denied that anything happened. Second the “first report evidence” does not serve as corroboration but is indicative consistency. That is the true purpose of the “first report evidence”.
- [16] In fact it is not clear when and to whom the first report was made. According to the complainant her mother confronted her with the allegation that she was being abused. During cross-examination, her grandmother testified that the complainant tried to tell her what happened but did not do so until her mother was discharged from hospital. The evidence relating to the first report is, at best, confusing. The Regional Magistrate misdirected himself and did not give proper consideration to the evidence.
- [17] The appellant was not a good witness. The Regional Magistrate justifiably criticized his version. His version that the complainant kissed his penis was not put to the complainant. Likewise the version about his intention to send the children to the Eastern Cape and his mother-in-law’s objection thereto was not put to the State witnesses.

[18] Regardless of the demerits of the appellant's version, the State must still prove its case beyond reasonable doubt. I am not convinced that the appellant's guilt has been proven beyond reasonable doubt.

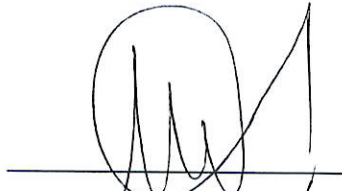
[19] I accordingly make the following order:

1. The appeal is upheld.
2. The conviction and sentence are set aside.

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C.J. MUSI, JP

I concur.

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N.M. MBHELE, J

Appearances:

For the Appellant:

Ms V. Abrahams
Legal Aid South Africa
Bloemfontein

For the Respondent:

Adv C.F. Steyn
Director Public Prosecutions
Bloemfontein