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**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

- REPORTABLE: NO
- CIRCULATE TO JUDGES: YES
- CIRCULATE TO MAGISTRATES: NO
- CIRCULATE TO REGIONAL MEGISTRATES: NO

APPEAL NO: CA&R 14/19

Heard on: 22 September 2019

Delivered on: 29 November 2019

In the matter between:

GRANT MBEDZI

APPELLANT

and

THE STATE

RESPONDENT

Coram: CC Williams J et L Vuma AJ

JUDGMENT

VUMA AJ

[1] The appellant was convicted by the regional court in Galeshewe on one count that he contravened the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007 (rape), read with the provisions of section 51(1) of Act 105 of 1997 in that on or about the 18th December 2015 he committed an act of sexual penetration with "the complainant", a 13 year old girl, by inserting his finger into her vagina without her consent. The trial court imposed a 16

years direct imprisonment sentence and the appellant was further declared unfit to possess a firearm. He now appeals against both conviction and sentence.

[2] The appellant states his grounds of appeal against his conviction as follows: The trial court erred in the following respects:

1. It failed to take into account the material contradictions between the evidence of the complainant and the version of the social worker contained in her report as was told to her by the complainant;
2. It failed to apply the cautionary rules applicable in respect of single witnesses and child witnesses;
3. In finding that there was corroboration for the complainant's version in the evidence of Dr Gradi;
4. In finding that the state proved beyond a reasonable doubt that the appellant penetrated the complainant;
5. In rejecting the version of the appellant as not being reasonably possibly true; and
6. In convicting the appellant of rape.

FACTS OF THE MATTER AS PER THE EVIDENCE

[3] What is common cause in this matter is that at the time of the alleged offence both the complainant and the appellant were close and knew each other since they were both staying at the complainant's grandmother's house. **Ms A[....] M[....]** testified for the state and stated that she is complainant's mother and that the alleged incident occurred when the complainant was 13 years old. On 18 December 2015 at about 22H00 whilst already asleep at her place of abode, she was woken up by a knock at her window and upon opening the door found that it was the complainant who was crying. Upon enquiring what the issue was, the complainant told her that the appellant had poked her in her vagina with his finger.

[4] They then proceeded to the complainant's grandmother's house whereat she confronted the appellant about the alleged incident. He denied ever doing anything to the complainant. She together with the complainant then proceeded to the police station to lay a charge against the appellant and from there the complainant was

taken to a doctor for medical examination. The complainant explained to her that whilst lying on her back and outside the house on the 'stoep' together with a certain baby and the appellant, she felt a finger inside her vagina which caused her pain.

[5] **Dr A[....] G[....]** also testified for the state and stated that he is a specialist in family medicine. At 03:00am on 9th December 2105 and whilst on duty at the Kimberley Hospital he did a clinical examination on the complainant and completed a J88 form. He was informed that the complainant was touched by her uncle's friend in her private parts whilst sleeping. She experienced pain, jumped up and ran away. He saw some discharge which he collected swabs from to be sent to a laboratory for analysis. The hymen was still intact. The doctor's conclusions are that although he did not see any evidence of vaginal penetration, he could however not exclude the penetration on the external genitalia, especially in light of the increased redness he saw at 5 o'clock. The redness could however have been caused either by the fluid/ discharge in the complainant's vagina as a result of an infection or by trauma.

[6] He further defined trauma as *'anything that would pinch or apply, sets a definite amount of pressure to the genitalia.....also, the redness could have been caused by trauma or if somebody touches inappropriately'*. He further testified that he neither saw any signs of injury on the complainant's *labia majora*. However, he minimized the presence of infection as being the possible cause of the redness, explaining that otherwise he would have expected to see a more generalized swelling. The swab analysis, though never forthcoming, could have indicated if the discharge was normal or due to an infection.

[7] A professional **report completed by the social worker** was, by agreement between the state and the defence, handed in and received by the trial court as an exhibit to substantiate the application by the state that the complainant testifies *via* an intermediary in terms of section 170A of Act 51 of 1977. In her report, the social worker states that the complainant informed her that the incident happened at night whilst she was lying on her bed when the appellant put his finger on her private parts, at which instance she woke up and ran away.

[8] **The complainant** testified that on the night in question the only people who were at her grandmother's house at the relevant time was herself, her uncle's one year old child and the appellant. Whilst sleeping inside the house and dressed in her cotton- made jumpsuit the appellant called her to come sleep outside saying it was

hot inside the house, which suggestion she rebuffed but acted on later. She then went outside and found the appellant together with her uncle's one year old child lying on a blanket outside. She joined them and then fell asleep. At the time she fell asleep her jumpsuit's top-part was lying by her waist given the hot weather.

[9] She was then awoken by a sharp pain she felt in her vagina and found that it was the appellant's finger which he had inserted in her vagina. I should mention at this stage that when the prosecutor asked her during examination-in-chief how she knew that it was the appellant's finger which pricked her, the complainant answered that she could not distinguish, but that it was something big and when she woke up the appellant was moving his hand away from her.

[10] At that time the appellant was lying next to her and she quickly got up and ran outside the yard to seek for help from a neighbour whom she found flat drunk. She then proceeded to her mother's place of abode and told her mother that the appellant had pricked her with his finger on her vagina.

[11] When confronted with the version she allegedly gave to the social worker that at the time of the incident she was lying on her bed, she denied ever having a conversation with the social worker, disavowing such a version. She also denied the appellant's version as was put to her.

[12] **The appellant** testified in his own defence and called one witness. He stated that on the day of the incident he was sitting outside the house with his friends A[...] and B[...] listening to music and having a few drinks. The complainant was inside the house busy playing radio. Whilst they were busy talking outside the complainant came running out of the house, shouting and screaming. Thinking there could be someone inside the house, the appellant went inside the house to check and found no one. Shortly thereafter the complainant's mother arrived with her and shouted at him that she was going to the police and that he raped her child. He denied that he did that. He stated that he and the complainant had a normal relationship and there was no hard feelings between them. As a possible motive for the complainant falsely implicating him in the alleged offence, the appellant explained that money had allegedly disappeared from the grandmother's house that night which the complainant was suspected of stealing and that she possibly wanted to deflect attention from the theft by accusing him of molesting her.

[13] **Mr M[....] G[....]** also testified in the appellant's defence that he was also

staying at the same house as both the complainant and the appellant then but that at the relevant time of the alleged incident he was not present at the shared home, having left his child with the appellant who was on the stoep with a person by the name A[...], who have since passed. At that time the complainant was inside the house busy watching television. When he returned home with his mother, the appellant' and A[...], were standing outside and he was informed that the complainant had run out of the house screaming. Mr G[...] had no knowledge of Big Joe being present at the house during the course of the night.

SUBMISSIONS BY THE STATE

[14] It was submitted that the appellant was the perpetrator and that the redness inside the complainant's vagina supports her version that there was penetration which went past the *labia majora* although it did not result in a full-on hymeneal penetration. It was further submitted that even the slightest penetration constitutes rape and that that is what has occurred *in casu*.

SUBMISSIONS BY THE DEFENCE

[15] It was submitted that from the Doctor's testimony, there was no sign of vaginal penetration and that at worst, the appellant's actions were nothing more than to touch the external part of the complainant's genitalia, which would then constitute an offence of sexual assault and not rape.

LEGAL PRINCIPLES

[16] Section 3 of the Sexual Offences Act defines rape as "an act of sexual penetration, without the consent of ('the complainant'). In terms of section 1, 'sexual penetration' is defined to include under subparagraph (a) thereof "*any act which causes penetration to any extent whatsoever by the genital organs of one person into or beyond the genital organs of..... another.....and (b) any part of the body of any person or, any object, including any part of the body....into or beyond the genital organs....of another person.*"

[17] In the matter of **S v Mahlangu and Another 2011(2) SACR 164 (SCA)**, the Court held the following at paragraph 21:

[21] Section 208 of the Criminal Procedure Act 51 of 1977 provides that:

'An accused may be convicted of any offence on the single evidence of any competent witness.'

The court can base its finding on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration.'

[18] In **S v Sauls and Others 1981 (3) SA 172 (A)** at 180 E-H Diemont JA said *'there is no rule of thumb test or formula to apply when it comes to a consideration the credibility of the single witness'.*

ANALYSIS

[19] The appellant alleges that the trial court failed to take into account the material contradictions between the evidence of the complainant and the version of the social worker contained in the latter's report as was told to her by the complainant. I am of the view that since the said report was handed in purely as an exhibit for purposes of an intermediary to be used without the testimony under oath of the said social worker, this court cannot *mero motu* unveil any issue not related to the purpose for which it was intended. Accordingly, this ground cannot succeed.

[20] With regard to the trial court's alleged failure to apply the cautionary rules applicable in respect of single witnesses and child witnesses as being one of the appellant's grounds of appeal, counsel for the appellant did not seriously challenge the credibility findings against the appellant. Neither did he attempt to diminish the weight that could be attached to the complainant's testimony on the grounds that she was a single child witness.

[21] Be that as it may, It is my view that the trial court correctly considered the applicable legal principles relating to the evidence of a young child and single witness. The trial court properly cautioned itself regarding the assessment of the evidence of a young child in weighing her evidence. The complainant had provided consistent details of the molestation without any contradictions. Furthermore, her

evidence provided a clear account of the circumstances under which the molestation occurred, including the place and the occasion. I will however revert to a further aspect of the cautionary rule later herein.

[22] With regard to the trial court finding the version of the appellant not being reasonably possibly true, I am satisfied that the version of the complainant as juxtaposed with the doctor's evidence gives credence to her version of events. The improbability in respect of the appellant's version arises from, *inter alia*, his failure to, without any explanation, to call Big Joe as a witness in circumstances where, on his version, Big Joe was present during the time the complainant alleges to have been raped. The only reasonable inference to be made from the failure to call Big Joe is that he would not have supported the appellant's version of events. The motive he advances as to why the complainant would implicate him was also correctly rejected by the trial court. What cannot be gainsaid is that the appellant and the complainant at the time of this incident were staying in the same house; they were known to each other way before this incident and that they had a very good uncle-niece relationship.

[23] As stated above, the complainant has been consistent with her version, from the time she went to her mother's, to the doctor's and also in court. This court is satisfied that from the above, it cannot be said that the motive allegation is sustainable. It is therefore my finding that the alleged motive is nothing more than a pipedream and thus the appellant's version cannot be reasonably possibly true.

[24] Taking into account all of the above, I am satisfied that the trial court correctly found that the appellant violated the complainant. The version by the appellant that at the time he heard the complainant's screams she was inside the house is highly improbable. Of course he could not have found anyone inside the house as he had stated since it was just the three of them at the time.

[25] The only issue left to consider is whether the offence committed is one of rape or sexual assault, the appellant contends that the magistrate erred in finding on the evidence that there was in fact vaginal penetration. What flows from the complainant's evidence is that the appellant pricked her inside her vagina with his finger. The doctor's evidence is that he found no evidence of vaginal penetration but signs of trauma which could have been caused by touching the complainant's *labia majora*, leading to the redness he saw at the 5 o'clock position. It was thus submitted on behalf of the appellant that on the evidence, a conviction on sexual assault should

have been returned, if anything, and not one of rape.

[26] From the evidence by the doctor and the complainant, it cannot be said that the only reasonable conclusion which one can arrive at is that the offence of rape was committed against the complainant. What the trial court clearly did not consider is the suggestibility of young children, which can be seen in the evidence of the complainant. On her mother's version, the complainant told her that the appellant had poked her in the vagina with his finger. She told the doctor that the appellant had touched her in her private parts. During examination-in-chief, she seems to have assumed the appellant used his finger since she was asleep at the time and only woke up to see him moving his hand away. Should one then have regard to the doctor's inconclusive evidence regarding penetration, trauma or infection being the cause of the redness to the genitals of the complainant, it cannot be safe to uphold a conviction of rape.

[27] Despite the state's contention that, however slight, a genital penetration constitutes rape since it is not a question of degrees, this court is therefore satisfied that the trial court erred in convicting the appellant of rape, which conviction therefore stands to be set aside. A conviction on sexual assault would in my view be competent in light of the evidence.

AD SENTENCE

[28] It follows in view of my finding that the sentence imposed needs to be reconsidered.

[29] The personal circumstances of the appellant are as follows:

1. He was 32 years old at the time of the incident and currently 35 years.
2. He is single father of two children aged 16 years and 18 years whom he financially supports.
3. He has a degree in Mathematics and Computer Science and also obtained a Master's degree therein.
4. At the time of the sentencing proceedings, he was self-employed with a monthly income of between R4000-00 and R20 000-00.

[30] The mitigating factors are the following:

1. Before the case was provisionally removed from the roll, he had spent six months in custody.
2. He is a first offender.
3. He was under the influence of alcohol at the time of the commission of the offence.

[31] The aggravating factors against the appellant is the youthfulness of the complainant, the trust between the complainant and the appellant which the latter abused and took advantage of and the appellant's lack of remorse by persisting with his innocence. The seriousness of the offence and the community's interest is very important.

[32] Despite the sentence in respect sexual assault being lesser as compared to one of rape, it must still emphasised that it is a very serious offence which totally degrades its victim and the courts frown upon such utter infringement of any person's bodily integrity.

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

1. The appeal in respect of both the conviction and the sentence succeeds.
2. The conviction of rape is set aside and substituted with the following:

"The accused is found guilty of sexual assault."

3. The sentence imposed is set aside and replaced with the following:

"The accused is sentenced to 3 (three) years imprisonment".

4. The sentence is antedated to 12 October 2018.

Livhuwani Vuma

Acting Judge of the High Court
Northern Cape High Court Division, Kimberley

I agree

CC Williams

Judge of the High Court
Northern Cape High Court Division, Kimberley

Heard on: 9 September 2019
Judgment delivered on: 29 November 2019

Appearances:

For appellant: Adv I.J. Nel
Instructed by: Rick Ishmail Attorneys

For Respondent: Adv N. Mxabo
Office of the OPP, Kimberley