

REPORTABLE



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR 278/18

In the matter between:

SANDILE PETROS KHOZA

Appellant

and

THE STATE

Respondent

ORDER

In the result, the following order is made:

- (a) The appeal in respect of conviction and sentence by the court a quo dated 14 September 2017 succeeds to the extent that:

‘1. The conviction and sentence imposed by the court a quo is hereby set aside and is substituted with the following order

2. (a) The accused is found guilty of sexual assault.

- (b) The accused is sentenced to 10 years imprisonment.
3. The sentence of 10 years imprisonment is ante-dated to 14 September 2017.'
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APPEAL JUDGMENT

Delivered on: 22 November 2019

Masipa J (Radebe J concurring):

Introduction

[1] On 14 September 2017, the appellant was convicted by the Regional Court, Ulundi on one count of rape read with the provisions of the s 51(1) of the Criminal Law Amendment Act 105 of 1997 read with part 1 of schedule 2 ('the 1997 Act'). He was sentenced to 15 years' imprisonment. This appeal is in respect of conviction only with leave of the court a quo.

[2] It is unclear from a reading of the record which of the two charge sheets set out the charge, which was put to the appellant. While the one charge sheet being written in manuscript, sets out the basis for the charge as being that the appellant unlawfully and intentionally committed an act of sexual penetration with the six year-old girl complainant A[....] M[....] by inserting his finger into her vagina; the typed charge sheet sets out the particulars of the rape as being that the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant, A[....] M[....] a six year-old girl by inserting his erect penis into her vagina without the consent of the said complainant

[3] What the record indicates is simply a recordal that the prosecutor put the charge to the appellant. At the end of the trial, the court a quo, when it convicted the appellant simply stated that the appellant was convicted as charged.

The Facts

[4] The evidence leading to the appellant's conviction and sentence is briefly set out below. The complainant was six years of age when she testified and was admonished. Her evidence was that on 26 November 2016, she and her older sibling S[...] went to the Khoza homestead where they were playing soccer with other children. They found an elderly lady and the appellant. As they were playing, the appellant who said he was going to put a handkerchief around her called her. The appellant who was sitting down in the veranda drinking home brewed beer, lifted her up, and placed her on his thighs. The appellant allegedly inserted his finger into her vagina and moved his finger around. According to the complainant, when the appellant called her and placed her on his thighs, S[...] saw him.

[5] The complainant felt pain and asked the appellant to let her go on three occasions and the appellant ignored her. She then told the appellant that she wanted to drink water and he let her go. She asked for water from B[...], one of the children from the Khoza homestead. They went to get the water from the house. She did not report anything to B[...] and was told that the adults were sleeping in the bedroom. As she did not want to bother them, she did not report the appellant's conduct to them.

[6] When she returned, she went to play and ran away from the appellant. The appellant called her again and allegedly inserted his finger into her vagina for the second time. The appellant told the complainant that he was going to make her his wife and asked her when she would cook and wash for him. While he was saying this, the appellant's finger allegedly remained inside the complainant's vagina. He then said that he was going to urinate, he let the complainant go, and she and S[...] went home. During cross-examination, the complainant confused the day when the incident occurred, initially saying it was a Friday and that they had returned from school and then said it was a Saturday. The court a quo found that this was immaterial to the issues it had to determine.

[7] S[...] M[...] testified and corroborated the complainant's evidence that they went to play at the Khoza homestead. Further, that the appellant was sitting on the veranda drinking homebrewed beer. She also confirmed that she witnessed the appellant calling the complainant and placing her in-between his thighs. They

continued to play and she did not see what happened thereafter. The complainant would go to them to play and the appellant would call her back. Other than the appellant, she did not see any other person sitting on the veranda. When they finished playing, all the children dispersed and she and the complainant went home. She did not notice anything wrong with the complainant.

[8] The complainant's mother Z[....] C[....] M[....] testified as a first report. She was home recovering from an epileptic fit. She had been sleeping and when she woke up, she saw the children playing next to the Khoza homestead. She called them to return home but they did not return until later in the afternoon. When the children returned home, Ms M[....] was asleep and was awoken by the complainant saying it was painful underneath, referring to her vagina. Ms M[....] did not take the complainant seriously and told her to go and bath. This was because she was of the impression that the pain was caused by the soil the children usually played with. After repeating the instruction for the complainant to go and bath, the complainant refused and said that it was because of the uncle. When Ms M[....] asked which uncle she was referring to, the complainant cried and said an uncle from the Khoza homestead who was inserting his fingers into her vagina and turning it inside. Further, that the uncle said he wanted her to be his wife and cook for him.

[9] When Ms M[....] enquired from S[....], she confirmed that she had seen the uncle placing the complainant on his thighs. Ms M[....] reported this to the elders in her homestead and was advised to phone the police, which she did. She also went to the Khoza family to report the incident. The police arrived and took her and the children to the police station but due to her epileptic attack, she was taken home and returned in the morning to make a statement and they were taken to Enkonjeni Hospital for the child to be examined.

[10] Sometime after the incident, the appellant arrived at her home with Mndeni Khoza and other family members from the Khoza family. She was with her father, Mr Jiyane. She told them that the matter was out of their hands and would be dealt with in court. The ladies from the Khoza homestead said that they were there to apologise on the appellant's behalf and offered a goat. The appellant told Ms M[....] that he was too drunk and was apologetic. She told him that he would apologise in

court. Mndeni Khoza never told Ms M[...] that the appellant could not have committed the act he was accused of, as he was very busy with gardening at the Khoza homestead on the day of the incident. They just apologised and said that the appellant was too drunk. When it was put to her that the appellant denied that he had gone to apologise and that he had in fact gone to her home to enquire about the incident, she said that the complainant would not have fabricated the report made to her. When it was put to Ms M[...] that the appellant would deny the incident, she stated that the Doctor had told her that the child had abrasions in her vaginal area.

[11] Moses Mkhontolo Jiyane testified for the State. He corroborated Ms M[....]'s evidence that the Khoza family went to his house. This was on 28 November 2016. It was the appellant, his aunt and Mndeni Khoza. He confirmed further that they said that they were there to apologise. They said they did not know what happened on the day of the incident but that the appellant confessed that he had consumed too much alcohol. When the members of the Khoza family arrived at his house, they said that they were there to enquire as to which child was said to have been sexually violated by the appellant as they had heard of the allegation. When asked further, he could not recall if they said they were there to apologise or if they limited their visit to being there to enquire about the alleged incident.

[12] Doctor Nontuthuko Zamantungwa Buthelezi examined the complainant on 28 November 2016 and completed a J88 medical report form. Under the gynaecological examination, she recorded that the vagina could only admit a tip of a little finger. This was normal for a child of the complainant's age who is *virgo intacta* (meaning never had sexual intercourse before). The hymen was intact. As a result, she could not advance her whole finger into the vagina because the complainant would have felt pain. She could not say there was no penetration or there was any penetration. When she examined the complainant, she was informed that the complainant had bathed which she said could have an effect on the examination since if there had been blood, it would be washed off. If the appellant had advanced the finger to the cervix, it could have caused injuries. These were not seen during the examination.

[13] The appellant testified and denied that he ever touched the complainant and that he was at the Khoza homestead working in the garden. There were many

children playing on the other side. He did not call any of the children. While admitting that the Khoza family went to the complainant's home, he said that it was to enquire as to who the alleged victim was. He denied apologising and further denied that they offered a goat. He accepted that he had consumed beer on that day. While this was never disputed during the State's case, the appellant said during his evidence that it was his brother Mndeni Khoza who was seated on the veranda.

[14] Mndeni Contract Khoza testified for the appellant and confirmed that they had gone to the complainant's homestead. The reason was that there were rumours that the appellant had committed an offence to one of the children in that family. The appellant indicated during the meeting that he knew nothing about the alleged offence. He denied that the appellant had apologised and said that it would not have been easy for him, (Mndeni Khoza) to apologise on behalf of the appellant as the matter had been reported to the police. In addition to this, the appellant kept denying that he had committed the offence.

[15] According to Mndeni Khoza, on the day of the alleged incident, he sat with the appellant on the veranda. He said that if the appellant denied that he had sat on the veranda, that would not be true. Mndeni Khoza denied that the appellant was working in the garden while he was seated on the veranda. He also denied that there was homebrewed beer. He however could not deny that the appellant drank beer and said he was tipsy but was not drunk. He then said the appellant was in his sober senses.

The argument on merits and the analysis

[16] As regards the issue of the two charge sheets, necessary averments should be recorded in the charge sheet. Section 84(1) of the Criminal Procedure Act 51 of 1977 ('the CPA'), provides that 'a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge'.

[17] It is instructive that sufficient particulars are provided. In the present case, the two charge sheets comply with the requirements set out in s 84(1). It is however unclear from the record as to which charge sheet was read when the charges were put to the appellant since all that the record says is that charges were put to the appellant. The court a quo, in its judgment, simply convicted the appellant as charged.

[18] While it is unclear from the charge sheet as to which charges were put to the appellant, it is apparent that he was charged with rape. What differs are the particulars of the rape. Section 88 of the CPA provides for the curing of a charge sheet through evidence. If the handwritten charge sheet was used, this would be consistent with the evidence led. There is therefore no need for this court to deal with the issue. If, however, the typed charge sheet was used, then it can be said that any defect in that charge sheet making reference to inserting his erect penis would have been cured by the evidence led since it was clear from the evidence that the offence was committed through the use of a finger.

[19] It is common cause that the complainant was a single witness in respect of the actual inserting and twisting of the finger in her vagina. This, coupled with the fact that the complainant was six years old and therefore a child witness when the incident occurred, gives credence to the argument by the appellant's counsel that greater caution is required. In *S v Artman & another* 1968 (3) SA 339 (A) at 314B-C, the court had the following to say about the application of the cautionary rule:

'I would add that, while there is always need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense;...'

[20] In *S v Letsedi* 1963 (2) SA 471 (A) at 473 and *S v Snyman* 1968 (2) SA 582 (A) at 586-587 it was held that when there is a measure of corroboration, even if it is small, one is no longer dealing with a single witness. It was conceded that the evidence of S[...] was to the effect that the appellant had placed the complainant on his thighs. This partly corroborates the complainant's evidence as against a

complete denial by the appellant, whose version was that he never sat on the veranda and who attempted to shift the blame to Mndeni Khoza.

[21] The court a quo had before it the evidence of Ms M[...], as the first report. Her evidence was consistent to that given by the complainant in respect of the incident. In *S v MG* 2010 (2) SACR 66 (ECG) at 73I-74B, the court stated that for this evidence to be admissible, the report must have been made freely and voluntarily. I add that the report must have been made at the earliest most reasonable time. While the complainant did not report the incident when she first returned to her home, I am of the view that it was made within a reasonable time. She was not prompted to tell her mother about the incident.

[22] The medical evidence was neutral and corroboration in the form of other evidence implicating the appellant in the commission of the offence was lacking (see *S v Gentle* 2005 (1) SACR 420 (SCA) at 430I-431A).

[23] Section 208 of the CPA provides that an accused may be convicted of any offence on the evidence of a single and competent witness. (See *R v Abdoorham* 1954 (3) SA 163 (N)). As has been argued by the State, such evidence must be satisfactory in all material respects. The court a quo considered the issue of caution and relied on the provisions of s 208 of the CPA. The submission by the State that it is improbable for the appellant to have conducted himself as stated in full view of other children and during the day as anyone could have seen this does not make sense. Also, the issue that the complainant had returned to the appellant after going to drink water is not supported by the evidence. Her evidence was that he called her back and not that she willingly returned to him. The evidence of S[...] corroborates this.

[24] Having considered applicable principles regarding a single child witnesses, I am of the view that the evidence of the complainant was clear and satisfactory in all material respects and was flawless. Further, that there was corroboration of her evidence from the evidence of S[...].

[25] As regards the issue of whether the incident occurred on a school day or a Saturday, I am of the view that this is immaterial. It was never in dispute that the children went to the Khoza homestead and were playing there. This is confirmed by the appellant and Mndeni Khoza. The appellant only denied committing the offence.

[26] While the statement of S[...] did not mention that the appellant had placed the complainant on his thighs, her evidence was that she had informed the police of this. She did not know why this was not included in her statement. In *S v Govender & others* 2006 (1) SACR 322 (E) in dealing with the deviation from a written statement by a State witness, the court held that the purpose of such statement was to decide whether to prosecute or not and was not intended to be a precursor to witness' testimony. The court noted that often written language was not that spoken by the witness and that there was a tendency of the contents being a written summary of what the witness would have said to the police officer. It was therefore not unusual or surprising that discrepancies would occur.

[27] In respect of the issue whether the appellant had gone to apologise, while it is noted that the court a quo did not sufficiently deal with this matter and reached an incorrect conclusion, this can be explained by the fact that Mr Jiyane had indeed testified that the Khoza family had said that they were there to apologise. However, under cross-examination, he did not corroborate the evidence of Ms M[...]. This however does not vitiate the proceedings. It was something that occurred after the event. What is crucial however from the visit was that Mndeni Khoza had said that the appellant could not recall what transpired as he was under the influence of alcohol.

[28] It cannot be correct that the court a quo erred in rejecting the evidence of the appellant on the basis that it was not reasonably posy true. The appellant called his uncle Mndeni Khoza who labelled the material parts of the appellant's evidence as untrue. This was the version that the appellant was not sitting on the veranda and that it was Mndeni Khoza who was sitting there. The complainant testified that the appellant had been consuming alcohol and S[...] corroborated this. The evidence of Mndeni Khoza in this regard was contradictory. While it can be accepted that the

appellant had consumed alcohol, this has not been used to suggest that his capacities were impaired.

[29] It is for the State to prove the guilt of the accused while the accused is merely required to provide a version, which is reasonably possibly true. The version of the appellant is improbable and cannot be reasonable possibly true. Accordingly, the court a quo was correct in rejecting it. However, one must consider whether the evidence led proved the offence of rape or something else. In order to determine this, it is necessary to consider the definition of rape as set out in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the Sexual Offences Act'), s 3 thereof which defines rape as follows:

'Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape.'

It is accepted from the evidence that there was no consent by the complainant. In any event, given the age of the complainant, she was incapable of providing any consent.

[30] What was however raised as an issue was whether it can be said on the facts of this case that there was penetration. As stated earlier in this judgment, the medical evidence is to the effect that the hymen was intact and Dr Buthelezi's evidence was that she could only fit in the tip of her finger. Ms *Hulley* for the appellant, argued that the complainant's evidence was that the appellant had inserted half of his finger into her vagina. She argued that this version was improbable since it was not supported by the medical evidence. Ms *Jacobs* for the state submitted that it could still be argued on the evidence that there was penetration since the conclusion by Dr Buthelezi recorded on the medical report (J88) was that there were no signs of heavy penetration. When Dr Buthelezi was asked to explain this, she clarified that there could not have been any penetration since according to the description of the complainant, the appellant had moved his finger around. Had there been any penetration, it would have caused injuries. Both counsel conceded ultimately that the appellant should at best have been convicted of sexual assault.

[31] In terms of s 5(1) of the Sexual Offences Act, sexual assault is defined as follows:

‘A person (“A”) who unlawfully and intentionally sexually violates a complainant (“B”), without the consent of B, is guilty of the offence of sexual assault.’

[32] Arising from this, it is necessary to also refer to the definition of sexual violation, which includes the following:

‘(a) direct or indirect contact between the—

- (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;’

[33] On a proper consideration of the evidence and arguments by counsel, this court finds that the conviction by the court a quo cannot be supported by the evidence led before it and can therefore not be sustained. There was a clear misdirection by the court a quo in convicting the appellant of rape. The evidence, however, is sufficient to sustain a conviction on the competent verdict of sexual assault.

[34] It is this court’s finding that the appellant was guilty of a lesser charge and it is necessary that we consider whether the sentence imposed by the court a quo is suitable. In doing so, we are guided by the triad as set out in *S v Zinn* 1969 (2) 537 (A) and *S v Mahomotsa* 2002 (2) SACR 435 (SCA), to consider the crime, the criminal and the interests of society. When the appellant was convicted of rape by the court a quo, it was rape of a minor and therefore the provisions of the 1997 Act applied, setting the minimum sentence applicable as life imprisonment. The court a quo found that there were substantial and compelling circumstances and consequently deviated from the prescribed minimum sentence. See *S v Malgas* 2001 (2) SA 1222 SCA.

[35] Since the sentence imposed was based on an erroneous conviction, it is instructive therefore that we consider an appropriate sentence in respect of the corrected conviction. Ms *Jacobs* submitted that a sentence of between eight and ten

years was appropriate. The offence, which the appellant is guilty of, is prevalent. Often we hear of young children being interfered with by old people around the age of the appellant's. These children must be protected by the courts. There is an outcry by society for perpetrators of such crimes to be dealt with harshly. The crime was committed on a six-year-old child who could not defend herself. The appellant was 46 years of age when the offence was committed, a first offender and was said to be taking care of his mother. This was what was before the court *a quo* when it decided to deviate from the minimum sentence.

[36] In *S v Hewitt* 2017 (1) SACR 309 (SCA), which involved the indecent assault of a 17-year-old girl, the court noted at para 15 that the appellant's personal circumstances being the advanced age of the appellant who was 75 years old when he was convicted and was of poor health were insufficient to interfere with a sentence of two years' imprisonment. We are of the view that on the facts of this case, a sentence of ten years imprisonment is reasonable to deter the-would-be offenders.

Order

[37] In the result, the following order is made:

- (a) The appeal in respect of conviction and sentence by the court *a quo* dated 14 September 2017 succeeds to the extent that:
 - '1. The conviction and sentence imposed by the court *a quo* is hereby set aside and is substituted with the following order
 2. (a) The accused is found guilty of sexual assault.
 - (b) The accused is sentenced to 10 years imprisonment.
 3. The sentence of 10 years imprisonment is ante-dated to 14 September 2017.'

Masipa J

I agree

Radebe JAppearances:

For the Appellant:	Ms A Hulley
Instructed by:	Legal Aid South Africa
For the Respondent:	Ms Jacobs
Instructed by:	Director of Public Prosecution
Matter heard:	15 November 2019
Judgment delivered:	22 November 2019