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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, BHISHO**

CASE NO. CC34/18

In the matter of:

THE STATE

versus

VUYANI MDASHE

Accused

JUDGMENT

STRETCH J.:

1. The 44 year old accused has been charged with raping and sexually violating three female children at Keiskammahoek on 29 January 2017. He pleaded not guilty and reserved the basis of his defence.
2. All three children testified through a CCTV feed with the assistance of a qualified intermediary. They all understood the difference between right and wrong, and comfortably distinguished between the truth and falsehood. They had minor difficulties with understanding the full import of the consequences of taking the oath, and were admonished to speak the truth.

The complainants

3. I[...] M[...] is 12 years old, having been born on 19 August 2006. She was ten when the offences were committed. L[...] G[...] was born on 13 August 2007 and is 11. At the time of the offences she was nine. L[...] M[...] is 11 years old having been born on 29 January 2008. The day on which the offences were committed was her ninth birthday.

The Sunday

4. It is common cause that on the afternoon of Sunday, 29 January 2007, the three girls were playing outside L[...]’s house when the accused approached.¹ According to the testimony of the girls, he invited them to join him to harvest traditional medicines in the forest. They accepted the invitation and walked with him towards the forest. He was carrying an axe. According to I[...] and L[...] he also had a plastic bag.
5. When they reached the thicket he instructed them to remove their panties. They refused. According to I[...] he threatened to suffocate them with the plastic bag. This frightened them. They obeyed.

¹ The accused is referred to by the complainants as “Malume” which means maternal uncle.

L[...]

6. He took hold of L[...] and instructed her to lift her legs. When she resisted he produced the axe and threatened to chop them. Thereafter he removed his trousers. According to L[...] he said that he did not intend raping her vaginally. Instead, he instructed her to part her thighs and rubbed his penis between her thighs, but ended up touching her “private parts” in any event which prompted her to close her thighs. She tried in vain to move away from him and was grabbing hold of the vegetation around her. At this stage she and the accused were facing each other.
7. According to L[...] he then instructed her to turn around and bend over. He inserted his penis into her anus and raped her from behind.² She said that she cried and ran to a rock. She climbed onto the rock and shouted for help but no one responded. The accused instructed her to keep quiet. She gathered her underwear, stepped aside and dressed herself.

L[...]

8. Thereafter he grabbed hold of L[...] and repeated his actions. She also obeyed after having been threatened with being suffocated and chopped up. According to L[...] the accused sexually violated her by inserting his penis between her thighs. Thereafter he raped her anally with his penis.³
9. She lifted one of her legs and placed it on his chest. He inserted his penis into her vagina. She too, cried, but the accused told her to keep quiet.

I[...]

² According to what Layola could see the accused first inserted his penis into her “butts” while she was standing. He then changed and inserted his penis “into her buttocks” for the second time while she was kneeling.

³ According to Inam’s observations Layola was instructed to lift one of her legs and place it on the accused’s chest. Thereafter he “inserted his penis into her buttocks”.

10. He then called I[...] and instructed her too, to lift up her legs. She tried to lift one of her legs as he was threatening to kill her by chopping her up with the axe. When she didn't manage to lift her leg, he did so for her and placed it on his chest. He inserted his penis into her anus and raped her. It was painful. She too cried, and tried to escape but he held her tightly and put his hand over her mouth. When he had finished she proceeded to dress herself.
11. When he had finished with all three of them, he picked up his axe and plunged it into the ground narrowly missing L[...]’s foot.⁴ He warned them not to report what had happened, as he would kill them by chopping them up.
12. They made their way back home. On the way they met a local man (referred to as Sol Peter) and asked him to pick some prickly pears for them which they ate. They were still anxious about the accused’s threats so they did not tell the man what had just happened to them.
13. They returned to their respective homes where they also did not report what had transpired.⁵ According to I[...] her mom enquired where she had been and why she was so dirty. She reported that she had been playing at L[...]’s home and that she was dirty from the prickly pears which had been picked for them. She refused supper and went to bed.
14. L[...] said that she too went home with some prickly pears, and gave one to her mom.

The Monday

15. According to I[...], they discussed amongst themselves what had transpired when they were walking home from school the next day. In particular they spoke about reporting this to their families at home. As expressed by I[...] in no uncertain terms, they decided to report, despite having been threatened because “It was pissing us off”.

⁴ According to Layola this happened before Lindo was raped.

⁵ It appears from Lindo’s evidence that they were not permitted to go to the bushes.

16. She said that while they were conversing, one “Chuma” and one “Nqali” were walking directly behind them. Chuma told them that he saw the accused raping them.
17. This was when Abongile, another colleague from school, arrived and enquired what they were discussing. It was then that they told someone for the first time that the accused had raped them. Abongile, who independently confirmed this when he testified, told I[...] that he was going to go with her to report this to her parents, which they duly did.
18. L[...] and L[...] were also questioned. The girls confirmed I[...]’s version that the accused had raped all three of them the day before.
19. The evidence regarding what transpired after school, which led to the questioning of the girls, was independently corroborated and is consistent with the evidence of I[...]’s parents who both testified. In particular the independent evidence of these two parents regarding what the girls had reported to them, is entirely consistent with what the complainants themselves told this court.
20. After all three girls had been questioned, everyone proceeded to the accused’s home to satisfy themselves that the children were indeed speaking the truth, particularly in that the accused himself, was also a father and a well-known person in the area.

The accused’s home

21. Amongst the people who then proceeded to the accused’s home were: the three complainants, both I[...]’s parents and L[...]’s grandmother who, according to her evidence, had by then also been put into the picture by I[...]’s father.

22. When they arrived at the accused's home his mother and his sister were present but he was at work. They informed the accused's mother of the purpose of their visit and what had happened to the girls.
23. The accused was summoned. He arrived. He was challenged by his mother about what the girls had reported. He admitted that he had had sexual intercourse with the girls, but explained that they had asked for it, and that he had reluctantly complied. Indeed, when L[...]’s grandmother testified, she explained the accused’s reaction in the following terms:

‘The accused’s mother said to the accused: “Here are the children. They say you raped them”. The accused said: “Why are they telling lies?” He said that the children had called him and had said: “Malume please give us”. According to the accused he then said to the children: “No, you are still very tender.” They nevertheless followed him. They arrived there and then that one of mine [presumably L[...]] was the first one to say: “Do it to us! Let me be the first one Malume!” So the accused said he reluctantly did it to them.....He said “I reluctantly did it on the thighs and at the back. They asked me to do it.”’
24. She added that when the accused admitted this to his mother in the presence of a full house, he did so of his own accord. He was not threatened with force or torture.⁶
25. L[...]’s grandmother testified that before this incident the girls had always had a good relationship with the accused. She repeatedly said: “The children rely on him. They know him. They rely on him. They know him.”
26. According to the witnesses, I[...]’s father said that now that he had admitted rape, the law would take its course, whereupon he forthwith summoned the

⁶ This evidence that the accused told his mother in the presence of a full house that these children had asked to be raped was overheard and confirmed by Inam and both her parents. Indeed, it was the evidence of Inam’s mom that she knew the accused and was shocked by what he had said. She said that being a parent himself, his reaction to such a bizarre invitation ought to have been to discipline the children. Then they would have been discussing an assault as opposed to rapes.

police. The police arrived and likewise questioned the accused who made a similar report to them.

27. Thereafter they were all escorted away by the police. The accused remained with the police. The complainants were taken, with their birth certificates, where they were medically examined at SS Gida Hospital by Dr Mlanduli.

The medical evidence

28. Dr Mlanduli examined all three girls that evening and reported her findings in writing. When she testified, she confirmed the facts, findings and opinions which she had recorded in writing and supplemented them when called upon to do so.

I[...]'s examination

29. Her examination form describes I[...] as a ten year old female patient who told the doctor that she had been sexually assaulted by someone she knew. She told the doctor that the perpetrator forced her to undress. He said that she must lie on her side whereafter he penetrated her buttocks.
30. The doctor did not observe any vaginal injuries except for redness of the vaginal mucosa (a pink soft mucous membrane). She attributed the redness to recent trauma as a traumatised mucosa normally heals within 72 hours. She conducted an anal examination and made the following clinical findings: The skin surrounding the orifice was dirty and the erythema was red. The orifice itself presented with twitchiness/winking and its rim was swollen. She digitally examined the anus and found poor laxity with a weak sphincter grip. She corroborated Inam's report to her and repeated in her evidence that the child had been anally penetrated.

L[...] examination

31. L[...] likewise told the doctor that she had been sexually assaulted by someone she knew. She said that the perpetrator had lured the three of them into the bush. Her underwear was removed. He inserted his penis between her legs. He then “went to the front and back” and inserted his penis into her anal orifice.
32. The child presented with a white vaginal discharge, redness of the mucosa and a visible tear in the anus. The hymen was not visible. There was no winking of the orifice of the anus.⁷The child was emotionally traumatised.
33. The doctor was of the opinion that Lindo had been penetrated vaginally. She was unable to exclude anal penetration but indicated that the clinical signs pointed more towards vaginal penetration.

L[...]’s examination

34. L[...] likewise explained to the doctor that she had been sexually assaulted by a person known to her. The perpetrator had instructed her to remove her underwear. Thereafter he placed his penis (“his urinating part”) between her buttocks but did not penetrate the anal orifice.
35. The skin surrounding the anal orifice was cracked and there was no winking of the orifice itself. The increased friability of the skin of the anus was suggestive of some form of sexual assault.⁸

The accused

36. The accused testified in his defence. He confirmed that he and the complainants were known to each other, and that L[...] was in fact his neighbour. He said that on the afternoon of 29 January 2007 he saw the girls playing under a tree when he went out to dig for/harvest medicinal bark for the treatment of cattle. He confirmed that he was carrying an axe. He said

⁷ According to Segen’s medical dictionary, in a young child, absence of an anal wink or reflex is likely associated with nerve damage.

⁸ The word ‘friable’ refers to tissue that tears, sloughs and bleeds more easily when touched. It is tissue which is overly sensitive and easily irritated usually as a result of duress, contact and especially rubbing.

however, that he did not speak to the girls but to another neighbour who wanted to know where he was going.

37. He said that upon his return just before sunset, he saw the girls with Sol Peter at the place where the prickly pear trees were. Sol saw him as well. Those were the only two occasions on which he saw the girls that day. He did not rape them, nor did he suggest to anyone that they had asked to have sex.
38. He confirmed that the complainants were his neighbours and that before this incident he had enjoyed good relationships with all of them and with their families. He suggested that they may have sustained the injuries or the conditions they had presented with from the prickly pears.
39. He said that the following day he was summoned from work and the girls accused him of having raped them. His mother was very hurt when she heard this. She said that he should clothe himself in something warm as he was going to prison.
40. I digress to add that according to the prosecution witnesses, the accused's mother responded in this fashion after the accused had confessed to her that he had raped the children, but at their request.

Evaluation

41. There is no statutory requirement in our law that a child's evidence must be corroborated. However, it has been accepted that the evidence of young children should be treated with caution owing to the dangers inherent in such evidence.⁹ I fully appreciate and have warned myself of the danger that children are sometimes open to imaginativeness and suggestibility. I will deal with this more fully in due course.
42. My primary concern however, is whether the evidence of these three girls is trustworthy.¹⁰ With regard to the facts of this case, I must in particular satisfy

⁹ *R v Manda* 1951 (3) SA 158 (A) 162

¹⁰ *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) 1028 B-D

myself that these children are sincere in the sense that they have evinced a consciousness to speak the truth and have in fact done so.

43. As for suggestibility, where the nature of the evidence is of a simple kind and the circumstances are such as to practically exclude the risk arising from suggestibility, then there are sufficient indicia of trustworthiness to dispense with corroboration.¹¹
44. The complainants are not single witnesses. They allege that they were raped together. This is not in dispute and I accept their evidence in this regard. Neither is it in dispute that they were the victims of sexual offences. I accept that they were. Not only have they corroborated each other in this regard, but the independent medical evidence obtained the day after the morbid events, bears this out.
45. Nor can the reliability of the identification of the accused be an issue. The accused is known to them and they to him.
46. The only issue which has been raised by the defence for my consideration is whether these children may have falsely implicated the accused, because they are protecting the real perpetrator with whom they were engaged in a type of sexual experimentation, it would seem. It goes without saying that if such a danger exists, it would be relatively easy for the complainants to substitute the real culprit with the accused, and then simply ascribe the culprit's conduct to the accused. Such a complainant indeed has a deceptive facility for convincing testimony. Because such a person actually participates in the event described, there exists a danger that a deft substitution of the accused for the real subject would be difficult to detect.¹² I will address this proposition in due course.
47. Over and above this suggestion, the accused's representative has pointed out that there are some inconsistencies in their evidence. Where this takes the defence case I don't really know, but I will touch on them in any event.

¹¹ *Manda* above 163

¹² *S v Snyman* 1968 (2) SA 582 (A) 585D

48. The main criticisms in this regard are:
- a. I[...] described how L[...] lifted up one of her legs and placed it on the accused's chest, and that thereafter, she was also instructed to lift up her legs, and that eventually the accused lifted one of her legs himself. This evidence is not replicated by L[...] and L[...].
 - b. L[...] described how she had mounted a nearby rock and had cried for help. The other two did not mention this. Indeed, L[...] denied that L[...] shouted for help.
 - c. L[...] also admitted that she had told the police that I[...] and L[...] had opened her buttocks but that the accused could still not insert his penis in her anus. I[...] was not asked about this. L[...] said she could not remember.
49. It is so that the three complainants did not give their evidence as if by rote, the one corroborating the minutest detail described by the other or others. I do not find this strange. Nor do these inconsistencies detract from their honesty and their reliability (when they say that they were the victims of sexual assaults), or from the accuracy of their description of their experience as a whole.
50. These singled-out differences in the way they have described their combined experience has no bearing on the defence case which suggests that they may be shielding the real culprit. The temptation to shield a real culprit is also not something which is unique to the child witness.
51. Nor is it a valid reason for approaching the child's evidence with caution. It is, in my view to be expected that children who were between nine and ten at the time of the morbid incident, and who testify in regard thereto two and a half years later, are likely, in the absence of deliberate collusion, not to dovetail their evidence in all respects. This is particularly so where the young child is called

upon to recall a painful experience which falls wholly outside of that child's frame of reference.

52. I turn now to deal with the suggestion that the children may have been "experimenting" with someone else. The defence appears to be relying rather heavily on the following in support of this suggestion: According to I[...], C[...] (who is about 15 years old, attended school with them and was not called as a witness by either party despite his availability and the availability of an affidavit deposed to by him), had told them that he had "detected" what had happened the previous day, and said that "they" had seen what had happened when the accused was raping them. C[...] had said that he saw the accused raping them when he was "nearer to that rock that has branches". According to L[...], she knew that C[...] had realised that something was wrong when he referred to them as "these children" at school.
53. It is contended on the accused's behalf that the prosecution ought to have called C[...] to testify if it is indeed so that he had witnessed the accused raping the girls. Mr Willemse, for the prosecution, has given me the assurance that both he and the defence are in possession of an affidavit deposed to be C[...], that his whereabouts are known, and that he can take the matter no further.
54. I do not believe that the election by the prosecution not to call a witness should, in these particular circumstances, detract from the reliability of the complainants. By the same token, if C[...] had stated on oath that he had witnessed the girls involved in age inappropriate shenanigans with someone other than the accused, I would have expected the accused to have lead this evidence in rebuttal or at the very least to have produced the affidavit attesting to this as part of the defence case.
55. There is, in any event, no basis for the suggestion that the children were sexually violated by someone other than the accused – someone whose identity the children were bent on protecting at the risk of implicating an innocent man. I say so for the following reasons: Whilst many strange things are possible, they are not probable when viewed in the contextual setting of the matter before me. It is common cause that the accused was both near and

dear to the complainants. He was perceived as a father figure, a maternal uncle, and an old man and neighbour who could be trusted and relied upon. Indeed, L[...] and her grandmother used to baby-sit the accused's niece.

56. If indeed, the complainants were sexually violated by someone other than the accused, it is highly improbable that they would, on the spur of the moment, have resorted to implicating the accused who had been both near and dear to at least two of the three complainants, one of them having arrived in the area shortly before the incident. Indeed, it would have been much easier and convenient for them to have blamed a stranger or a fictitious person for that matter.
57. I reject any suggestion made on the accused's behalf that the complainants had voluntarily experimented in this type of conduct and/or are now protecting the perpetrator at the expense of the accused.
58. I am satisfied that all the complainants truthfully relayed to this court, to the very best of their abilities, what they experienced and the extent thereof. They described what had happened to them in a forthright and logical fashion. Their joint demeanour was brave and uncompromising.
59. Indeed, I[...]’s evidence that they decided to tell the adults what the accused did to them, because it was “pissing” them off, has a curious ring of truth about it. I am satisfied too, that what L[...] overheard being discussed after school, was not a secret conspiracy to falsely implicate the accused. Rather, it was three young girls who were finally establishing that they could rely on each other for support and comfort in order to expose the accused's reprehensible conduct.
60. As for the accused, he did not impress me as a witness. He was vague and elusive throughout his testimony. When he was confronted with the evidence of the prosecution witnesses - that he had admitted to his mother that he had raped the children - he made a weak attempt to improvise in the witness box and spoke utter nonsense. He said that his mother had said that she had spoken to him for a long time about staying out late (as there were break-ins

where they lived) and that she had said that he was going to jail for staying out late, and not because he had admitted to having sexually violated the girls.

61. Not only was his conduct cowardly and irresponsible when he was caught out, but he has sunken into what can only be described as a blatant denial which cannot be supported from whichever angle it is viewed.
62. The evidence against the accused, that he took advantage of these young children on the Sunday in question and subjected them to demeaning and disgusting sexual abuse, is overwhelming.

The charges

63. I now turn to the specific charges. I am satisfied, that as far as I[...] is concerned, her own evidence, insofar as it has been consistent and insofar as it is corroborated materially by the medical evidence, makes for proof beyond a reasonable doubt that she was raped by the accused. On the other hand, there is insufficient evidence to support a contention that the accused also sexually assaulted her by rubbing his penis between her thighs.
64. L[...]’s evidence, her consistent explanation and the medical evidence is clear. She was both raped and sexually assaulted by the accused.
65. As far as L[...] is concerned, her testimony, her consistent report and the medical evidence confirms that she was indeed sexually assaulted by the accused when he, inter alia, rubbed his penis between her thighs. However, insofar as she appears to have told the doctor that he placed his penis between her buttocks but did not penetrate her, the accused is entitled to the benefit of the doubt and is guilty at best, in this respect, of attempted rape.

Order

I make the following order:

On count one (rape): the accused is found guilty as charged.

On count two (sexual assault): the accused is found not guilty and he is discharged.

On count three (rape): the accused is found guilty as charged.

On count four (sexual assault): the accused is found guilty as charged.

On count five (rape): the accused is found not guilty and he is discharged. He is found guilty on the competent verdict of attempted rape.

On count six (sexual assault): the accused is found guilty as charged.

I.T. STRETCH

JUDGE OF THE HIGH COURT

For the State: Mr Willemse

Director of Public Prosecutions

For the accused: Ms Dyantyi
Legal Aid

Argument heard on: 21 June 2019

Judgment delivered on: 24 June 2019