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**IN THE HIGH COURT OF SOUTH AFRICA
EASTEN CAPE LOCAL DIVISION – EAST LONDON**

Case No: CC 01/2019

In the matter between:

THE STATE

and

MABHUTI UNATHI SKEPE

Accused

JUDGMENT

MALUSI J:

[1] The accused, a 30 year old male, is facing a charge of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act i.e. the crime of rape. It is alleged that between May and July 2017 and at or near Zozo

Location, Kwelerha, in the district of *East London*, the accused did unlawfully and intentionally commit an act of sexual penetration with the complainant, AS, a 5 year old girl, by having intercourse with her *per vaginam* against her will and without her consent.

[2] The accused pleaded not guilty and exercised his right to silence regarding disclosing the basis of his plea.

[3] The State led the evidence of two witnesses in an attempt to prove the case against the accused viz *MND* and *LS*. Before I deal with their evidence I need to address the failure of the complainant to testify.

[4] The complainant, AS, is presently 7 years old. She was called by the State as a witness. Due to her young age and state of development I came to the conclusion that she would not understand the nature and import of the oath. I invoked the provisions of section 164(1) of the Criminal Procedure Act 51 of 1977 which provides:

“164 (1) *Any person who, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.”*

[5] I conducted an enquiry to determine whether the child can distinguish between truth and falsity. At the very best her answers were contradictory. In one breath she gave the favourable impression she understood the difference and the next moment she gave the direct opposite.

[6] I unusually gave the counsel for both parties an opportunity to clarify the confusion, if they so wished. The reason for this course of action was that a ruling adverse to the case of one of them was likely to be made in circumstances. Regrettably, the confusion only deepened.

[7] I requested the assistance of *Karen Andrews*, a clinical psychologist who provided a helpful report. After assessing the child she concluded that the child does not have the mental capacity to give evidence in court. The child is confused about the concepts of truth and lies due to negative environmental factors that have deleteriously affected her intellectual growth.

[8] I made the ruling that the child is not a competent witness due to her inability to distinguish between truth and lies.

[9] Reverting to the evidence, *Mrs [D..]* testified that the child regularly visited her home to play with her grandchildren and other neighbourhood children. On an unspecified day she noticed that the child was left behind when other children departed her homestead. She took the child to the latter's home. On arrival the child was reluctant to enter. *Mrs [D..]* took the child into the shack.

[10] The child's mother *LS* was present and obviously inebriated. Due to the child's distress that her mother would leave her alone with the accused, *D* took her home. On the following day the child made a report to her that alleged the accused had raped the child in Linda's absence. On a later day, also unspecified, the child arrived walking on her toes with her legs wide apart. She decided to pay for the child and *L* to go to *K* as she held the view that the alleged rape was continuing. [*Ms S..*] and the child left the following day.

[11] Linda testified that she had been gone to *Duncan Village* on an unspecified Friday during July 2017. On her return home on the following Sunday she visited her

neighbours with the child. When the child got drowsy in the evening she took the child home. The child refused to be left alone at home as she alleged the accused would rape her. Upon questioning by *Linda*, the child alleged the accused had raped her the previous Friday. *L* confronted the accused who denied the allegation and later that night assaulted her with a spade.

[12] The State brought an application for the admission of hearsay evidence of the child. The defence opposed the application. I admitted the hearsay evidence for the following reasons:

12.1 These were criminal proceedings. I took into account the caution in *S v Ramavhele*¹ that:

“ . . . a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so.”

It was my view that the hearsay evidence would only be relied upon if there was corroborating evidence to support it.

12.2 The nature of the evidence was a report that alleged rape and identified the alleged perpetrator as the accused. Again, corroboration would be decisive.

12.3 The evidence was tendered by the State to prove that the rape had indeed occurred and the accused was the perpetrator.

¹ 1996 (1) SACR 639 (A) at 649C-D.

- 12.4 The reliability of both *Mrs [D..]* and *Ms [S..]* was not at issue. The defence did not challenge that the child had made the reports to them. The reliability of the child was challenged. Again I held the view that corroboration was essential.
- 12.5 The child had not given evidence due to the Court's ruling that she was not a competent witness as discussed above.
- 12.6 *Mr Giqwa*, who appeared on behalf of the accused, submitted the general prejudice due to lack of cross-examination was present. The Supreme Court of Appeal has held that such would amount to prejudice only if the case of the accused could be advanced by cross-examination.² *Mr Giqwa* provided no acceptable submissions how the cross-examination would have advanced the accused case.
- 12.7 I also took into account the other factor that part of the hearsay i.e. allegation of rape was proven to be true by way of a medical report. In my view in the circumstances of the case it was in the interests of justice to admit the hearsay evidence.

[13] The defence invoked the provisions of section 174 of the Act and applied for the discharge of the accused. The application was opposed by the State.

[14] The factors of this case and its presentation bring to mind the important observation made by *Nugent JA* when he stated:

"The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all

² *S v Shaik* 2007 (1) SACR 247 (SCA) at para 177.

the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone.”³

[15] It appears the State relied unduly heavily on the hearsay evidence of the child. Not much effort was expended to corroborate the hearsay or gather other circumstantial evidence to assist the court to determine the truth of what transpired.

[16] It is a notorious fact that the rape of children is committed in secrecy. The perpetrators take great care to cover their tracks and avoid detection.

[17] In my view the only issue for determination is the identity of the perpetrator. The fact of rape is not in dispute. On that issue the only direct evidence available is the mere say so of the child. Even if she testified her evidence would have been treated with caution because she would be a single witness and a child witness.

[18] In the present matter more than one cautionary rule applies on the complainant as a witness. She is both a single witness and a child witness. In such a case the Court must have proper regard to the danger of uncritical acceptance of the evidence of both a single witness and a child witness. In dealing with such evidence our Courts have laid down certain general guidelines which are of assistance when warning themselves of the danger of relying upon a single witness who is also a child witness. In the ordinary course;

- i) A Court will articulate the warning in a judgment, and also the reasons for the need for caution in general with reference to the particular circumstances of the case;

³ *S v Vilakazi* 2009 (1) SACR 552 (SCA) at para 21.

- ii) A Court will examine the evidence in order to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in all material respects;
- iii) Although corroboration is not a prerequisite for conviction, a Court will sometimes, seek corroboration which implicates the accused before it will convict beyond reasonable doubt;
- iv) Failing corroboration, a Court will look for some feature in the evidence which gives the implication by a single child witness enough of a hallmark of trustworthiness to reduce substantially the risk of a wrong reliance upon her evidence.⁴

[19] In my view this is a type of a case whose circumstances were aptly described by *Mthiyane JA* as '*crying out for corroboration to provide some guarantees that the truth had been told.*'⁵

[20] I considered the fact that the child was reluctant to go home which is very strange. Why was a report not obtained from one of the two psychologist involved in this case regarding her aversion to be in the property on her own? I am not satisfied that it is the only reasonable inference that the child was raped in the property by the accused on the available evidence.

[21] It is trite that the evidence of identity has to be treated with caution. Why was further corroborating circumstantial evidence not obtained to bolster the scant State case?

⁴ *S v Artman* 1968 (3) SA 339 (A) at 340H-341C.

⁵ *Swanepoel v S* 2008 (4) All SA 389 (SCA) at para14.

[22] In my view this Court would not convict the accused at the conclusion of these proceedings unless he incriminated himself. The Constitution is clear that the accused may not be put to his defence in the hope that he will incriminate himself.

[23] I need to make this clear *Mr Skepe*, you will be acquitted not due to your innocence. In fact, I have a strong suspicion that you raped this child. You are simply benefiting from the failure of the State to present evidence to prove your guilt beyond reasonable doubt.

[24] Another aspect calls for comment. The evidence of *Ms [S.]* is that she called the police to report the alleged rape. She was told by the police to wait at the road in her locality but the police never came. The delay in registering the case may have played a role in the acquittal of the accused due to evidence not being gathered on time.

[25] An order is issued for the Provincial Commissioner of the police to investigate the conduct of the police at Bluewater Police Station relating to CAS 03/08/2017 in allegedly failing to promptly respond to *LS* complaint of rape of the child.

[26] I wish to convey my gratitude to *Mrs [D.]* for her exemplary conduct in reporting the case to the social workers and ensuring that the child is moved to a safer environment. The acquittal of the accused should not detract from her commendable actions.

[27] Accused is found not guilty and discharged.

Judge of the High Court

Appearances:

For the State: Adv Mgenge *instructed by*

Director of Public Prosecutions

GRAHAMSTOWN

For the Accused: Mr Giqwa *instructed by*

Legal Aid Board

EAST LONDON

Heard on: 29 & 30 January 2019 and 1, & 4 February 2019

Delivered on: 4 January 2019