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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A328/2017

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

In the matter between:

ELVIS BAYANA

Appellant

and

THE STATE

Respondent

J U D G M E N T

MAHALELO, J:

[1] This is an appeal against both conviction and sentence. The appellant, Mr Bayana was convicted in the Boksburg Regional Court of rape in contravention of section 3, read with sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Relation Matters) Amendment Act 32 of 2007 further read with section 51(1) Act 105 of 1997 and kidnapping.

[2] He was sentenced to life imprisonment on count one and five years' imprisonment on count two. The two counts were ordered to run concurrently. The appellant enjoys an automatic right of appeal.

[3] It was alleged in the charge sheet that on 8 August 2015 and at or near Angelo Squatter Camp the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant, to wit, D G a 14-year-old girl by penetrating her vagina with his penis without her consent and in count two that, the appellant unlawfully and intentionally deprived the complainant of her freedom of movement by locking her inside his shack for the whole night without her consent.

[4] The appellant was duly represented and pleaded not guilty to both counts. He alleged that the sexual intercourse between him and the complainant was consensual, he denied the allegations in count two.

[5] At the beginning of the trial the appellant made the following formal admissions in terms of section 220 of the Act:

5.1 That the complainant slept at his place on 8 August 2015 and he had sexual intercourse with her with her consent.

[6] It was argued on behalf of the appellant that the complainant had informed him that she was turning 17 years on 9 August 2015 and requested from him R50 in exchange of sexual intercourse. Accordingly, appellant was not supposed to have been convicted of rape more so that the evidence of the complainant is fraught with contradictions and inconsistencies.

[7] The learned Regional Magistrate decided the case, regarding the facts in issue, to be whether the appellant was aware of the age of the complainant and whether there was actual consent to sexual intercourse.

APPLICABLE LAW

[8] The offence of rape is defined in section 3 of the Sexual Offences Act 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.”

[9] In terms of section 1 of the Sexual Offences Act a child is defined as follows:

“‘Child’ means –

(a) A person under the age of 18 years; or

(b) With reference to section 15 and 16, a person 12 years or older but under the age of 16 years.”

[10] Circumstances in subsection 2 in respect of which a person (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in section 3 and 4 include but not limited to, the following:

“(d) Where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act:

(ii) ...

(iii) A child below the age of 12 years or

(iv) A person mentally disabled.”

[11] Section 57 of the Sexual Offences Act provides that:

“(1) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act.”

POINT IN LIMINE

[12] In heads of argument filed in this court the appellant raised *in limine* that he did not receive a fair trial. The appellant argued that the presiding officer descended into the arena and was biased in favour of the State’s case. He submitted that the record is replete with instances where the learned Magistrate unfairly engaged the appellant sometimes at length, the task that

should have been left to the prosecutor and the defence counsel. It was alleged that the appellant was asked questions which proved nothing but a continuation of cross-examination and were not intended to seek any clarity on any issue but merely to pressurise him to admit guilt.

[13] The following appears on the record at page 241 between the trial court and the appellant:

"COURT: Okay, let us go to the, into the issue because consent is the fact in issue here, let us go into detail with it, so you must listen.

ANSWER: Yes.

COURT: Now this is the statement, give me R50, I will give you sex, is there any consent there?

ANSWER: Yes.

COURT: Where is the consent?"

[14] At page 244 the following appears:

"COURT: According to you this issue of buying sex from a child by R50, is that not tantamount to the abuse of the child?

ANSWER: If I knew she was a child I would not have done that."

[15] On page 242:

"QUESTION: Did you consider that buying of sex with R50 was a real consent by a child?

ANSWER: *What gave me clarity was that after she told me that the following day was her birthday and I asked her how old is she turning, she said 17, I knew that she was old enough to consent to sex.*

QUESTION: *Ja but you are not answering the question. The answer is simple. You bought sex for R50 and that sex was from the child, did you consider as a real consent from a child.*

ANSWER: *Yes, because the fact that she was a minor I did not know she told me a false age.*

QUESTION: *How old are you?*

ANSWER: *27.*

QUESTION: *She told you she is 16.*

ANSWER: *Yes.*

QUESTION: *Between the two of you who was older than the other one?*

ANSWER: *Myself.*

QUESTION: *So you could realise that the one before you is younger."*

[16] *"Although a presiding officer is sometimes obliged to ask questions of a witness, it is important to guard against conduct which could create the impression that he or she was descending into the arena of conflict or that he or she was partisan or had pre-decided issues which should only be decided at the end of the trial. Nor should a presiding officer put attacking proportions to an accused. Such conduct can create the impression that the presiding officer is acting as a cross-examiner, associating himself with the State's case against the accused." See S v Mafu 2008 (2) SACR 653 (W).*

[17] In S v May 2005 (2) SACR 331 (SCA) the learned judge stated that:

"Judicial officers are not umpires. Their role is to ensure that the parties' cases are presented fully and fairly, and that the truth is established. They are not required to be passive observers of a trial, they are required to ensure fairness and justice, and if that requires intervention then it is fully justifiable."

[18] In my opinion, the questions posed by the court *a quo* to the appellant were merely asked to obtain clarification. This Court does not find that the trial Court lost its impartiality towards, or was biased against the appellant. This Court finds that the questions posed did not negatively impact on the impartiality of the court *a quo*. Accordingly, no prejudice to the appellant prevailed. This Court cannot find that the trial court had prejudiced the matter and the questions posed were to ensure justice and fairness. In the circumstances the point *in limine* is dismissed.

[19] However, even if I am wrong in this assessment, the evidence presented was not sufficient to sustain a conviction on the charges of rape and kidnapping for the reasons discussed below.

[20] The cautionary rule is applicable to the evidence of the complainant. She was a single witness to the alleged incidents. It appears, however, that the court *a quo* ignored several contradictions in her evidence. There is also no reason why her brother was not called to testify.

THE EVIDENCE

[21] The complainant testified that on 8 August 2015 she was playing with her friends nearby her home. At around 18:00 they all dispersed and went to their respective homes. Her parents were in Limpopo at the time. She was only left with her older brother at home. She went home but found no one. She decided to go to her cousin D's place. Along the way she met the

appellant who pulled her by force and took her to his shack. The appellant was not known to her by then. On their way to the appellant's shack they met with the appellant's friends. They all went with and upon arrival at the shack the appellant sent his friends to go and buy meat. He then took beer bottles and went to buy beer. He locked her inside the shack.

[22] After a while he came back with the beers, his friends followed with the meat. They all ate. At some stage the appellant's friends offered her a beer. She refused to drink indicating to them that she was a church person. They grabbed her and forced her to drink half of the bottle. Thereafter the appellant's friends left. The appellant then locked the door and switched off the light. He undressed her clothes and had sexual intercourse with her without her consent. During the sexual intercourse she felt something warm, she asked him what it was and he told her that it was sperms. Eventually he climbed off her and she got dressed. The appellant instructed her to go to her home. At that stage she took the appellant's cell phone from underneath his pillow and saw that the time was 24:00. She told him that it was late and not safe for her to leave as they kill people.

[23] She slept until the next morning. Nothing happened to her during the night. At 06:00 she left and went to D's place. She reported to D what happened to her. D indicated to her that her brother came looking for her. She went home in the company of D and along the way they met with her brother. He asked her where she slept. Before she could explain, he

assaulted her and said to her that she must go and show him the place where she slept.

[24] She went with her brother to the appellant's place and when her brother knocked the appellant came out, he asked them to go and talk at the gate and he fled. People chased after him but he outran them. They then went back home. Her brother assaulted her again with a cable. He then phoned her parents and they came back from Limpopo on 10 August 2015. On that day her father asked her what happened, when she explained to him her mother started to assault her. She was later taken to the police station by her parents and a case of rape and kidnapping was opened on her behalf. Thereafter she was taken for medical examination.

The complainant denied that she voluntarily went to the appellant's shack and that she consented to sexual intercourse. She disputed that she told the appellant that she was turning 17 the next day and that her parents were in Limpopo.

[25] I G, the complainant's father testified that he was in Pietersburg when he received a call from his son on 9 August 2015. His son made a report to him and on the same day he came back home. He spoke to the complainant who reported to him that a certain boy by the name Brown raped her. He went to the community members and reported to them what the complainant told him. He was advised to go to the police station. He went to the police station with the complainant and opened a case of rape against the appellant on behalf of the complainant.

[26] The State then closed its case where after the appellant applied for a discharge in terms of section 174 of the Criminal Procedure Act. The application was refused. The appellant then testified in his defence. He told the court that he knew the complainant before the day of the incident. When he was off duty the complainant used to pass by his home and request him to buy her airtime. On the day of the incident the complainant passed him at his gate. She greeted him and told him not to go away as she was going to come back to him. She came back and went straight to his shack. He followed her into the shack. The complainant informed him that the following day was her birthday and because her parents were in Limpopo she needed R50 to buy herself a cake to celebrate her birthday. She said to him that in return they could have sexual intercourse together. He asked her how old she was, she told him that she was turning 17 on the following day. At that stage the complainant undressed her clothes and lay on the bed. He also undressed and put on a condom and had sexual intercourse with her. When he finished he gave her the R50. She dressed up and left. He went back to his friends at the gate. Later the complainant came back and went into the shack. She informed him that there was no one at her home. He remained with her in his shack when his friends went to buy meat. They came back and ate.

[27] He requested the complainant to leave because he wanted to go to the tavern with his friends. She refused, she indicated that it was late and that she was scared. She pleaded with him to sleep at his place. He told his friends to leave him behind. He remained with the complainant whereupon she

requested him to buy her some alcohol. He went and came back with hunters' dry cider. They each drank a bottle and later went to sleep. Nothing happened between them. In the morning at around 06:00 he woke her up so that she could go home. She said it was still early. She woke up at 07:00 and went home. Later, while he was still sleeping the complainant, her brother and some other boys knocked at his door. The complainant's brother enquired from him if the complainant slept at his place. He was told to put on his shoes and was taken to the playground where he was threatened with death. He managed to escape and ran away. He later received a call from one of his friends. He spoke to the complainant on his friend's cell phone. The complainant then apologised to him for telling people that he raped her. The complainant told him that she had no choice as her brother assaulted her for not sleeping at home. She also told him that she wanted to bring him cake as a sign of apology. When he went back to his shack he found the cake on top of the table. When the police came to arrest him they found this cake in his shack. He denied that he kidnapped the complainant and raped her.

[28] James Mapheba, a Warrant Officer in the SAPS was called by the appellant as his defence witness. He testified that on 13 August 2015 he went to Angelo Squatter Camp to arrest the appellant. He was in the company of his crew members, the complainant and her mother. They found the appellant sitting outside his shack with two male friends. He then asked the complainant to point out the suspect. The complainant hesitated and took some time. When she finally pointed out the appellant, she was smiling. He

gained the impression that the complainant and the appellant knew each other.

[29] After the complainant had pointed out the appellant, he explained to him that he was under arrest and requested him to get into the shack to take warm clothes because he was going to take him away. He went inside the shack with the appellant, the complainant and her mother. He saw a big cake on the table. He asked the appellant whose cake it was. He replied that it was brought to him by the complainant to apologise for saying that he had raped her and bringing a mob of people to his shack. According to Warrant officer Mapheba when he asked the complainant about the cake, she confirmed what the appellant said in the presence of her mother. It was then that the appellant was arrested and taken to the police station.

[30] The trial court then called Maria Manape Galane, the complainant's mother to testify. The reason for doing so does not appear from the record. She testified that she knew the appellant by sight, having seen him in the company of the complainant. Upon coming back from Limpopo with the complainant's father, the complainant explained to them what happened to her. On the following day the police came to her house and requested her to accompany the complainant to the police station and to the appellant's place as she was a minor. She went with the police to the appellant's place and found the appellant in his yard and the police arrested him. According to her, there were no discussions between the police and the appellant or the complainant before the appellant was arrested. She said that when they

arrived at the appellant's place the complainant pointed out the appellant to the police and he was arrested. She disputed that she or the complainant entered the appellant's shack. She also disputed that she saw a cake on the table. She denied that she assaulted the complainant after she reported to her what happened.

ISSUES

[31] The issue in this appeal is whether the State succeeded in proving beyond a reasonable doubt that the sexual intercourse between appellant and the complainant was not consensual; whether the complainant voluntarily went to the appellant's shack and whether the trial court misdirected itself in the assessment of the evidence of the complainant as a single witness.

ASSESSMENT OF EVIDENCE

[32] The evidence of the complainant is that of a single witness. The court *a quo* had regard to the cautionary rules applicable when assessing this type of evidence. The court *a quo* was aware that it was dealing with the evidence of a child witness and the proper approach in evaluating the evidence of a child witness who is also a single witness. Evidence of a single witness needs to be satisfactory in every material respect. The trial court referred to *DPP v S* 2000 (2) 711 (T) and *Klink v Regional Court Magistrate NO and Others* 1996 (3) BCLR 402 (SE) as well as *S v Sauls* 1981 (3) SA 172 (A) at

180E-G and cautioned itself that it had been held that such rule does not replace common sense.

[33] In my view, the learned Magistrate incorrectly concluded that the evidence of the complainant was satisfactory in all material respects in respect of the fact that she did not consent to sexual intercourse with the appellant. My reasons include:

33.1 During her evidence in chief, the complainant testified that when the appellant grabbed and pulled her to his shack she was meeting or seeing him for the first time. During cross-examination she testified that earlier on that day of the incident the appellant followed her to the shops when she was with her younger brother and offered to buy her fruits. She also testified that she saw the appellant on 5 August 2015 in the company of his friends. When she was questioned about the name of the appellant her evidence was that she heard the name "*Brown Onion*" from the appellant's friends after the incident when they asked her if the appellant had raped her. When the court enquired from her if she knew the appellant before she answered that she knew him before because he once proposed love to her and she refused. She also testified that the appellant once requested her cell phone numbers from her through D and she informed him that she did not own a cell phone and that he promised to buy her a cell phone. The complainant's responses

to questions whether she knew the appellant before the incident were confusing. She kept on changing her versions in this regard. It was and remains unclear if the complainant knew the appellant before the incident or not.

33.2 The complainant testified that she never discussed her birthday and the fact that her parents were in Limpopo with the appellant. It seems strange that the appellant knew that the very next day was her birthday, and as testified to by her parents, they received a report from the complainant's brother whilst they were in Limpopo. In an attempt to explain this, she stated that the appellant saw her friend with a gift and he was told that it was for her birthday.

33.3 On the facts initially presented by the complainant, she was locked in the shack by the appellant and did not have the means to escape. She testified that she did not scream to alert the neighbours that she was held in the shack against her will because she was scared that the neighbours would think that she was stealing. On this point, the complainant testified that whilst she was locked in the shack and left alone a certain person came and knocked at the door and said that he wanted to buy something. She told this person that the door was locked and she was left alone in the shack and that the appellant left with the key. In my view this is not consistent with the conduct of

a person who was locked in the shack against her will. The complainant could have asked for help from this person. She failed to that and did not advance any reason for her failure.

33.4 Even if I were wrong in this evaluation, the following discrepancies further support the conclusion that the complainant's evidence was not satisfactory in all material respects. The complainant testified that during the sexual intercourse with the appellant she felt something warm and she asked him what it was and he replied that it was sperms. This in my view is also not consistent with the conduct of a person who is being raped or that of the rapist. She stated further that once the appellant was finished raping her, she dressed up and the appellant told her that she could leave, at that stage she was able to put her hand underneath the appellant's pillow and took out his cell phone to have a look at the time where after she told him that it was late, she was scared to go out alone as they kill people. She then slept with him till the next morning. In my view the complainant's conduct was somehow inconsistent with that of a person who was held in the shack against her will and who had just been raped.

33.5 The complainant, upon meeting with her brother on the street, told him that a certain guy troubled her. She did not tell him that Brown Onion raped her. When confronted about this she

testified that her brother assaulted her before she could tell him that she was raped. When asked why her brother assaulted her she said she did not know. When asked if her brother did not ask her where she spent the night she replied that he did and she told him after he assaulted her that she slept at a certain boy's place and that boy raped her. The complainant did not mention the name Brown Onion to her brother even though she testified that she knew him before the incident. Even when she was taken by her brother to go and point out the place where she slept, according to the appellant she firstly pointed out a wrong person to her brother. She did not dispute that this is what happened. When asked why she firstly pointed out the wrong person yet she knew the name and place of the person who raped her, she replied that she pointed out the residence of the boy who she always saw with the appellant. Fact of the matter is, the complainant did not sleep at this boy's place and it was not this boy who allegedly raped her. She had no reason to firstly point out the wrong person to her brother.

[34] In *Rughubar v The State* [2012] ZASCA 188 (30 November 2012) it was stated that:

"it must be accepted that young children experience difficulties when relating to the court what actually happened with the precision expected of an adult, especially pertaining to incidents concerning sexual behaviour as well as incidents that occurred a while ago". The need for caution cannot be ignored. The court in asserting the need for caution referred to *Viveiros v S* [2002] 2 All SA 86 (A) where the Court stated:

“In view of the nature of charges and the age of the complainants it is well to remind oneself at the outset that, whilst there is no statutory requirement that a child’s evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution (R v Manda 1951 (3) SA 158 (A); Woji v Santam Insurance Co Limited 1981 (1) SA 1020 (A) at 1028B-D); and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach (S v J 1998 (2) SA 984 (A) at 1009B). For reasons which will presently emerge, the present case is plainly one which calls for caution.”

[35] Furthermore the SCA in the matter of *Stevens v S* [2005] 1 All SA 1 (SCA) expressed itself as follows:

‘Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behaviour are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such behaviour, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural safeguards are properly applied and adhered to.’

[36] The SCA went further and set out how these rules and safe guards should be applied when it said as follows at para 17:

‘As indicated above, each of the complainants was a single witness in respect of the alleged indecent assault upon her. In terms of section 208 of the Criminal Procedure Act 51 of 1977, an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (see, for example, S v Webber 1971 (3) SA 754 (A) at 758G–H). The correct approach to the application of this so-called “cautionary rule” was set out by Diemont JA in S v Sauls and others 1981 (3) SA 172 (A) at 180E–G as follows:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Webber ...). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in R v Mokoena 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean “that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence were well-founded” (per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.’ (See further all the other authorities referred to therein).

[37] The evidence of the complainant’s mother also has its shortcomings. In her testimony in chief she denied that she assaulted the complainant upon arrival from Limpopo. During cross examination she conceded that she assaulted the complainant because she came late at night. The complainant testified that she was assaulted by her brother even before she could report to him that she was raped. She also said that as she was telling her father that she was raped her mother also assaulted her. In the evidence of her mother, the complainant was a child who walked about at night and came home late.

[38] The appellant denied all the allegations by the complainant save that he admitted that he had consensual sexual intercourse with her and that she slept at his place.

He called one defence witness Warrant Officer Mapheleba who testified that the complainant was hesitant in pointing the appellant out. Further that the complainant was smiling when she pointed the appellant out and this created an impression on him that she and the appellant were known to each other.. This confirms the evidence of the appellant that he knew the complainant before the day of the incident. The complainant, during cross examination also confirmed that the appellant was known to her prior the incident. Mapheleba said that he saw a cake on top of the table in the appellant's shack and he enquired from the appellant whose cake it was whereupon the appellant told him that it was brought by the complainant as a sign of apology for alleging to community members and her parents that he had raped her. Mapheleba testified that this was confirmed by the complainant in the presence of her mother. Mapheleba was an independent witness who was just performing his duties. In my view he had no reason to be untruthful to the court. It is my respectful view that the court *a quo* had no reason to reject his evidence.

[39] When evaluating the totality of the evidence, this Court is faced with the problem that the evidence of the complainant is riddled with contradictions which the trial court considered as not material. In my view the trial court misdirected itself in this regard. Therefore, when the totality of the evidence is considered and the appellant's version is compared to the evidence adduced on behalf of the State, it cannot be said that there was justification to reject his evidence in preference of the State's version. It cannot therefore be said on a consideration of all the evidence properly before the trial Court, that the State

established the guilt of the appellant beyond a reasonable doubt on both charges.

[40] It is accordingly ordered that:

40.1 The appeal is upheld; and

40.2 The conviction and sentence on both charges are set aside.

**M B MAHALELO
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

I agree:

**U BHOOLA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

APPEARANCES

For the appellant	Adv Mokakaba
Instructed by	Legal Aid South Africa
For the respondent	Adv Moleko
Instructed by Gauteng	Director of Public Prosecutions,
Date of hearing	31/07/2018
Judgment delivered on	07/09/2018