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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Appeal no. A23/2018

In the appeal of:

MAFA SIMON SHIBANE

Appellant

and

THE STATE

Respondent

CORAM:

MATHEBULA J et I VAN RHYN AJ

JUDGMENT BY:

I VAN RHYN AJ

HEARD ON:

23 APRIL 2018

DELIVERED ON:

10 MAY 2018

- [1] The Appellant, a 21 year old male was convicted by the Regional Magistrate, Bloemfontein on one count of rape on 30 May 2017 and was sentenced to eighteen (18) years imprisonment.
- [2] The Appellant applied for leave to appeal against the conviction which was granted by the Court *a quo*.
- [3] The State alleged that the Appellant, on 27 June 2016 committed an act of sexual penetration with the Complainant, a five (5) year old girl, by putting his penis into her mouth. The Appellant was duly warned by the regional magistrate that in terms of the provisions of Sec 51(1) of the Criminal Procedure Act 51 of 1977 ("CPA"), and should he be found guilty as charged, the prescribed minimum sentence is life imprisonment. The Appellant was legally represented during the trial.
- [4] The record reflects that before the Complainant gave evidence, the Court made a ruling in terms of Section 170A(1) of the CPA that her evidence be presented through the assistance of an intermediary. The defence did not object thereto and after considering the qualifications and experience of the proposed

intermediary, an order was duly granted. Complainant gave evidence in camera.

[5] Section 162 of the CPA peremptorily requires that all witnesses will testify under oath subject to exceptions applicable to limited categories of witnesses. The first exception is for a witness to take an affirmation in terms of Section 163. The second exception, in terms of Section 164, provides for a witness to be admonished to speak the truth after finding that he/she does not understand the nature and impact of the oath or affirmation due to ignorance arising from youth, defective education or other causes.¹

[6] The Complainant was born on [...] 2010 and was six (6) years old at the time of the trial. She was five (5) years old when the alleged incident took place.

[7] The record reveals that the Regional Magistrate posed a number of questions to the Complainant to establish whether she understood the difference between the truth and lies. It is

¹ **Director of Public Prosecutions, Kwazulu-Natal v Mekka 2003 (4) SA 275 at 276 H - I**

apparent from the questions posed to the Complainant and her answers thereto that she understood the difference between telling the truth and facts that were incorrect and therefore false. A difficulty however arose when the Complainant was asked why it would be false to, for example say that her teacher at school is a male while she in fact is a female. She replied that she did not know. When she was asked whether anything would happen to her if she lied, she answered in the negative. The Magistrate informed the Complainant that it is expected of her to tell only the truth in Court because the Appellant may go to jail due to her lies and whether she understood the consequences if she did not tell the truth. Again she replied in the negative. The Complainant was warned not to tell any lies in Court where after the magistrate found her to be a competent witness who would be able to distinguish between the truth and falsehood and that she was also made aware of the dangers of speaking such untruths.

- [8] The manner in which the evidence of young children should be approached is thoroughly analysed in **Woji v Santam Insurance Company Ltd 1981 (1) SA 1021 (A) at 1028**. The concern about the testimony of a child is not merely his or her ability to distinguish between the concepts of truth and falsehood but also

the proviso that the child must understand what it means to speak the truth.²

[9] The Complainant testified that she went to the shack situated on the same premises as her parental home to look for her sister's books. The Appellant was inside the shack and he asked her to enter. She was reluctant at first even though she was not scared of him. The Appellant then told her to lay on top of him whereafter he undressed, by dropping his pants to expose his penis and inserted his penis inside her mouth. The Complaint demonstrated, by making use of anatomical dolls, how the Appellant lay and how he dropped his pants.

[10] She placed the male doll, lying in a horizontal position on his back and placed the female doll on top of the male doll with the abdomen flat on the male doll, facing his private parts.

[11] The Complainant's sister entered the shack whereafter the sister questioned the Appellant and the Complainant on what was happening but neither of them replied. Her sister took her and they went to the main house. The sister started crying and upon

² Section 164(1) and (2) of the CPA

concerns of her brother, who was in the main house, and it was decided to inform the Complainant's mother of the incident.

[12] The Complainant's evidence that the Appellant was lying on top of a steel bath caused confusion and several questions were posed by the Magistrate and the Defence to ascertain whether the Appellant was inside the bath or whether the bath was perhaps turned upside down. It appears as if old clothes and blankets filled up the bath and resulted in the explanation that the Appellant was "on top the bath" when the incident took place.

[13] During cross-examination the Complainant was confronted with her sister's version as per her police statement, that she was holding the Appellant's penis in her hands. She denied this version. According to her evidence she held her hands next to her body. It was also put to her that according to her sister's statement, the Appellant grabbed a blanket to hide his penis when her sister entered the shack which she also denied.

[14] The second State witness was the Complainant's sister, N. W., aged twenty two (22). She testified that at around midday, on the day in question, she returned home as she was supposed to

baby-sit her son and the Complainant. When she entered the shack, she found no one in the kitchen and proceeded to the bedroom. It was dark in the bedroom although it was not as dark as it becomes during the night.

[15] She found the Appellant sitting on top of the bath while the Complainant was sucking his penis. She questioned the Appellant about what was happening but did not receive any reaction from neither the Appellant nor the Complainant. She grabbed the Complainant and left the shack. Her brother found her crying in the bedroom and she related what she found in the shack where after her brother went to the sitting room. The Appellant then entered the sitting room and denied that he did anything to the Complainant. Upon her arrival from work the Complainant's mother confronted the Appellant with the allegations which the Appellant denied.

[16] During cross-examination the sister indicated that when she entered the shack, the Appellant was sitting but leaning backwards slightly. The Complainant was on her knees facing the Appellant and holding his penis in her hands while she was sucking it. She confirmed that she only observed the scene for

about six (6) or seven (7) seconds, which is not an adequate time in the circumstances. The sister was confronted with the discrepancies between her version and the testimony by the Complainant as well as the discrepancies as contained in her witness statement. Her statement was commissioned on the day after the alleged incident and was handed in during the trial as exhibit “A”. In the statement she said that she “ ... *found Mafa* (the Appellant) *lying on top of a pile of clothes and saw Manana* (the Complainant) *standing and holding Mafa’s penis*”. No mention was made that the Complainant had the penis in her mouth or was sucking it. The sister denied that the version contained in the statement was correct and attributed the inconsistencies to the fact that she relayed her version in Sesotho while it was written down in English. No other witnesses were called by the prosecution. By agreement the Competency Report of a forensic social worker as well as the J88 were handed in as exhibits. I will refer to the contents of these documents herein later.

- [17] The version of the Appellant was a denial of the accusations. He however admitted the age of the Complainant and that he and the Complainant were together in the shack on the day of the

incident. He was lying on blankets on the floor in the shack when the Complainant entered the shack. She fell asleep on top of the blankets and clothes that filled the bath. After the sister entered the shack, the Complainant ran towards him and bumped into him. Prior to the sister's entry into the shack he was fast asleep. The sister started yelling at the Complainant and took her to the main house. He confirmed that he did not answer the sister's question on what was happening in the shack because, at first he thought that she was joking, and then he expected certain accusations to follow and it would end up in an argument.

- [18] The Appellant, obviously in an effort to explain the motive for the false accusations against him, testified that he and his brother Thabo, were orphans who initially lived in Thaba 'Nchu. His uncle fetched them where after the family as well as the Appellant and his brother lived in the shack. Subsequent to the building of a RDP house on the property the rest of the family relocated to the RDP house while the Appellant and his brother were left to stay in the shack. According to the Appellant he and his brother were ill-treated by the foster family and accusations were levelled that their foster grant from the State were inappropriately used by their uncle. The Appellant and his brother dropped out of school due

to a lack of funds and the Appellant testified that his brother left after the case against him was opened, as he was afraid that the family would also implicate him in wrongdoings.

[19] The Appellant's testimony that he was ill-treated, was corroborated by the Complainant during cross-examination when she confirmed that her mother and sister did not want the Appellant to stay with them. The Complainant further explained that the Appellant was ill-treated but his brother, Thabo was not. The Complainant also mentioned that something happened between her brother and the Appellant but she did not know exactly what the problem was.

[20] When addressing the Court the Prosecutor stated that the forensic report compiled by a social worker, who assisted the Complainant to relay what happened to her, indicates that the child was unable to communicate properly and it was also indicated on the J.88 that the Complainant was only able to show with hand signs what happened to her. It is evident from the J.88, completed by Dr J M Kotzé that no visible abnormalities were found and that child abuse can neither be confirmed nor negated. The doctor furthermore noted that the Complainant was friendly

but refused to speak. Regarding the incident it was noted that the child showed her mother that the person (twenty one (21) years old) put his penis into her mouth and she was scared of him.

[21] From the Competency Report compiled by Colonel T S Monosi, dated **3 March 2017**, a registered social worker with fourteen (14) years experience, it is evident that three separate consultations were conducted with the Complainant. It was stated that the Complainant is functioning at pre-operational stage and that a child's thoughts during this period is being governed by principles such as egocentrism, animism and other similar constructs. It is further stated that communication at the Complainant's age is egocentric and it may appear to be disorganized or fanciful. For communication to happen, children of this age group must have acquired a certain level of intelligence, vocabulary and conversational skill.

[22] Evidence pertaining to the competency of a child to testify assists the Court not only on the question whether the evidence of the child is to be admitted but also the weight/value to be attached to

the evidence of the child³. Having correctly found that the evidence of the Complainant is admissible it is necessary to scrutinize not only the testimony of the Complainant, but also whether her evidence was corroborated by the evidence of her sister.

[23] On several occasions the Complainant faulted to respond to questions put to her in an appropriate way and at times indicated that she does not understand the question. The following examples will illustrate the point.

“Yes what happened then? --- He undressed and then inserted his penis inside my mouth.

Okay and then what did he undress? --- His pants.

Where in the shack were you when this happened? --- I was inside.

Was there anything else in the shack? --- No, Your Worship.

COURT: *What was in the shack? --- it was my sister’s books.*

And,

³ S v V 1998 (2) SACR 651 (CPD) at 653.

Did you see his penis? --- Yes.

What did it look like? --- It was not okay.

Can you describe it to us? --- No.

And,

What was he wearing when he inserted his penis in your mouth? -

-- He was wearing pants, Your Worship. Trousers.

And after he undressed? --- I do not know.

And,

Manana, you indicated that your sister entered. What happened then? --- I do not know."

The complainant's answers to some of the questions posed to her indicates that her power of observation, recollection and communication skills raises the question whether she has the capacity to understand the questions put to her and frame and express intelligent answers in relation thereto. The reason for evidence to be given under oath or, as in this case, where a child

is admonished to speak the truth, is to ensure that the evidence given is reliable⁴.

[24] In his judgment convicting the Appellant, the Magistrate referred to the evidence of the Complainant and found that she maintained her version throughout and no material contradictions could be detected in her evidence. The magistrate also found that she gave a logical and detailed account of what happened to her and was impressed by her demeanour. When the Complainant was confronted with her sister's statement she refuted her sister's version of the events.

[25] Recently the Supreme Court of Appeal in the unreported matter between **Saamwerk Soutwerk (PTY) LTD v Minister of Mineral Resources**⁵ restated the circumstances justifying overturning the trial court's findings of credibility as follows:

“[38] It is trite that an appellate court is reluctant to upset findings of credibility and fact of a trial court. This is so mainly because the trial court had the advantages of seeing and hearing the witnesses and of being steeped in the

⁴ DPP v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT 2009 (4) SA 222 at 279 [166]

⁵ (1098/2015 & 206/2016) [2017] ZASCA 56 (19 May 2017)

atmosphere of the trial. The advantages of the trial court must, however, not be overemphasised, because that may render the appellant's right of appeal 'illusory'. The findings of the trial court in respect of credibility and fact will thus be disturbed if they are plainly wrong."

- [26] However several contradictions not only regarding the evidence between the Complainant and her sister appear from the record, but also further discrepancies in the evidence of her sister and her sister's witness statement. The Court *a quo* found that the discrepancies relating to whether the Complainant was holding the Appellant's penis in her hands is not of a material nature. Of importance to the Court *a quo* was whether the Appellant's penis was in the Complainant's mouth and it was found that both the Complainant and her sister corroborated each other on this crucial aspect. It was furthermore found that the Complainant was corroborated by her sister with regard to the fact that the Appellant was lying on his back when the incident occurred. This however was not the evidence of the sister. According to the sister the Appellant was sitting and the Complainant was kneeling in front of him. The Magistrate found that the sister was fair enough to admit that she did not see the Appellant's penis. The

sister evidence was that she saw the Complainant holding it. No mention was made of the fact that the sister failed to mention in her witness statement that the Complainant had the Appellant's penis in her mouth.

[27] Regarding the Complainant's concession that her sister and mother disliked the Appellant the Magistrate referred a question that was put to the Complainant during cross-examination. The question was whether her sister and her mother told the Complainant that Mafa (Appellant) put his penis into her mouth. The complainant's response was: "Yes".

[28] The record reveals the following regarding the subsequent questioning by the Prosecutor and the Magistrate:

In re-examination:

"PROSECUTOR: Manana, did you tell anyone why ... how Mafa put his penis in your mouth? --- No, uncle.

Manana, you said now that your sister and your mother told you to say that Mafa put his penis in your mouth. Why did they say that to you? --- No, Uncle.

To what are you saying no? --- No, my Uncle.

COURT: *Who told you that you should say that Mafa put his penis in your mouth? --- It was not me, Uncle.*

Who said so? --- It is my mother.

What did she say to you? --- I do not know, uncle.

PROSECUTOR: *Is it the truth that Mafa put his penis in your mouth? --- It is the truth."*

[29] It is not expected of a witness to furnish precisely the same account in evidence in Court as in a witness statement and experience has shown that two or more witnesses hardly ever give identical evidence with reference to the same incident or event.

[30] There is no evidence of a first report made by the Complainant. The remarks by the mother as recorded in the J.88 medico-legal report that the Complainant indicated to her what had happened to her, was not presented at the trial.

[31] It is trite that the proper approach to evaluate evidence is in the ultimate analyses to look at the evidence holistically in order to determine whether the guilt of the Appellant has been proved beyond a reasonable doubt. In **S v Hadebe and Others**⁶, the following was stated:

“But, in doing so, one must guard against a tendency to focus to intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood from the trees.”

[32] In the present case eleven (11) months passed before the Complainant was called to testify in Court. Taking cognisance of

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1998 (1) SACR 422 (SCA) at 426 f – h.

her age and the time lapse between the incident and the trial, this may have resulted in her inability to respond adequately to some of the questions as indicated above.

[33] The evidence indicates that, but for the sister's encounter with the Complainant and the Appellant in the shack, there probably would not have been a report by the Complainant. The sister did not question the Complainant about the incident and merely informed her brother and her mother about what she witnessed. It can reasonably be expected that the Complainant's mother would have questioned the Complainant, but no evidence of a voluntarily complaint to her mother was placed on record. On the other hand, the question remains whether the Complainant realized the immoral nature of such an act. There is no evidence that the Complainant was intimidated or threatened by the Appellant but for the note by the doctor recorded on the J.88, which the Complainant refuted.

[34] Faced with the contradictions between the sister's evidence during the trial, the testimony of the Complainant and the further contradictions contained in the sister's witness statement, Mrs S

Giorgi, on behalf of the State, proposed that less weight should be attached to the sister's evidence.

[35] We are required to approach the evidence of the Complainant with caution, firstly because as to a certain extent she is a single witness and secondly, because she is a young child.⁷

[36] The requirement remains that the Court must be convinced that the guilt of an accused has been established beyond reasonable doubt. The fact remains that more than one witness' evidence regarding the incident in the shack was presented at the trial and the best indication that a court has applied its mind in the proper manner is to be found in its reasoning for the judgment including its reasons for the acceptance and the rejection of the respective witnesses. It is quite evident that apart from the fact that both the Complainant and her sister testified that the Appellant's penis was in the Complainant's mouth, the evidence relating to the position of the Appellant, as to whether he was lying or sitting, whether the Complainant was lying on top of the Appellant as she indicated with the dolls, kneeling or standing when the immoral act

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R v Manda 1951 (3) SA 158 (A) at 163; Viveiros v s 2000(2) All SA 86 SCA; Woji v Santam Insurance Co Ltd 1981 (1) SA 1020 (A) at 1028.

happened and whether the Complainant held her hands next to her body or holding the appellant's penis differs to a great extent. These aspects were found to be immaterial by the Court *a quo*. In my view, corroboration on these aspects or at least some of these aspects would have provided proof beyond reasonable doubt.

[37] There is no legal provision requiring corroboration of evidence of children but it is settled law that the evidence of children should be approached with caution.⁸

[38] The Magistrate found that the Complainant was corroborated by her sister with regard to the fact that the Appellant was on his back. This is a misdirection.

[39] Too much reliance was placed upon the Appellant's response or lack of response when the sister entered the shack and enquired about what was happening. The Magistrate found that the Appellant's denial that he did not do anything to the Complainant subsequent to him entering the house is not the response of an innocent person. On the other hand, the Appellant's version that

⁸ **R v J 1966 (1) SA 88 (SR AD).**

he heard the sister being questioned by her brother and it concerned the Complainant, caused him to assume that the sister was under the impression that he was doing funny things to the Complainant in the shack, seems more probable. The Appellant also confirms the sister's testimony that the brother questioned the Complainant as to what happened in the shack, confirming that the Appellant was able to hear what was discussed in the house. Too much weight was attached to the fact that the Appellant, only during cross examination stated that he informed his previous legal representative that he had misgivings about the way that the foster grant from SASSA was used and that this aspect was not put to the State witnesses when they testified. The Appellant explained that he consulted with another legal representative and was under the impression that his present legal representative was aware of his instructions. This explanation does not seem improbable or far fetched.

[40] In **S v Tshabalala**⁹ the approach to a criminal trial is summarized as follows:

⁹ 2003 (1) SACR 134 (SCA) at 139 i – l 140

“[When dealing with a criminal trial] the correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

- [41] Even though the Magistrate on several occasions correctly warned the legal representative of the Appellant and the Prosecutor not to confuse the Complainant and rather give the Complainant an option of choosing between two versions, as a child may be prone to just answer in the affirmative, several of the Complainant’s answers were not coherent or a proper response to the particular question. Of concern remains the response to the questions whether her mother and/or sister could have suggested to the Complainant what had happened in the shack. The sister indicated that the Appellant answered her mother “with an attitude” when he was questioned about the incident. She also testified that even though her mother took the Appellant and his brother in as her own children, the Appellant and her stepfather

(the Appellant's uncle) quarrelled at times. This is a clear indication that there could have been animosity towards the foster children or at least against the Appellant as confirmed by the Complainant. The sister explained that she had a good relationship with the Appellant because they used to go out together and she even sponsored him to play pool. She also testified that the Appellant only slept in the shack on the occasions that he went out and brought home a girlfriend. She confirmed that the Appellant dropped out of school and was encouraged by herself and her stepfather to continue his studies. The Appellant however indicated that he could not write his June exams due to a lack of financial support and accused his foster parents of misusing the grants they received from SASSA.

[42] In **S v V**¹⁰, the approach to the Appellant's version can be summarized as follows:

“It is trite that there is no obligation upon an Appellant person where the State bears the onus, to ‘convince the Court’. If his version is reasonably possibly true, he is entitled to his acquittal even though his explanation is improbable. The Court is not

¹⁰ 2000 (1) SACR 453 (SCA) at 455 a – c

entitled to convict unless it is satisfied that not only the explanation is improbable, but that beyond reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true, but whether one believes him, is not the test."

[43] *In casu*, having weighed the strengths, weaknesses, probabilities and improbabilities, I am of the view that the prosecution failed to prove its case beyond reasonable doubt.

[44] Accordingly I propose the following orders:

1. The appeal is upheld.
2. The conviction and sentence are set aside.

I VAN RHYN AJ

I concur and it is so ordered

M.A. MATHEBULA, J

On behalf of the Appellant:
Instructed by:

Ms S Kruger
BLOEMFONTEIN JUSTICE CENTRE

On behalf of the Respondent:
Instructed by:

Adv. S Giorgi
DIRECTOR PUBLIC PROSECUTIONS
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