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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

Case No: A81/2018

In the matter between:

FRANS MONGADI MAKHETHA

APPELLANT

and

THE STATE

RESPONDENT

CORAM:

NAIDOO, J *et* MOLITSOANE J

JUDGMENT BY:

NAIDOO J

HEARD ON: 13 AUGUST 2018

DELIVERED ON: 16 AUGUST 2018

INTRODUCTION

- [1] The appellant was convicted on one count of Rape in the Regional Court, Welkom. He pleaded not guilty to the charge, but was convicted thereon and sentenced to sixteen (16) years' imprisonment. The court a quo refused leave to appeal and the appellant comes before us, having successfully petitioned the Judge President for leave to appeal against his conviction and sentence. Mr LM Tshabalala represented the appellant in this court and Mr E Van Rensburg represented the respondent, being the state.

BACKGROUND

- [2] Ten year old M X (M) and her 7 year old friend, N N (N), were sent by N's mother to go and look for N's sister at the local stadium. On the way there they met a man that neither of them knew and he asked them to look for a boy called "Seun", and offered to give them one Rand each should they find him. They then went in search of Seun and a few minutes later they met the same man at a street corner. He then asked them to walk along with him and took them to a shack in the area, where he asked both of them if they knew how to play house – house game. M said no she did not know how to play. The man then said that she will be the mother he will be the father and N will be the child. He then sent N to one bedroom in the house and took M to the other bedroom. There he

asked her to undress and when she was reluctant, he threatened to shoot her. She then undressed and he made her lay on her stomach and proceeded to have sexual intercourse with her from the rear. She testified that he had penetrated her anally but it later turned out, upon being examined by the doctor at the hospital, that she was in fact vaginally penetrated. I will deal with this aspect later. M's evidence is that he repeated this process about 4 times, after he kept going into the other room where N was. Thereafter he asked her to get dressed, as the owner of the house was going to arrive. He then walked with them a distance until they reached a tarred road, and then they parted company. Apart from N, M told no-one of this incident

- [3] M testified that her mother asked her about three weeks later what had happened. She refused to tell her mother about the incident as she was afraid that her mother would give her a hiding. Her mother then called the neighbour to whom M revealed what had happened. The matter was reported to the police and she was taken to the hospital.
- [4] N confirmed M's evidence that they were sent to look for her sister at the stadium. She said that M pushed a wheelbarrow for a woman and in that process they met the strange man on the street who asked them to accompany him to a shack. They were taken to a shack by this man and were asked if they knew how to play the house – house game. However M remained in the kitchen with this man while she was sent to 1 of the bedrooms. She testified further that at some stage she peeped into the kitchen where M was with this man and saw him raping her. It was not clear where exactly M was in the kitchen, but she said that M was lying down and demonstrated, by using the anatomically correct dolls, that the

man was on top of M from the rear. She also demonstrated what she saw, by inserting the genital organ of the male doll into the female doll.

- [5] The state closed its case after N delivered her evidence. The defence applied for the discharge of the appellant in terms of section 174 of the Criminal Procedure Act 51 of 1977 (CPA). There is no indication in the record that the application was refused, but the magistrate indicated in his judgment that the application was refused. Prior to the trial court delivering judgment (presumably) in respect of that application, the court indicated that it wished to call the forensic nurse as it needed further information in order to make a proper finding. The court invoked the provisions of Section 186 of the CPA and called Mabel Qathatsi, who testified that she examined M and confirmed that her findings were recorded on the medical form commonly referred to as the J88. She also confirmed that M was penetrated vaginally as opposed to anally, as she was unable to find any injuries in the anal area, whereas she found a number of healing injuries in the vaginal area. The court allowed cross examination of this witness by the prosecution and the defence, and also allowed them to call any further evidence as a result of this witness' evidence. There is no record of any formal application by the state to reopen its case, but the allowance by the magistrate to call further witnesses caused the state to reopen its case. Acting upon the invitation of the magistrate, therefore, the state called the evidence of M's mother, M X (Mrs X).
- [6] Mrs X testified that when M complained of stomach ache and feeling ill, her mother wanted to administer what appears to be an enema to her, she discovered that the child was injured in the genital area. She asked M how she received those injuries and M

refused to tell her. The mother then enlisted the assistance of the neighbour who then ascertained from M what had happened. She confirmed that the incident had happened approximately three weeks prior to M being questioned by the neighbour. The matter was then reported to the police, whereafter M's mother asked her to point out the shack where the man could be found. The mother took M with her and went to the shack where they found a bearded man. M then informed her mother that this is not the man who raped her. They then returned to their home. A little later it appears that the mother went back to the shack to make enquiries about the owner/occupants of the shack and there they found the bearded man as well as the appellant.

- [7] Due to a break in the recording, the rest of this witness's evidence in chief was not transcribed. However, under cross-examination, it emerged that after making enquiries about the occupants of the shack, the police arrived. Mrs X and M went back to that shack where they encountered the bearded man again, together with another male person. It seems that the police asked the two men to stand together and then asked M to point out the man who raped her. She pointed out the appellant.

M was then taken to the local hospital for a medical examination. Mabel Qathatsi, a forensic nurse examined M and recorded her injuries on the J88, as indicated above.

- [8] The appellant's version is that M and her mother arrived with the police, at the shack where he was visiting. He had never seen M or her mother before that day. He was very surprised that she pointed him out, as he worked most days. He, however, could not remember where he was at the time M alleges he raped her. His further evidence was that the shack belonged to a friend of his,

called Papie. There were others that would also visit the shack, some of them being the same build and height as he is. The appellant denied raping M.

[9] It is trite that the state bears the onus to prove the guilt of an accused beyond reasonable doubt and that the accused person bears no onus to prove his innocence. In this matter the appellant assails the judgment of the trial court on a number of grounds, the most important of these being that the court failed to undertake a proper analysis and evaluation of the evidence, and erred in finding that the evidence of the state witnesses as to the appellant's identity was sufficient. The appellant also alleges that the court erred in not finding that the evidence of the appellant is reasonably possibly true and in rejecting his evidence.

[10] It is well settled in our law that evidence relating to identity, especially where identity is in dispute, must be approached with the necessary caution, and the court must be satisfied that the witness is not only honest but his/her evidence is reliable and trustworthy. It goes without saying that where the identifying witness is a child, extra caution must be exercised by the court. Guiding principles for assessing such evidence have been set out in a number of cases:

In **S v Mthethwa 1972(3) SA 766 (AD) at 768**, the court said

“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the

mobility of the scene; corroboration; suggestibility; the accused's face, voice, gate, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities..”

A similar view was expressed by the Supreme Court of Appeal in **S v Charzen 2006(2) SACR 143 (SCA)**, where the only evidence called by the state about a robbery was that of a single witness. The court said at para 11 on p147:

“..... In matters of identification, honesty and sincerity and subjective assurance are simply not enough. There must in addition be certainty beyond reasonable doubt that the identification is reliable, and it is generally recognised in this regard that evidence of identification based upon a witness's recollection of a person's appearance can be ‘dangerously unreliable’, and must be approached with caution.”

The court continued in para 19 on p149:

“.... There was no physical evidence: not a fingerprint, not a recovered cellphone, no wallet, no purse, no baby seat, nothing to connect the accused to the crime and thus provide a measure of objective assurance against the pitfalls of subjective identification. The greatest assurance of guilt must lie in such evidence, rather than in identification on its own, which, as this case shows, can be beset by error and misdescription and doubt, in which case, possibly and even presumably, guilty persons must walk free.”

- [11] Similarly, in the present matter, there is nothing apart from the identification by M, a 10 year old child, some three weeks after the incident is said to have occurred, to link the appellant to the offence. The trial court correctly warned itself of the dangers of uncritically accepting the evidence of a child witness, and in doing so, referred to the case of **S v Diara 2010(1) SACR 29 (EC)**. The court *a quo* referred to contradictions in the complainant's testimony whereas the J88 reflected that she was vaginally

penetrated. I am in agreement with the court's assessment of how this could have occurred, and that the medical evidence can be accepted. What the trial court did not refer to is the contradictions between N's evidence and that of the complainant, M.

[12] In her narrative of how they met the man that raped her, M made no mention at all that she pushed a wheelbarrow for a woman, and that she and N ran away and only then met the man who took them to the shack. N made no mention that the man wanted them to look for a boy called Seun or that the man offered them R1.00 each. M also said that she was raped in the one bedroom while N was in the other bedroom. She made no mention of either of them being in the kitchen. Furthermore, M's evidence was that it was about to become dark as they entered the shack in which she was raped. There is no evidence about the state of lighting inside the shack. From N's evidence that after M was raped, they told the man that they have to leave as it was late, it can be inferred that it was now dark. There was absolutely no evidence as to the lighting in the shack even at that stage. M's evidence that the man raped her four times and all four times, she was made to lie on her stomach, indicates that she did not have much opportunity to observe his face during the rapes.

[13] To my mind, one cannot ignore the fact that M did not report the incident to her mother because she was afraid her mother would give her a hiding. When it was revealed three weeks later, it was evident (and understandable) that the mother was upset and made a concerted effort to find the perpetrator. The manner in which the appellant was identified is unsatisfactory, to say the least. M was made to choose one of the two men in the room, one of which she had earlier indicated was not the man that raped her. In my view,

the reliability of her identification of the appellant in this manner must be viewed in the light of the factors I have mentioned in paragraph [11]. Added to this, is M's evidence that she does not know the man who raped her, whereas the J88 reflects that the perpetrator is a known male. To my mind it is very unusual for the child to have been bleeding three weeks after the incident, but no evidence was forthcoming as to why this was, which leaves a sense of unease about what really happened. Having said that, however, I point out that there is no dispute, nor is there any doubt in my mind that M was raped approximately three weeks prior, in the manner in which she described.

- [14] I have no doubt that both M and N were honest in the account they tendered in court, in respect of the incident. However, I am of the view that the trial court ought to have interrogated the reliability of such evidence in the light of the factors I have mentioned, namely that the perpetrator was unknown to both children, the lighting may well have been inadequate for a proper observation of the perpetrator's face, and although they may have spent considerable time in the perpetrator's company (as suggested by the trial court), the opportunity for observation of his face was limited. While M may have immediately pointed out the perpetrator, one cannot lose sight of the circumstances under which this was done, and the state of mind that M may have been in at the time – a scared and traumatised child who had to choose one of two people as the perpetrator. I am not satisfied that the trial court gave sufficient weight or consideration to all the prevailing circumstances, which bear significantly on the issue of identification. To my mind sufficient doubt exists regarding the reliability of M's identification of the appellant to give him the benefit of that doubt. I do not deem

it necessary to deal with the issue of sentence, as the sentence falls to be set aside and cannot, therefore, be sustained.

[15] In the circumstances, the following order is made:

15.1 The appeal against the conviction and sentence is upheld.

15.2 The conviction and sentence in this matter are, hereby, set aside.

S. NAIDOO, J

I Concur

P MOLITSOANE J

On behalf of Appellant:

Instructed by:

Adv. LM Tshabalala

The Justice Centre

Bloemfontein

On behalf of Respondent:

Instructed by:

Adv. E Van Rensburg

The State