



**IN THE HIGH COURT OF SOUTH AFRICA,
NORTHERN CAPE DIVISION, KIMBERLEY**

Case no: CA & R 81/2017

Not reportable

In the matter between:

P

APPELLANT

And

THE STATE

RESPONDENT

Heard: 06 November 2017

Delivered: 13 April 2018

Coram: Phatshoane ADJP et Lever AJ

JUDGMENT

Phatshoane ADJP

- [1] On 14 July 2016 Mr P aged 54 was convicted on two counts, rape and assault with intent to do grievous bodily harm (assault GBH), in the Kimberley Regional Court, by Magistrate M Qomoyi. On 29 July 2016 he was sentenced to 15 years imprisonment for rape and three years for assault GBH, which sentences were ordered to run concurrently. He is before us on appeal against his convictions and sentence with leave of this Court and is on bail pending this appeal.
- [2] The appellant stood trial on five counts. His 13 year old stepdaughter, Ms S, is the complainant. The five charges are:

- 2.1 Count 1, sexual assault. It was alleged that during or about September 2014 he unlawfully and intentionally sexually violated Ms S by touching her breasts and vagina without her consent;
- 2.2 Counts 2 and 3, rape. It was said that on or about October 2014 he unlawfully and intentionally committed an act of sexual penetration on Ms S by inserting his penis into her vagina without her consent;
- 2.3 Count 4, rape. The State contended that during or about February 2015 he unlawfully and intentionally committed an act of sexual penetration on Ms S by inserting his finger into her vagina without her consent; and
- 2.4 Count 5, assault GBH. It was said that on or about 19 July 2015 he unlawfully and intentionally assaulted Ms S by hitting her with a “sjambok”¹ over her body with the intention to cause her grievous bodily harm.
- [3] The appellant pleaded not guilty on all counts and elected not to testify. In his plea explanation he denied the outlined allegations. In respect of assault GBH he admitted to beating the complainant with a “sjambok” but disputed that he had the intention to cause her grievous bodily harm. He claimed to have merely chastised her several times before the incident in issue when she came home late and lied about her whereabouts.
- [4] The Magistrate found the complainant’s explanation, that the rapes were painful, to be inconsistent with the medical evidence. In the main she found that the complainant did not report the sexual assault and the two incidents of rape referred to in Counts 2 and 3 at the first opportunity. In addition, she held that the complainant’s evidence was contradicted by other state witnesses. On these conspectus she acquitted the appellant on Count 1, sexual assault, and on the two counts of rape.
- [5] In respect of Count 4, the Magistrate found that the complainant reported to her mother, their neighbour, Ms M (“Ous Peggy”), and her daughter, Nosi Tokela, that the appellant inserted his finger into her vagina at the park. The Magistrate

¹ A long stiff whip originally made of rhinoceros hide (Online -Oxford living dictionaries)

rejected the argument that the complainant and Ous Peggy connived to implicate the appellant falsely or that Ous Peggy had a grudge against him. In respect of Count 5 the Magistrate was of the view that, apart from the fact that the appellant admitted to whipping the appellant, the medical evidence was consistent with the complainant's evidence. She held that the evidence presented by the State, in respect of Count 4 and 5, called for an answer from the appellant. Insofar as he failed to rebut the allegations made against him it followed that the evidence adduced excluded any reasonable doubt about his guilt. She convicted him on counts 4 and 5, rape and assault GBH.

[6] The grounds of appeal were presented in the form of argument and mainly highlights the contradictions in the complaint's evidence vis-à-vis that of the other State witnesses. In summary the grounds of appeal, as paraphrased, are the following:

- 6.1 The State did not adduce sufficient evidence to prove its case beyond reasonable doubt. It is contended that the complainant was a single witness on the alleged rapes and that her explanation of assault GBH is at odds with the appellant's plea explanation that he merely chastised her and did so not with the intention to cause her grievous bodily harm.
- 6.2 The complainant was not a credible witness. Regard being had to her evidence that the rapes were a painful experiences, it was argued that, it was improbable that she would not have suffered injuries after she was raped twice and thereafter penetrated with a finger in her private part.
- 6.3 To the extent that the complainant testified that she told Nosi that the appellant raped her on two occasions and instructed Nosi to tell her mother (Ous Peggy) her evidence was contradicted by that of Nosi who strenuously denied this allegation.

- 6.4 The complainant contradicted her mother's version with regard to the time that she reported the rape that the appellant perpetrated by insertion of his finger into her vagina (the park incident).
- 6.5 It is contended that the complainant had the tendency to tell lies as confirmed by her mother. The complainant herself also testified that she lied to her parents on regular basis regarding her whereabouts.
- 6.6 The complainant's mother confirmed the appellant's version that there was some collusion between Ous Peggy and the complainant and that the former had a negative attitude towards the appellant because, amongst others, he kept sheep in the yard which she claimed caused flies and constructed a shelter for the complainant's mother with poles he sourced from the veld. It is contended that this conspiracy is supported by the complainant's conduct in discussing the park incident with Ous Peggy before reporting same to her mother.
- 6.7 It is further contended that the probabilities in respect of the plot between the complainant and Ous Peggy to implicate the appellant falsely is inescapable because the latter reported the incident to the social workers. It was argued that it was odd that the allegations of rape surfaced not on the complainant's own free will but from Ous Peggy after the appellant had chastised the complainant. It was further argued that the negative attitude that Ous Peggy had towards the appellant is evident from the statement she made to the police, in particular, where she intimated that she had been the family's neighbour for years until "*die ma met Joseph (the appellant) deurmekaar geraak het.*"
- 6.8 The Court *a quo* accepted the complainant's version in respect of counts 4 and 5 as the truth while rejecting her version in respect of Counts 1 to 3. It is contended that the trial Court's explanation for the acceptance of the evidence in respect of counts 4 and 5 on the basis that the incidents were reported and therefore served as corroborative

evidence was erroneous. It was argued that the fact that certain offences were reported pointed to the machination between the complainant and Ous Peggy to implicate the appellant falsely.

6.9 It is further contended that the appellant had no intention to cause the complainant grievous bodily harm. He chastised her as a parent to admonish her from being disobedient. It is argued that Ous Peggy's evidence that the complainant had welts all over her body evinces her negative portrayal of the appellant. It was submitted that there were no serious injuries that the complainant sustained following the beating, as has been found by the trial Court. This notwithstanding, the Court *a quo* found him guilty of assault GBH.

6.10 In respect of the sentence of three years imprisonment, for assault GBH, it was contended that the Court *a quo* wrongly found that a previous conviction of assault, which was already 19 years old, had to be taken into account in terms of the Criminal Law Amendment Act, 105 of 1997 (minimum sentence regime), for purposes of determining the appropriate sentence.

[7] Even though the appellant was acquitted on some of the counts and the alleged offences are said to have been committed at different times with diverse factual matrix it is essential to briefly set out the background pertaining to the five counts because the question of credibility of the witnesses runs through the whole chain of events.

[8] The appellant was in a 13 year long-term relationship with the complainant's mother and shared a home with her, the complainant and his four year old son. He raised the complainant from the time she was about two years old. During September 2014 the complainant says that, while taking a bath in her bedroom and was naked, her stepfather, the appellant, entered and ordered her to turn around. When she did so he touch her breast and her private parts and told her that she was getting beautiful and growing up. She was scared as she never

thought that the appellant would act in that manner. She did not report the incident to her mother because the appellant warned her not to betray him.

- [9] One evening in October 2014 around 08h00, while the complainant was asleep, the appellant entered her bedroom and laid next to her. He ordered her to turn around; he took off her panty and inserted his penis into her vagina without her consent and had sexual intercourse with her without a condom. This lasted for a long period and was painful. Her mother was sleeping in an opposite room with the door slightly ajar. She did not call her mother out for help as she was scared.
- [10] The next day at 12h00 midnight whilst her mother was asleep in the parental bedroom the appellant raped her once more. When he was done he ordered her not to utter a word. She nevertheless informed Nosi, her friend who lived next door, weeks later and requested her to tell Ous Peggy, Nosi's mother, about the rapes. Nosi denied that the complainant reported the rapes to her or that the appellant touched her inappropriately. Nosi testified that the complainant told her that the appellant had a problem when she covered herself with a towel after taking a bath.
- [11] The complainant says on 14 February 2015, the following year, she socialised with a certain boy at a park from 21h00 to 24h00. Upon her arrival home her parents enquired where she had been. She first lied that she was with her girlfriends but confessed when they disbelieved her. On the appellant's instruction she took him and pointed out the spot in the park where they sat. He enquired what they were doing. She explained but he accused her of lying and said she had been engaged in sexual intercourse with the boy under one of the shelters situated in the park. He pulled her by her trouser and said he wanted to inspect if she had intercourse with the boy and inserted his finger inside her vagina without her permission. She reported the incident to her mother when she woke up the next morning. The mother summoned the family for advice. The appellant denied the allegations. The family threatened to report the incident to the police if it were to recur. The conclusion by the family was that they did not know who, between the complainant and the appellant, was telling

the truth. The complainant did not inform the family about the previous two incidents of rape because she felt that it was already too late to report them. After this meeting the complainant approached Ous Peggy, their neighbour, and reported the park incident to her. Nosi also confirmed that the complainant informed her of this incident.

[12] The complainant says on 19 July 2015 she visited her aunt in Delporthoop. On one occasion whilst in Delporthoop she arrived home around midnight. This prompted her aunt to call her mother and informed her of the indiscretion. Upon her arrival in Kimberley the appellant confronted her concerning the report. She explained that she was with her friend but his father accused her of lying and hit her repeatedly with a sjambok on her upper leg in the presence of her mother. She sustained injuries (reddish welts) on her left upper leg. The complainant's mother confirmed that the appellant hit the complainant but said it was moderate: "*Hy het [haar] net op sy boud getik*". She also had a welt on her buttock. The next day the complainant informed Ous Peggy of the whipping and the latter told her that she would report the matter to social services.

[13] Ous Peggy confirmed that the complainant reported to her that her father hauled her to the park where he put his fingers in her private part to test if she had been engaged in sexual intercourse. She says that after the complainant's family meeting to discuss this incident the complainant came to her and informed her that his father said she must recant her disclosure. She further confirmed that after the complainant's visit to Delporthoop she reported to her that her father assaulted her because she wandered around. She saw some welts on the complainant following her beatings. She then approached social services for help. She accompanied the social workers to the complainant's school to fetch her. During the complainant's questioning she heard for the first time of the two rapes the appellant allegedly perpetrated against her.

[14] Ms Claudelia Jenkins, a nursing sister, examined the complainant on 22 July 2015, almost four months following the alleged insertion of the appellant's finger into the complainant's private part and two days following the alleged assault. She observed two welts on the complainant's left upper leg. She did

not observe any injuries on her genitalia but said that vaginal penetration by means of a finger could not be excluded. She confirmed that this may also entail the absence of penetration. She indicated that the hymen would show a cleft or an old injury that has healed if the victim had sustained prior injuries. In this case, she intimated, there was no cleft or old injuries she could observe on the complainant's genitalia. Her hymen was intact.

- [15] The only incriminating evidence against the appellant on the Count of rape, the alleged insertion of his finger into the complainant's private part, is that of the complainant. It is so that the child's vulnerability and susceptibility to manipulation deserves sharp scrutiny and should be considered with great care. The complainant is a single witness whose evidence has to be approached with caution. In *S v V*² the Supreme Court of Appeal pronounced:

'[2] In view of the nature of the charges and the ages 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) at 163 C, *Woji v Santam Insurance Co Limited* 1981 (1) SA 1020 (A) at 1028 B-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 (SCA) at 1098).'

- [16] It is trite that the Court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true³ or that such evidence is substantially satisfactory in every material respect, or if there is corroboration.⁴ The Court will weigh that evidence, 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 evidence it is satisfied that the truth has been told.⁵

- [17] As already pointed out, the question of credibility of the witnesses runs through the whole chain of events as foreshadowed in all the charges. There are a number of issues negatively impacting on the complainant's credibility when

² 2000 (1) SACR 453 (SCA) at 454 para 2

³ *R v Abdoorham* 1954 (3) SA 163 (N)

⁴ *S v Mahlangu and another* 2011 (2) SACR 164 (SCA)

⁵ *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G

considering her evidence as a whole together with that of the other witnesses. To highlight few of these inconsistencies:

- 17.1 She says that she reported to Nosi about the two rapes mentioned in Count 2 and 3 weeks after the commission of these offences and requested her to disclose this to her mother, Ous Peggy. Nosi categorically disputed it. On the reading of the record Nosi appears to be a trustworthy witness. I am of the view that complainant was less than frank on this aspect.
- 17.2 She also gave further conflicting versions on her failure to report the two rapes. Her evidence was to the effect that she was scared to report the two rapes to Ous Peggy lest she inform her parents about them. When confronted on this she intimated that she did not want to personally inform Ous Peggy about the rapes but did so through Nosi. On the question whether she was not afraid that Ous Peggy will make the disclosure to her parents, having been apprised thereto by Nosi, she replied negatively. On further probing whether her earlier testimony to the effect that she was scared to report the incident was untruthful she gave various unsatisfactory responses and ended up saying that she did not want to personally discuss "such things" (the rapes) with Ous Peggy. What is remarkable is that while she said she did not want to discuss "such things" with Ous Peggy she nevertheless reported the vaginal penetration.
- 17.3 The complainant plucked up courage to tell her mother about park incident and said she did not think that she will reveal this to her father but would instead report the matter to the police or the social workers. She further intimated that she was not afraid to tell Ous Peggy of the same incident and the whipping because the acts did not involve sexual intercourse. What is remarkable about this is that she did not inform Ous Peggy about the first incident, where the appellant allegedly touched her breast and private parts. This incident did not involve sexual intercourse. When confronted on this discrepancy she said she

was under the impression that it will never happen again. On her version, it happened again. She was allegedly subjected to painful rapes on two consecutive nights but kept her silence.

17.4 While in her examination-in-chief she said she told Ous Peggy about the incident at the park following the family meeting that was called by her mother, under cross examination she said she did so after a few days. As it shall be recalled she testified having told her mother of this incident when she woke up in the morning. Her mother's evidence was that it was in the afternoon after she had told Ous Peggy. When confronted on the discrepancy she intimated that she was not certain to whom she disclosed the incident first. That may well be.

[18] It is a settled norm that the evidence must be assessed holistically in order to determine whether the guilt of an accused person was established beyond any reasonable doubt.⁶ On the above analysis it cannot be said that the attack on the complainant's credibility as set out in the grounds of appeal is without any substance.

[19] As already alluded to, in convicting and in other instances acquitting the appellant of the rapes the Magistrate largely based her finding on whether the complainant had reported the incidents. It has been held that the facts and contents of a complaint in a sexual misconduct case can be used only to show that the evidence of a complainant who testifies that the act complained of took place without her consent, is consistent. It is relevant solely to her credibility. The complaint cannot be used as creating a probability in favour of the State's case.⁷

[20] The evidence of a report cannot serve as corroboration. In my view, the complainant's evidence was not substantially satisfactory to merit the conviction for rape. The State conceded in this appeal that it failed to prove its case

⁶ *S v Shilakwe* 2012 (1) SACR 16 (SCA) para 11

⁷ *S v Gentle* 2005 (1) SACR 420 (SCA) 431 para 19.

beyond a reasonable doubt that the appellant raped the complainant by inserting his finger into her vagina. This concession was well made. It follows that the conviction on Count 4, rape, ought to be set aside.

[21] Concerning Count 5, the complainant confirmed that she would arrive at home after midnight. She also confirmed, on more than two occasions during her testimony, having lied to her parents about her whereabouts for which her father chastised her. The complainant's mother intimated that if she was in a physical position to administer discipline on her daughter she would have done so because she was economical with the truth. She says that the beatings were moderate. As already alluded to, sister Jenkins observed two welts on the complainant's body. The Magistrate quite rightly reasoned, albeit during the sentencing phase, that the injuries that the complainant sustained were not of a serious nature. The State conceded that it failed to prove that the appellant had the intention to cause the complainant grievous bodily harm. I am satisfied that the conviction of assault GBH is not sustainable on the facts. The magistrate misdirected herself in so convicting the appellant. It follows that that conviction should be set aside and replace with that of assault *simpliciter*.

[22] On the question of the sentence, Insofar as we are disposed to setting aside the conviction on the Count of assault GBH and to replace same with assault common, we are at large to interfere with the sentence of three years imposed by the trial Court and to determine an appropriate sentence afresh.

[23] The appellant is at present 57 years old and the sole breadwinner who does odd jobs to maintain his family. He took care of the complainant's mother who underwent a hip operation and had impaired physical mobility. He pushes her on a wheelchair to get around. He has a five year old son with the complainant's mother; three children from his previous marriage who are already of age; and a 15 year old child from a previous relationship whom he is still maintaining. He has four previous convictions. In 1985 he was found guilty of assault and sentenced to a fine of R40.00. In 1996 he was found guilty of assault and sentenced to a fine of R500.00 or three months imprisonment. In 1998 he was found guilty of theft and sentenced to a fine of R600.00 or three

months imprisonment. Lastly in 2014 he was found guilty of possession of drugs and paid an admission of guilt fine in the amount of R150.00. These offence are not only inconsequential but have, save for the 2014 admission of guilt, also superannuated.

[24] The Magistrate imposed a sentence of three years imprisonment on the basis of a wrong conviction and on the incorrect premise. On the facts of this case the sentence of three years imprisonment is disproportionate to the crime, the offender and the interest of the society. I am of the view that the sentence of 12 months imprisonment wholly suspended on certain conditions meets this case. I make the following order.

Order:

1. The appeal is upheld to the following extent:
2. The conviction on Count 4, rape, is set aside.
3. The conviction on Count 5, assault with intent to do grievous bodily harm, is set aside and replaced with the following:
“The accused is convicted of assault common.”
4. The sentence of three years imprisonment on Count 5 is set aside and replaced with the following:
“The accused is sentenced to 12 (twelve) months imprisonment wholly suspended for a period of five (5) years on condition that the accused is not convicted of an offence involving an assault or an offence involving violence on the person of another committed during the period of suspension.”

MV Phatshoane ADJP

Lever AJ concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPELLANT:

Adv A. Van Tonder

Legal Aid SA: Kimberley

FOR THE RESPONDENT:

Adv R Makhaga

The Director of Public Prosecutions