



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Not Reportable

Case No: AR 429/2015

In the matter between:

BOY ROBERT DUMA

Appellant

And

STATE

Respondent

Coram: Gorven and D Pillay JJ

Heard: 9 February 2016

Delivered: 11 February 2016

ORDER

On appeal from Regional Court for the Regional Division of KwaZulu-Natal,
Pietermaritzburg (Ms Linda):

- 1 The appeal is dismissed and the conviction and sentence are confirmed.

JUDGMENT

Gorven J (D Pillay J concurring):

[1] The appellant, a 60 year old man, was charged with one count of rape under the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. It was alleged that, during July 2012, he inserted his penis into the vagina of a 9 year old girl from his neighbourhood. He pleaded not guilty and elected not to disclose his defence. His trial took place in the Regional Court, Pietermaritzburg. He was convicted and sentenced to 15 years' imprisonment. The appellant's application for leave to appeal against his conviction and sentence was refused by the trial court. This court granted him leave to appeal against his conviction and sentence on petition.

[2] The complainant was 11 years old when she testified. She gave evidence with the assistance of an intermediary in terms of s 170A of the Criminal Procedure Act 51 of 1977. She said that, on one late afternoon during July 2012, she and two friends were playing in the road. It was beginning to get dark. I shall refer to the friend who gave evidence as N. They saw the appellant alight from a minibus taxi. He gave her friends R1 to buy some sweets and told the complainant to accompany him. He walked with her to his home. On their arrival, he closed the door, took off her panties, put her on top of the bed, undressed himself and then inserted his penis into her vagina, performing some movements. After climbing down, he remounted her and repeated his actions. He did this on five occasions. She was crying but he blocked her mouth with his hand. She felt severe pain in her vagina and noticed a white discharge from it. He then dressed himself and she did likewise. He gave her bread and an apple

and threatened that if she told anybody of the incident, he would kill her. She did not tell anyone. This was the first occasion on which he had done this to her.

[3] She testified that some days later, her mother noticed that when she urinated, the sound made was not like that of a child urinating but like that of a woman. Her mother inspected her and asked whether anyone had been interfering with her and the complainant responded by saying 'yes'. Her mother called the neighbours and thereafter the police became involved.

[4] N, also with the assistance of an intermediary, testified to similar effect. She had been 8 years old at the time. In addition, N said that when she and her friend returned from purchasing sweets, they went to the home of the appellant and found the door locked. They could hear the complainant crying behind the locked door and calling for N to help her. N did not report this because the appellant used to buy fruit for them. She saw the complainant again that day and asked her why she was crying. The complainant responded that 'an old man told her to take off her panty which she did and an old man caused her to lie on the bed after that then an old man inserted his thing to her.' When she was told this she reported the incident to the complainant's mother. She did so on a Thursday.

[5] The mother of the complainant confirmed that she was alerted to the problem by the sound of the complainant urinating. She also confirmed having inspected the complainant and having called the neighbours. She also testified that the complainant had suddenly no longer been able to cope at school. The complainant initially pointed to an 8 year old boy as the perpetrator. The mother was not satisfied with this and implored her to identify her true assailant. When the police arrived, the complainant became anxious and tearful and identified the appellant. She was taken to a medical doctor who subsequently testified.

The mother said that, when she asked the complainant, she was told that this was not the first time that the appellant had done this to her. There was no mention in her testimony that the complainant told her that the appellant had repeated his actions on five occasions. There was also no mention in her testimony that N had reported the incident to her.

[6] The doctor, a paediatric registrar at Grey's Hospital, testified. She said that she examined the complainant on 11 July 2012. The complainant was tearful and withdrawn when relating what had happened. She was told that the incident took place on 6 July 2012. Her notes were not clear, but talk of 'the last incident' being on 6 July 2012. No mention was made of the five time repetition. It is recorded in her notes that the complainant's mother had been called into school before it closed as the behaviour of the complainant had changed; she had become anxious, withdrawn and was not concentrating in school. The hymen of the complainant was absent, this was not normal in a nine-year-old girl and sexual assault could not be ruled out.

[7] Under cross-examination, it was put to both the complainant and her friend that the appellant only ever gave food such as apples to a certain boy called Xolani. The complainant denied this, saying that, apart from the occasion in question, the appellant sometimes called the children to sing for him in his home and would thereafter give them apples. The complainant's friend gave the same answer. It was put to both the complainant and her mother that there was strife between the two families. Her mother confirmed that the relationship was not good, but indicated that she only knew the accused and his son, not his wider family. She stated that they attended the same church as the appellant, who was the pastor of the church. She had trusted the appellant as a result and allowed the complainant to go to him from time to time. The difficult relationship was between the complainant's grandmother and the appellant. It

was also put to the mother of the complainant that the wife of the appellant was always at home with him. The response of the mother was that she did not know the name of his wife. She said that the appellant has many women, but that she wondered whether this particular person was the one which the appellant had recently struck with a bush knife.

[8] The appellant testified in his own defence and called two witnesses. He denied that he had raped the complainant. He also denied that he had ever given sweets or apples to any children other than a young boy called Xolani. He speculated that the family of the complainant held a grudge against his family because, although they already occupied two RDP houses, they wanted the one which he had moved into and which was owned by his son. He stated that trouble had begun between the two families before he moved to the area and that, in fact, he moved there because his son requested him to assist in sorting out the difficulties between the families. Under cross-examination, he eventually conceded that he had asked the children to come to his home to sing for him and thereafter given them fruit. He explained that he had denied this because it appeared to him that it was claimed that he had done so with bad motives. His explanation of hostility between the families was shot through with contradictions and vagueness.

[9] The son of the appellant contradicted him almost totally concerning the family feud. He said that this only began after the appellant moved to stay with him. He said that only the grandmother of the complainant was involved in the feud. He also contradicted the dates on which the appellant came to live in his house and when he himself left the house. The wife of the appellant gave evidence. She claimed to have a good relationship with him but it subsequently emerged that she had been hospitalised due to the appellant stabbing her with a bush knife as the mother of the complainant had testified. She also conceded

that, having said that there had been only one quarrel between her and the appellant, serious arguments had taken place. In fact, after the arrest of the appellant, she burnt his clothing. It was quite clear that she was simply supporting the appellant's version.

[10] No store can be set by the evidence of the appellant and his witnesses. It was correctly rejected as being false beyond reasonable doubt.

[11] That is not the end of the matter. It is still necessary that the state prove beyond a reasonable doubt that the appellant raped the complainant. The complainant was the sole witness to the rape. The cautionary rule relating to single witnesses therefore operates. The early dictum that the evidence of a single witness must be 'clear and satisfactory in every material respect'¹ has been modified. The approach, which is set out in *S v Sauls & others*,² is 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* 1971 (3) SA 754 (A) at 758). 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 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.'

[12] There was some lack of clarity in aspects of the state case. The complainant testified that the appellant repeated his actions five times on the

¹ Per De Villiers JP in *R v Mokoena* 1932 OPD 79 at 80.

² *S v Sauls & others* 1981 (3) SA 172 (A) at 180E-G.

day in question. None of the other witnesses indicated that the complainant had told them this. The mother testified that the complainant reported to her that this was not the first time that the appellant had done this to her. This may also be an inference which can be drawn from the notes made by the doctor who examined the complainant. The complainant's own evidence was that it had not happened before. The complainant did not mention that she had told N of the incident. There were other unsatisfactory aspects of the evidence of the state witnesses. An example is that N testified that she told the complainant's mother of the report made to her by the complainant but the mother did not mention this.

[13] In the light of all of these, it must be assessed whether the requisite standard of proof was met by the state. Unfortunately, the conduct of the trial leaves much to be desired. None of these potential difficulties was dealt with in cross-examination or questions by the trial court. One is keenly aware that, when young children testify, particularly in a matter such as this, it is a priority to minimise the trauma of their having to testify. This is why the Act makes allowance for intermediaries under s 170A. Indeed, in matters such as this it is common knowledge that rape survivors of all ages often experience the trial as another violation. A trial court is therefore placed in a quandary. The rape survivor must be protected to the greatest extent possible. If the scourge of rape in our society is to be addressed, sufficient evidence must be led, if available, to obtain a conviction. If sufficient evidence is to be led to sustain a conviction, at least some emotional trauma on the part of a rape survivor is probably unavoidable.

[14] It may be that the practitioners concerned and the learned magistrate were alive to the vulnerability of the complainant and that this was at least part of the reason why the issues mentioned above were not properly explored. However, it is not even clear that the two counsel and the learned magistrate were aware of

the issues mentioned above. I would also have expected the learned magistrate to deal pertinently with some of them in her judgment. This was unfortunately not done. I am therefore obliged to conduct that exercise.

[15] Did the lack of evidence by the other witnesses of any mention of the five occurrences give rise to an inconsistency in the evidence of the complainant? This is not necessarily so. It depends on what precisely was said. Without it having been explored, the inference of inconsistency cannot be drawn. A very brief account was given of what the complainant told them. Of course, only evidence of the first report is admissible in support of the state case. Any other reports can only be used to show inconsistencies. The next matter is the initial identification of the 8 year old boy. It was only when the police came that the complainant, in great emotional anguish, identified the appellant as her assailant. This, too, does not detract from the acceptability of the evidence of the complainant. If anything, it is entirely consistent with her fear, induced by the threat of her assailant, that he would kill her if she told her mother. What then, of the evidence of N that the complainant told her and that she told the complainant's mother? Whilst it is unsatisfactory that this was not explored, it does not negate her testimony. She corroborated the complainant that the appellant gave her money to buy sweets on the day in question and took the complainant with him. She also corroborated the evidence that the appellant used to ask the children to sing for him at his home and then gave them fruit. This evidence could not have been rehearsed and, after initially denying it, was ultimately confirmed by the appellant himself.

[16] As regards whether it was the first time that the appellant had done this to the complainant, this was not properly explored with the complainant or the mother. The time frames are somewhat unclear in that there is no evidence of when the July school holidays began or evidence from the complainant's

mother to match that of the doctor that the school called her in before the end of term to discuss the change in behaviour of the complainant. This does not detract from the state case but could indeed have made it stronger. The precise date of the occurrence is not crucial. When the complainant was asked about this, she was asked by a leading question whether she remembered playing with her friends during July 2012. The precise time and date may have achieved more significance if the appellant had raised a specific alibi concerning a specific date but this was not done. Many of the ambiguities arise from the evidence of N who was 8 years old at the time of the incident. One cannot expect crystal clear evidence concerning dates and the like from someone of that age.

[17] What is abundantly clear from the evidence is that the complainant was raped around July 2012. The medical evidence is consistent with it, the description of the complainant of what was done to her, her changed behaviour at school and her fear and tearfulness when confronted by her mother and the police and when being examined by the doctor cumulatively prove this beyond reasonable doubt. Once this is clear, the question is whether there is sufficient evidence to prove beyond a reasonable doubt that the appellant was the rapist. The evidence all points in that direction. The evidence of the complainant was given in a straightforward fashion. The trial court was impressed with her as a witness. Her mother did not attempt to disguise the conflict with the family of the appellant but was also not challenged when she testified that she had trusted the appellant as the pastor of her church. In addition, the evidence of the complainant and N, initially denied but subsequently confirmed by the appellant, that he would ask them to his home to sing and thereafter treat them with fruit shows that the children would not have a motive to falsely accuse him. The mendacity of the appellant provides the finishing touch.

[18] I am therefore satisfied that the state proved beyond reasonable doubt that the complainant was raped and that the person who did so is the appellant. It is therefore my view that, even though it failed to address the issues mentioned above, the trial court did not misdirect itself in its factual findings. It correctly found the appellant guilty as charged.

[19] As regards sentence, the offence attracted a minimum sentence of life imprisonment in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 read with part I of Schedule 2. This can only be departed from if substantial and compelling circumstances, as envisaged in s 51(3) warrant it. The learned magistrate found that such circumstances existed, primarily due to the appellant being a first offender and 60 years of age, rendering it disproportionate to impose a sentence of life imprisonment. Although leave to appeal against the sentence was granted, the appellant submitted that the sentence was not harsh in the circumstances of the matter. Taking into account the usual triad of factors, which is the appropriate approach to adopt once a court has concluded that it may deviate from the prescribed minimum sentence, I can find no misdirections in the approach of the trial court. The sentence is also certainly not startlingly inappropriate. As a result, there is no basis on which we, as an appeal court, can interfere.

In the result the appeal is dismissed and the conviction and sentence are confirmed.

GORVEN J

D PILLAY J

DATE OF HEARING:	9 February 2016
DATE OF JUDGMENT:	11 February 2016
FOR THE APPELLANT:	EX Sindane, instructed by the Pietermaritzburg Justice Centre
FOR THE RESPONDENT:	IP Cooke, instructed by the Director of Public Prosecutions, Pietermaritzburg, KwaZulu-Natal.