



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: A806/2014

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE:	YES /NO
(2) OF INTEREST TO OTHER JUDGES:	YES /NO
(3) REVISED	
6/8/15	
DATE	SIGNATURE

In the matter between:

TEBOGO KOETSI

Appellant

and

THE STATE

Respondent

Heard: 15 June 2015

Delivered: 14 August 2015

JUDGMENT

A.A.LOUW J

Introduction

[1] The appellant was charged with one count of rape of a girl under the age of 16 years. It was alleged that the complainant was raped more than once. The appellant was legally represented during the trial. On 13 November 2013 the appellant pleaded not guilty and offered no plea explanation. The appellant was found guilty as charged and life imprisonment was imposed. The appellant appeals against the conviction and sentence in terms of his automatic right of appeal because a life sentence was imposed.

[2] At the outset I mention that the State failed to prove that the complainant was raped more than once. In any event section 51(1)(a) of Act 105 of 1997 is applicable because the complainant was under the age of 16 years. When she was allegedly raped she was 11 and when she testified 14 years old.

Summary of evidence

[3] Mohammed Rawat testified that he is a medical doctor. On 14 December 2010 he examined the complainant. During the gynaecological examination he found redness, swelling and tenderness. It was also noted that the hymen was perforated previously and the information he received was that the complainant was raped approximately a year prior to the incident. During cross examination the witness very reluctantly admitted that the symptoms could also have been caused by an infection. He however maintained that his finding was correct and that there were clear indications of penetration.

[4] Dr Rawat was extremely argumentative and repetitive in again and again saying that the complainant was raped although there were no physical symptoms from which one could conclusively make the inference that she was raped.

[5] From his evidence it is abundantly clear that he stuck to a version of rape simply because it was so reported to him. His notes in para 5 of exhibit "B" read "raped by one man on 3 December 2010 – was also raped ± one year ago." What here is also disturbing is that in the paragraph dealing with conclusions he equivocally states that "rape did occurred". It is extremely rare that a medical practitioner, that is a doctor or a qualified nurse, makes such a finding. The normal conclusion is that the injuries seem are consistent with a rape. Under these circumstances his evidence is unacceptable.

[6] The aunt of the complainant was the second witness Ms. Motoane. She was called as "a first report witness".

[7] In her evidence in chief she testified that the appellant was her boyfriend at the time, but failed to mention that thereafter she married the appellant and at the time of the trial was divorcing him. This only came out during cross examination. The complainant stayed with them. On 3 December 2010 she went to town to do shopping. She left the complainant at home with the other children and the appellant agreed to look after the children. When she returned home she found the complainant busy cleaning

the floors. When Ms Motoane placed the plastic bags on the table the complainant helped her to unpack the groceries. She instructed the complainant to take a bath whereafter she and the appellant went to her cousin. They did not stay long before returning home. The appellant went to buy beer and Ms Motoane found the complainant watching television. The complainant still did not clean herself and Ms Motoane confronted her. The complainant did not answer at first but when Ms Motoane threatened to hit her with a belt, the complainant told Ms Motoane that she was raped by the appellant. When the appellant arrived home she confronted him with the allegations made by the complainant. The appellant initially denied the allegations but later admitted that he raped the complainant and that it was not the first time.

[8] When the confrontation of the appellant first occurred there were several individuals present namely the witness, her cousin Portia, the husband of her cousin and four of accused's friends.

[9] In the presence of all these people the appellant did not admit the rape but after Ms Motoane had sent all the other people out, and they were alone, he did admit to raping the complainant.

[10] The cousin, Portia, was phoned by Ms Motoane. When she arrived they examined the complainant, undressed her and looked at her private parts. This witness was adamant that she saw some sperms.

[11] The complainant testified with the help of an intermediary after being admonished. The complainant confirmed that she was staying with Ms Motoane and the appellant. She did not like the appellant due to the “funny things” he did to her. When the appellant did the funny things to her, Ms Motoane was in town. The complainant was busy scrubbing floors when the appellant came into the house and told her that they must go to the bedroom. The complainant refused and the appellant then dragged her to the bedroom where he put her on the bed. He undressed the complainant as well as himself whereafter he penetrated her vagina with his penis.

[12] When Ms Motoane arrived home she asked the complainant why she was sitting with a broken heart. The complainant would not answer Ms Motoane immediately. Only after Ms Motoane threatened to hit the complainant with a belt, did she tell Ms Motoane that the appellant had raped her. When the complainant told Ms Motoane that the appellant raped her, the appellant was also present. The complainant testified that the appellant raped her more than five times. After the appellant had raped her, the appellant continued to stay with them and he raped her three more times. Her explanation that she thought she would not be believed is rejected. Ms Motoane believed her in regard to this alleged rape. The complainant testified as follows:

“Why not? --- I was afraid to tell her because I thought that she will not believe me.

Ja and why would she not believe you because when you told her the first time she believed you. He took you to the doctor, she took you to the police.”

[13] The evidence of the appellant is that the complainant was a disobedient and disrespectful child. On 3 December 2010 while Ms Motoane was in town, he asked the complainant to bring him a beer. The complainant ignored him. The appellant went into the house and confronted the complainant. He pushed her against a cupboard and told her that she could not act like a grown woman. He further told her should she not behave she will go back where she came from. That is a reference to her previous place of residence where she said that she was also raped. This was at Gannalaagte where she stayed with other family members.

[14] He denied that he raped the complainant. He further testified that even after the allegation of rape was made against him, Ms Motoane married him but that they were in the process of getting a divorce.

The evaluation of the evidence of a single witness

[15] Section 208 of the CPA states that an accused may be convicted of any offence on the single evidence of any competent witness.

[16] In their discussion the authors of *Commentary on the Criminal Procedure Act* state the following:

“Who is a single witness?”

Where two or more witnesses are called by the State, but only one witness gives evidence that tends to incriminate the accused, so that the conviction rests solely on his testimony, then such witness should be regarded as a single witness and the cautionary rule should be applied (R v Mokoena 1956 (3) SA 81 (A) at 85F–G). In S v Lotter 2008 (2) SACR 595 (C) the complainant in a rape case was held to be a single witness where her mother's evidence did no more than fill in some background and the evidence of other State witnesses was not corroborative of the complainant on any of the essential issues. A single witness to the making of a confession by the accused must be treated in the same way (S v Letsedi 1963 (2) SA 471 (A) at 473F–G). Furthermore, caution must be exercised where two witnesses are called who recite identical versions of the facts in issue (R v Vlok and Vlok 1954 (1) SA 203 (SWA)). However, a witness will not be regarded as a single witness where another witness gives evidence which, although not directly corroborative or incriminating, inferentially establishes one of the facts in issue (S v Snyman 1968 (2) SA 582 (A) at 586-7).

Failure to call further witnesses

Where the State fails to call a witness whose name appears on the list of witnesses furnished by the Director of Public

Prosecutions to the accused in terms of s 144(3)(a) of the Act, and who is clearly in a position to corroborate the evidence of the single witness, an adverse inference may justifiably be drawn (S v Teixeira 1980 (3) SA 755 (A)). The court may infer that in the opinion of counsel the evidence may possibly give rise to contradictions which could reflect adversely on the credibility or reliability of the single witness (at 764A). In S v Kubeka 1982 (1) SA 534 (W), however, the court refused to draw an adverse inference where it was not known whether any attempts had been made by the State to find other witnesses.”¹

Evaluation of the evidence

[17] The cautionary rule referred to in the quote above is that the evidence of a single witness must be clear and satisfactory in every material respect.²

[18] I am not satisfied that the evidence of the complainant meets this standard. The probabilities also come into play in this process of evaluation. There is a material contradiction between her evidence and that of Ms Motoane. The latter testified that when the appellant admitted the rape only she and the appellant was present. On the other hand, the complainant testified that the appellant was also present when that confession was made.

[19] What is also unsatisfactory about her evidence and has the effect that her evidence has to be treated with caution are the following:

¹ Du Toit et al (Loose-leaf edition) p24-3 – 24-4

² R v Mokoena 1932(OPD) p79 at 80

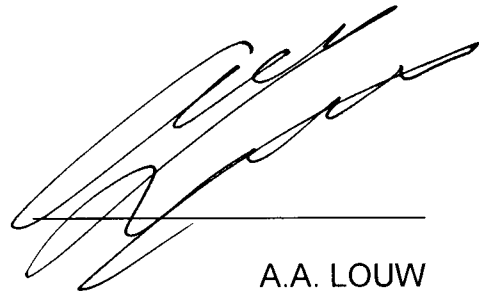
- (a) She only told Ms Motoane about the rape after she was repeatedly questioned as to what was wrong. The report was only made to Ms Motoane after this questioning and after Ms Motoane had threatened to give her a hiding with a belt.
- (b) She testified that after this incident she was raped again by the appellant on three occasions. From her evidence it appears that the first subsequent rape was on the very next day. She testified that all these rapes occurred in the period 3 to 15 December 2010. She did not report any of these rapes to Ms Motoane. Furthermore the appellant was in custody during this period.
- (c) Ms Motoane says that she and Portia saw sperm. It is very doubtful to me that she could distinguish between a discharge as a result of an infection and sperm.
- (d) It is also unsatisfactory that Portia did not testify. She is the cousin of Ms Motoane, living close by, and it must be accepted that she was available. In this regard I refer to the passage regarding the failure to call further witnesses which I have quoted above.

Conclusion

[20] I find that there exists reasonable doubt and that the appellant's version is reasonably possibly true. He should therefore have been acquitted.

Order

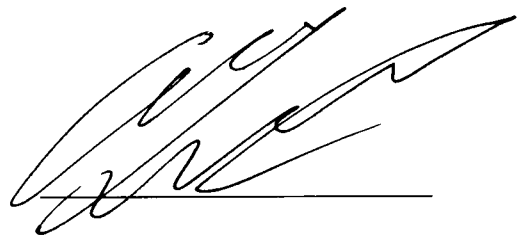
[21] The appeal succeeds and the conviction and sentence are set aside



A.A. LOUW

Judge of the High Court

I agree



H.K. KOOVERJIE

pp Acting Judge of the High Court

For the Appellant	:	Adv. L Augustyn
Instructed by	:	Legal Aid South Africa
For the First Respondent	:	Adv. S.D. Ngobeni
Instructed by	:	The DPP