

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : A234/2014

In the matter between:-

THULWANE ISAAC PHAKOE

Appellant

And

THE STATE

Respondent

CORAM:

MOCUMIE, J *et* SJ REINDERS, AJ

HEARD ON:

23 FEBRUARY 2015

DELIVERED ON:

05 MARCH 2015

MOCUMIE, J

- [1] The appellant appeared in the regional court, Welkom, (Ms N.....) on a charge of rape of a 12 year old girl, his step daughter. He pleaded not guilty, but despite his plea of not guilty, he was convicted as charged and was sentenced to eighteen years imprisonment. The trial court refused leave to appeal. Leave to appeal was granted by this court in respect of the conviction only.

- [2] The question in this case is whether the State failed to prove its case beyond reasonable doubt considering the discrepancies in its case.
- [3] When the complainant testified in 2014, she was 12 years of age. She had been staying with her step father, the appellant, her mother and younger brother who was in grade 1 and 7 years of age at that time. She testified that earlier that day the mother had left her and her younger brother at their aunt's place. Later in the evening they went home. Their mother did not return home. By 20h00 or just after, she went to sleep, leaving her step father and her younger brother watching television. While she was sleeping, she felt the appellant on top of her raping her. He had removed her jeans and underwear before he took off his own pants. She screamed from pain as the appellant penetrated her. Her younger brother called out the appellant and he stopped to rape her. As he left the room he told her not to tell anyone as she will break up his marriage.
- [4] In its judgment, the trial court found the complainant to have been consistent, credible and honest despite her age. Mr. Van Rensburg, on behalf of the appellant, could not point to any fault with the trial court's finding. We hold the same view.
- [5] In his defence the appellant denied that he raped the complainant. He alleged that, based on the fresh injuries in her private parts which the medical doctor noted, she must have been raped by someone else when he sent her to buy

cigarettes for him at a shop during the night in question. He submitted that there were discrepancies in the complainant's aunt's evidence-in-chief and her statement to the police which should have cast doubt in the trial court's mind. Furthermore, the State failed to call the complainant's younger brother to corroborate her.

- [6] The trial court, however, rejected the appellant's version on the basis that it was highly improbable, particularly because it was, inexplicably, never put to the complainant or any of the state witnesses, but introduced for the first time when the appellant testified. Mr. Van Rensburg conceded that the version the appellant relied on was never put to the complainant and any other state witness.
- [7] Before us, Mr. Van Rensburg submitted that there were contradictions in the evidence of the state. When pressed to highlight them, he could not because there were none except in the evidence of the complainant's aunt evidence-in-chief and her own statement to the police. These discrepancies the State readily conceded.
- [8] The full bench of this court recently had the opportunity to restate the law regarding the differences between a police statement and evidence in *Teboho Meje and Another*.¹The court stated:

¹ *Teboho Meje and Another v S* (A 264/2013) (delivered 29 May 2014) para 6-9.

“[7] Before a witness can be discredited because of the differences between a police statement and evidence, there have to be material discrepancies (*S v Bruinders en 'n Ander* 1998(2) SACR 432 (SECLD) at 437g-j). In *S v Mafaladiso en Andere* 2003(1) SACR 583 (SCA) at 593i-j Olivier JA points out that where there are contradictions, the court should in the first place determine what the witness really intended saying on each occasion. Secondly, not every contradiction affects the credibility of a witness (594c-d). Thirdly, the contradictory versions must be compared and evaluated holistically (594d-e). Lastly, the trial judge must weigh up the statement against *viva voce* evidence of the witness (594f-g). In *S v Govender and Others* 2006 (1) SACR 322 (ECD) Nepgen J repeated the requirements listed in Mafaladiso and added that regard must also be had to the type of person the witness is, and cultural differences (at 326c-j). Some witnesses give ill-conceived and nonsensical answers when they find themselves in a perceived predicament (326e-f).”

- [9] The evidence-in-chief of the complainant's aunt indeed differed from her statement to the police. This, she readily admitted in the trial court. The State too conceded this before us. These differences, however, go only as far as the appellant's alleged confession to have raped the complainant when he was confronted by the aunt, the grandmother his own brother after the complainant had reported the rape to them the next day. The aunt explained that she did not tell the police about the confession the appellant allegedly made, but that the complainant told the police about the confrontation which extracted the alleged confession. The explanation suffices to the extent that it actually corroborates the consistency of the complainant's version that she

reported the rape to her aunt and grandmother. The two and the appellant's own brother confronted the appellant.

- [10] In so far as the evidence of a second incident of rape that occurred prior to the one before us; whilst the complainant and her family were staying in Pretoria is concerned, the less said the better. The evidence is clearly hearsay that should not have been admitted or extracted as it was by the regional magistrate. The admission of hearsay evidence is clearly set out under the Law of Evidence Amendment Act 45, 1988². The approach to such evidence has been authoritatively pronounced by the Supreme Court of Appeal in *S v Ndhlovu*³ and needs no repeat. We, in any event did not take it into account at all because even without it, the complainant's evidence was unassailable. She was consistent and unshaken in her evidence. She was corroborated by her aunt and grandmother as far as the report she made the first opportunity she had the next day. Both the aunt and grandmother saw what they believed was semen coming out of her private part. As much as the evidence of the doctor who examined the complainant was not above board for a professional in his field, the fact remains that he noticed fresh tears in the complainant's *posterior fourchette* which the appellant could not refute but instead put the blame on someone else, unknown.

² Section 3, which has revolutionised the South African approach to hearsay evidence.

³ *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA), 2002 (6) SACR 305 (SCA). The Supreme court of Appeal followed Cameron JA's approach in *Mamushe v S* [2007]4 All SA 972 (SCA).

[12] Having said that, the fact that the state did not call the complainant's younger brother as a witness cannot be held against the state in the face of the satisfactory evidence presented. It is trite that once the state abandons a witness not because the witness will necessarily contradict the key witness, the defence is entitled to call such witness if it deems it necessary to cast doubt on the state's case. But not to prove the appellant's case. The younger brother would not have made any difference in the state's case. In all probabilities, he did not witness anything as he was in the other room from where he called his father.

[13] Bearing all relevant facts in mind and when the evidence is viewed as a whole, between the two versions, the complainant's version is more probable. I am consequently satisfied that the state proved its case beyond reasonable doubt. The appeal ought not to stand.

ORDER

[14] In the result, I make the following order.

The appeal against conviction is dismissed.

B. C. MOCUMIE, J

I concur

S. J. REINDERS, AJ

On behalf of appellant: Adv. A. Coetzee
Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

On behalf of the respondent: Adv. Steyn
Instructed by:
The Director: Public Prosecution
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