

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: A269/2014

In the matter between:

D[...] C[...] B[...]

Appellant

and

THE STATE

Respondent

CORAM: MOCUMIE, J *et* HINXA, AJ

JUDGMENT BY: HINXA, AJ

HEARD ON: 23 MARCH 2015

DELIVERED ON: 30 APRIL 2015

INTRODUCTION

[1] The appellant was convicted by the Regional Magistrate, Bloemfontein (on 19 June 2014) of rape wherein the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 were invoked since the victim was under 16 years old, on 19 June 2014. According to the record he was sentenced on 25 June 2014 (yet the grounds of appeal reflect 23 June 2014) to 5 years imprisonment. His consequential application for leave to appeal was dismissed by the court *a quo*, whereupon he successfully petitioned the Judge President, hence this appeal. At the outset, it bears mentioning that the appeal is directed at conviction only.

FACTS

[2] Complainant is the appellant's biological daughter and she chose to stay with the appellant after a fall out

between her and her mother. The mother divorced her stepfather and returned to Bloemfontein sometime in 2012 and the two started to get to know each other then. The appellant and complainant have separate bedrooms at appellant's home and sleep accordingly. On the day in question the appellant celebrated his birthday at his home with complainant and a few friends. After the guests had left, the appellant and the complainant prepared to go to sleep. They slept in the appellant's bedroom. During the night of Saturday or early hours of Sunday morning the appellant inserted his finger into the complainant's private parts. When he asked to lick her private parts, the complainant refused. The complainant reported the incident to her mother via a detailed text messaging the same day and solicited advice from her. The mother left the final decision in the hands of the complainant. On advice of her aunt, her mother and a psychologist the complainant laid a charge against the appellant and he was arrested. The complainant and her mother ("E[...]") testified for the state whilst the appellant and his mother ("K[...]") testified for the defence. Almost all the facts were common cause between the State and the defence, being only mutually destructive in so far as the finger penetration and the suggested licking of complainant's private parts by the appellant were concerned.

GROUND OF APPEAL

[3] The conviction is assailed on the following grounds:

3.1 There are more than enough reasons and motives for the complainant to have fabricated the allegations against the appellant, not the least being:

- a) The complainant and the appellant had a troublesome past and had difficulties in establishing a relationship.
- b) The complainant was subscribing to a view that "all men are pigs" pursuant to an abusive relationship which she and her mother ascribed to the appellant.
- c) The complainant was harbouring a resentment against her stepfather for abusing her mother whilst she (complainant) was lying on her bed listening to that and fearing for the expectable worst.

3.2 The complainant materially contradicted herself as regards the incident of the Friday night prior to the alleged rape on Saturday. She initially stated that she was not scared but under cross-examination she changed to say that she was scared.

3.3 The complainant's account of events pertaining to whether the front door was locked or not (impliedly to facilitate her escape) was not convincing.

3.4 Same with the version that she nodded her head to signal for the appellant to desist from what he was doing, yet she conceded that the appellant was not looking at her.

3.5 The complainant would not tell the starting time of the rape and the time at which she reported by text messaging to her mother, yet she acknowledged that her cellular phone had time display.

3.6 The J88 (Exhibit “B”) contradicted the complainant by reflecting that, according to her (complainant), the appellant touched her all over her body whereas her testimony in court was that the appellant only inserted his finger into her private parts.

3.7 The complainant’s conduct towards the appellant after the incident was not compatible with rape, to wit:

- a) Accompanying him to the garage late at night.
- b) Sleeping with him in his bedroom on that particular night.

3.8 The complainant’s actions on the Sunday morning after the alleged rape are not co-existent with such allegation, viz:

- a) Singing in her room (ostensibly, a sign of joy).
- b) Eating very well.
- c) Requesting a lift from the appellant to his friend and not raising any alarm at the friend’s place.
- d) Riding with him (appellant) on his motor cycle.
- e) Returning to the appellant’s house.

THE LEGAL POSITION

[4] If an appeal is levelled against a *courts a quo*’s findings of fact, the court of appeal must take into consideration that the court a *quo* was in a better placed position than itself to form a judgment. When inferences from proven facts are in issue, the court a *quo* may also be in a better placed position than the court of appeal, because it is better able to judge what is probable in the light of its observations of witnesses who have testified before it. Therefore, where there have been no misdirections of fact a court of appeal must assume that the court a *quo*’s findings are correct and will accept these findings, unless it is convinced that

they are wrong. See **R v Dhlumavo and Another** 1948 (2) SA 677 (AD) at 705-6.

[5] Thus, in order to interfere with the court a *quo*'s findings, it has to be established that there were misdirections of fact, either where reasons on their face are unsatisfactory, or where the record shows them to be such. See also **S v Monyane and others** 2008 (1) SACR 543 (SCA) at para [15] where the Supreme Court of Appeal stated that it is only in exceptional cases that that court will be entitled to interfere with the *court a quo* evaluation of oral evidence. The court held:

“This court’s powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence show them to be clearly wrong (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court’s factual findings, bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court’s evaluation of oral testimony (*S v Francis* 1991 (1) SACR 198 (A) at 204E)”.

[6] It admits of no doubt that the state’s case herein turned on the evidence of a single child witness. Consequently, this matter cries out for a high degree of cautionary approach. A proper approach to the cautionary rule in cases of this nature was aptly formulated by Zulman JA in **Viveiros v S** [2000] 2 All SA 86 (A) at 88 paragraph 2 as follows:

“In view of the nature of the charges and the age of the complainants it is well to remind oneself at the outset that, whilst there is no statutory requirement that the 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 163C; *Woji v Santam Insurance Co Limited* 1981 (1) A 1020 (A) at 1028B-D; and that the evidence in a particular case involving sexual misconduct may call for cautionary approach (*S v J* 1998 (2) SA 984 (A) at 1009B). For reasons which will presently emerge the present case is plainly one which calls for caution”.

[7] The “multi-pronged” cautionary rule was comprehensively elaborated by Jones J in **S v MG** 2010 (2) SACR 69 at 72A -72B in the following manner:

“1) The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness, as a result of lack of judgement, immaturity, experience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to

convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity (*S v Viveiros* [2000] 2. All SA 86 (SCA) para (2). Here more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness (Schmidt: *Law of Evidence* 4-7).

2) Our courts have laid down certain general guidelines which are of assistance when warning themselves of the danger of relying upon a single witness who is also a child witness. In the ordinary course:

(a) a court will articulate the warning in the judgement, and also the reasons for the need for caution in general, and with reference to the particular circumstances of the case;

(b) a court will examine the evidence in order to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in all material respects...;

(c) although corroboration is not a prerequisite for a conviction, a court will sometimes, in appropriate circumstances, seek corroboration which implicates the accused before it will convict beyond reasonable doubt...;

(d) failing corroboration, a court will look for some feature in the evidence which gives the implication by a single child witness enough of hallmark of trustworthiness to reduce substantially the risk of a wrong reliance upon her evidence (*S v Artman* 1968 (3) SA 339 (A) at 340H).

3) The cautionary rule is a rule of practice, not a rule of law, to be applied in the light of warning of Holmes JA in the *Artman* judgment cited above at 341C, that-

‘... [W]hile there is always a need for caution in such cases, the ultimate requirements is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense...’.

4) There are cases where the evidence of a single child witness has been found to be clear and satisfactory in every material respect, and hence sufficient for proof beyond reasonable doubt, without corroboration implicating the accused or without some additional hallmark of trust worthiness, other

than the inherent value of the child's evidence itself (*Director of Public Prosecutions v S* 2000 (2) SA 711 (T)). What is always necessary is that the evidence of a single child witness is evaluated with a full appreciation of the dangers of uncritical reliance upon it.

It is therefore necessary to examine the quality of the evidence of the single child witness in this case, in the light of the background facts, the inherent probabilities, and her merits and demerits as a witness. What are the weaknesses in the State case? What are the reasons, if any, for the need to apply a cautionary rule to the facts and circumstances of this case?"

EVALUATION OF EVIDENCE

[8] I now turn to consider the grounds of appeal; the evidence adduced; and the judgement of the *court a quo* with the foregoing *dicta* uppermost in mind. At this juncture it is timely to state that it is manifest from the judgment of the *court a quo* that, in accepting the evidence of the single child witness, the *court a quo* warned itself of the special danger of convicting on the evidence of such a witness.

[9] Having distinctly, with reference to the case law, eluded to the burden of proof incumbent upon the State in criminal cases generally, the court *a quo* distinctively interrogated the caution attaching to acceptance of the testimony of a single child witness specifically as manifested by case law. In conclusion, it came to the following finding:

"She was clear in the manner in which she gave her evidence; she gave a detailed account of the events from 5 October 2013 through to 6 October 2013. Despite lengthy cross-examination she stuck steadfast to her version of events, not once did she contradict herself, she was an honest witness who was prepared to concede that she is the one who asked for alcohol. It is common cause that she had a good relationship with the accused. That relationship and trust persisted until they got to the accused bedroom. They had a close relationship. The complainant had herself chosen to leave her mother and stay with the accused person".

[10] In dismissing the contention of the defence (with its ancillary reasons) that the complainant fabricated the allegation against the appellant, the court *a quo* found,

"...had she been desirous of putting accused in prison she would not have been reluctant to lay a charge initially."

The court *a quo* further found that:

"The defence version that the complainant was furthermore falsely incriminating the accused because

she did not like the discipline and routine imposed in the house was also ruled to be without substance by the trial magistrate. He reasoned that since the complainant's arrival and continued stay at the accused's place was voluntary she would have left if she felt uncomfortable with the arrangements".

[11] In analysing the defence evidence the *court a quo* observed,

"He sought to deny suggestion of physical contact with the complainant, that he had no physical contact relationship with the complainant but under cross-examination he later admitted*that he had in fact hugged her before, she gave alcohol to the complainant despite being a strict disciplinarian and alcohol being not allowed at his house ... He suggested that the complainant sleep over at his room despite that not being the practise..."

The court *a quo* then concluded by finding that the only reasonable inference that could be drawn was that the accused was trying to weaken the complainant's defences and creating an opportunity to commit this offence.

[12] Although the appellant's counsel wielded a vigorous attempt, in a detailed analysis of the evidence, to argue that this finding is misdirected, I am not persuaded that the court *a quo* erred in his assessment of the witnesses, and I agree with the court *a quo* as to the impression produced by a reading of the record.

[13] That having been said, it only remains, in addition, to make some observations pertaining to, but without necessarily dealing *seriatim* with, the grounds of appeal. I do so hereunder.

[14] The complainant was throughout her evidence unwaveringly consistent in her account of events against the appellant as regards the penetration; starting with her MMS text message to her mother immediately after this incident (Exhibit 1); reiterating same with more details when she met her mother later that day; in her statement to the police (Exhibit A); and lastly during her testimony both in-chief and under cross examination.

[15] The text communiqué with the mother, to which the court *a quo* also alluded to, is so detailed that the only inference to be drawn is, as the court *a quo* correctly found, it was prompted by helplessness; fear; and desperation.

Whilst on this point, it is fitting to state that it is highly improbable that the complainant's protracted communication at that time of the day i.e. 4am, was ignited by a mere fabrication as the defence vehemently sought to argue. This then lends credence to the trial court's finding of the complainant's satisfactory and honest demeanour; which in turn endorses truthfulness of her version and negates validity of the contention of fabrication on the complainant's part as contended for extensively by counsel for the appellant.

[16] Adv. Greyling for the appellant also wielded a double edged sword on the incident of Friday night prior to Saturday's alleged rape: Firstly, he contended that the complainant contradicted herself by stating that she was not scared when the appellant touched her thighs but changed to say she was scared. I hasten to point out that the aforesaid contradiction was based on the following "question-answer" exchange that unfolded between Mr. Jordaan for the appellant in the *court a quo* and the complainant;

"Q - Were you scared by this incident?

A - Not after Friday but only on Saturday.

Q - ... You just testified ... that you were not scared at that stage after the Friday night incident?

A - I was scared when he did that.

Q - So if I now ask you the question, after the Friday night incident were you scared of him or not, what will be your answer?

A - Not after the Friday night

Q - So the word that you use there in your statement "bang" meaning afraid, that is not correct?

A - It is your worship, but now it was when he was busy doing that.

Q - And what will that be, what will that fear be?

A - I was scared of that he will have sexual intercourse with me" (My underlining)

[17] If the foregoing answers are read contextually and holistically than in piecemeal, one can discern from them that the complainant sought to explain that she was scared of a possibly consequential sexual intercourse than the touching of the thighs itself, hence my underlining above. This interpretation further finds credence in the complainant's explanation that she thought the appellant might have forgotten about Friday's incident hence she accepted the invitation by the appellant, despite the previous incident, to his bedroom on the Saturday night.

[18] Secondly, Adv. Greyling submitted that the fact that the complainant was scared of the appellant's immoral act on Friday did not co-exist with her claim that on Saturday she yielded to his (appellant's) invitation to the latter's bedroom at night. This perceived anomaly as pertinently put to the complainant during the trial in the following manner:

“Q - Were you not uncomfortable to be close with him like the previous night, the Friday night?

A - No

Q - Why not, what changed?

A - I thought that he did not become aware of what he was doing.”

[19] Mr. Jordaan later reverted to this aspect, ostensibly with a view to testing the complainant’s consistency, but the complainant stood her ground as follows:

“ Q - Why did you go there after what happened Friday night?

A - I did not think he thought what he was doing the Friday night because I was just trusting him.

Q - Why did you not leave the room then?

A - I was afraid that he will confront me again.

Q - But he did not do that on the Friday night, why were you afraid that he would do it now?

A - Because this incident was now different from that”.

[20] From the above cited exchange it is clear that the complainant subjectively believed that the appellant had forgotten about Friday’s incident and that he was still trustworthy. The fact that her belief might perhaps not withstand objective scrutiny cannot, in my view in itself, without any further ado, render her untruthful. At worst, it can render her naïve. It may be as well to recall that the complainant, in a rather unusual move, had preferred to leave her mother and come to stay with the appellant after their divorce. Consequently, the trust in the latter cannot, despite all odds, easily wane.

[21] At this juncture ! deem it prudent to mention that the cautionary rule of practice that has grown recognises that a witness may implicate someone near and dear to him/her as one of the safeguards for conviction. (See **S v Hlapezulu and Others** 1965 (4) SA 439 (A) at 440 F-G). Whilst **Hlapezulu** dealt with the evidence of an accomplice, there is no reason why the aforesaid *dictum* cannot be apposite for a child witness’s evidence. (See DT Zeffert and AP Paizes: **The South African Law of Evidence**, 2nd Ed P972 paragraph 5). *In casu* it is common cause that the complainant is the appellant’s daughter which is the nearest and dearest bondage one can fathom. The enormous calibre of bondage between the complainant and the appellant is further mirrored by the complainant’s choice to leave her mother and stay with the appellant and the complainant’s reluctance to lay a charge against the appellant in this matter.

[22] The alleged positive behaviour depicted by the complainant after the alleged incident also did not escape an attack by the appellant's counsel. *Inter alia*, he relied on the fact that she rode with the appellant in a motorcycle to the appellant's friend without raising an alarm even at the latter's house. In the Heads of Argument and his oral submissions counsel took issue with the coexistence of such behaviour with the one reasonably expected of a rape victim.

This contention leaves out of account the reality that the complainant was a child. As Jones J observed in **S v MG** (*supra*) at 73 D-F,

“...there should ordinarily be evidence of facts which suggest that she did not make a complaint because her allegation is indeed untruthful. There are many understandable reasons why a child who has been raped may not say so immediately, and in my view a child is not necessarily to be blamed or criticised for not raising the traditionally expected hue and cry following an attack on her chastity. In any event ... the complainant made a complaint the very next day...”.

[23] These remarks are directly in point in the circumstances of this case. This is more so that the complainant herein reported the incident to her mother on the same Saturday night/Sunday morning in stark contrast to the complainant in **MG** (*supra*) who reported the incident the following day. Consequently, the submissions on this point, at the risk of stating the obvious, ring hollow on the light of the circumstances of this case.

[24] Furthermore, it is only reasonable to infer that the complainant was heeding her mother's advice that she should pretend as if nothing had happened. To lend credence to such inference I consider it apt to reproduce hereunder the relevant portion thereof as captured from Elizma's testimony in court. It reads,

“... ek het gesê jy is oud genoeg om jou eie besluite te maak volgens die wet, jy kan 'n saak maak maar dan gaan dit 'n groot hofsak wees, of jy kan besluit om niks te doen nie en sorg dat jy nie weer alleen saam met horn is dat iets so iets kan gebeur nie, ek kan nie namens jou besluit nie, ek sit in 'n moeilike situasie en jy weet dit...”

[25] It is elementary and standard practice for a party to put to each opposing witness so much of her/his own case as regards that witness. The defence omitted to put to the complainant one of the crucially integral parts of appellant's version that the complainant was so truant and troublesome that she would even cut herself with a razor.

In this regard, I find the following *dictum* in **Ndizi v S** [2014] 3 All SA 43 (SCA) at paragraph 21 apt,

“... Counsel failed to put the appellant's defence of necessity or emergency to the State witnesses. As

a result of this failure, the court never had an opportunity to hear and see how the State witnesses reacted to the appellant's version of the events and to assess its congruency".

[26] At this juncture I pause to mention that the complainant's truance vis-a-vis the appellant's disciplinarian manner was the highlight of the appellant's basis upon which his defence of a possible fabrication by the appellant was premised. The sentiments in **Ndlazi** also hold true as regards Adv. Greyling's contention that since the complainant was on anti-depressant treatment she was susceptible to hallucination, imagination and illusion. This was not, even in the slightest, per se, put to the complainant. Nor was it specifically attested to during the entire trial proceedings. If anything, the appellant only widely speculated that the fabrication against him might possibly have been ignited by his disciplinarian attitude against the complainant. Consequently, the contention of the defence in this regard is baseless.

It may be as well to remind oneself that the complainant was candid enough to state that the appellant simply fell asleep after inserting his finger into her private parts. Had she harboured any ill will of fabrication she would easily have added other serious misdemeanours at her disposal, like actual licking of her private parts, attempted rape, or even actual rape with his private part.

[27] Accordingly, taking all the evidence into account, and having given careful consideration to the judgement of the *court a quo*, I am driven to the ineluctable conclusion that the State has discharged the onus which rested upon it.

[28] In the result, the following order is granted.

ORDER

1. The appeal is dismissed.
2. The conviction is confirmed.

M.D.HINXA, AJ

I agree.

B.C.MOCUMIE, J

On behalf of the appellant: J. L. Jordaan

Instructed by:

J L Jordaan Attorneys

BLOEMFONTEIN

On behalf of the respondents: Adv. A. M. Ferreira

Instructed by:

Director: Public Prosecutions

BLOEMFONTEIN