

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: A7412015

In the matter between:

ISHMAEL LEBAKENG

Appellant

and

THE STATE

Respondent

CORAM: MOLOI, J et MOHALE, AJ

HEARD ON: 12 OCTOBER 2015

DELIVERED ON: 13 OCTOBER 2015

MOLOI, J

[1] The appellant came before us on appeal against both his conviction and sentence on a charge of contravening *section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 1997 read with section 51 of the Criminal Law Amendment Act No. 105 of 1997*. The appellant was convicted of rape of a 5 year old female and sentenced to life imprisonment by the Regional Court. The court *a quo* granted him leave to appeal the sentence only but by virtue of section 309 (1) (a) of the Criminal Procedure Act No 51 of 1997 he had an automatic right to appeal both the conviction and the sentence imposed.

[2] Central to the appellant's basis of appeal against the conviction was the question of identity of the perpetrator and whether or not the complainant's private part was penetrated. The evidence of the complainant was that one Khiba pulled down her panty while standing and putting a stick between her legs. The appellant was fully clothed. She had to tell her grandmother what happened only when she was beaten up by her. First she said one P. did it to her but later when the grandmother realised she was lying she then said it was Khiba. Khiba is another name the appellant is known by. The grandmother suspected a man must have sexually assaulted the complainant because she noticed some fluid on the complainant's thighs and believed it was semen.

[3] According to the evidence this incident happened at the complainant's friend's, M.'s, house where she had gone to play. P. is M.'s elder sister. They were all in the house. According to Dr. Coetzee when she examined the complainant she could not find any genital injuries on the complainant though she noticed some dried fluid on the labia majora and some redness at five past seven o'clock position. According to Dr Coetzee the redness she saw could be caused by various factors e.g. improper hygiene, infection and scratching by the complainant herself. The dried fluid that she noticed could even be a discharge from the complainant herself as it is normal in children of her age.

[4] The evidence of the appellant was that he and his wife were visiting another place on the day in question and that he was nowhere near the complainant. This evidence was corroborated by P.. The magistrate rejected this evidence; however, without dealing with the reasons for his rejection thereof save for saying the appellant should have called his wife to corroborate his *alibi*. The magistrate also allowed the gaping contradictions in the complainant's evidence justifying them on the ground of her tender age.

[5] Evidence of identification must always be treated with caution: *S v Mthethwa*. 1972 (3) SA 766 (A) at 768 A-C; *S v Shekelele & Another* 1953 (1) SA 636 (T). In this matter the complainant, when confronted by the grandmother, said it was P. that handled her private part. Upon been given a beating she said it was Khiba. It was, however, not determined which Khiba she was referring to. The appellant's evidence is that he was not at the scene at all and this finds corroboration in P.'s evidence but was rejected. Evidence of the appellant can only be rightfully rejected if it is found to be false beyond a reasonable doubt: *R v Matsoso* 1950 94) SA 178 (0) at 185F-G. Also *R v Difford* 1937 AD at 373. In *S v Kubeka* 1982 (1) SA 534 .G12 at 537 D-H the following was stated:

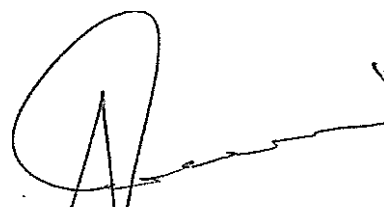
"...whether I subjectively disbelieve him is, however, not the test. I need not even reject the state case in order to acquit him. I am bound to acquit him if there exist a reasonable possibility that his evidence may be true."

[6] In the light of the foregoing it is clear that the trial court erred in material respect to convict the appellant of statutory rape. The evidence before the trial court falls far too short to constitute proof beyond a reasonable doubt. In the light of this finding it will be unnecessary to deal with the sentence imposed.

[7] In the result the following orders are made:

7.1 The appeal is upheld

7.2 The conviction on a charge of contravening *section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No 32 of 1997 read with section 51 of the Criminal Law Amendment Act No. 105 of 1997* is set aside and is substituted by an order that the Appellant is found not guilty and is discharged.



K. J. MOLOI, J

I concur.



MOHALE. AJ

On behalf of the Appellant: Adv. SS Kambi
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of Respondent: Adv L Bontes
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN