

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

Appeal No.: A231/2013

In the matter between:

MAHLOMOLA LUCAS MARUPING

Appellant

and

THE STATE

Respondent

CORAM: LEKALE, J *et* JAJI, AJ

HEARD ON: 23 JUNE 2014

JUDGMENT BY: LEKALE, J

DELIVERED ON: 27 JUNE 2014

- [1] The appellant, who was legally represented, was on the 20th June 2012 convicted of rape of a 6-year old girl by the regional court at Welkom. He was, eventually, sentenced to 20 years imprisonment on the 21st June 2012. He now comes before us on appeal against both the conviction and sentence with leave

to appeal against sentence granted by the court below and leave to appeal against the conviction, effectively, granted by members of this court on the 10th March 2014 when the matter first served on appeal against sentence.

- [2] In returning the guilty verdict the trial court characterised the appellant's version as a fabrication flawed with contradictions and improbabilities and, further, as not being reasonably possibly true. The court below, further, found that the essential features of the story told by the child complainant, who was a single witness on the appellant's alleged involvement in the crime, were true. The court *a quo*, furthermore, found that no inference could be drawn from failure, by the complainant, to implicate the appellant earlier by making a report about the rape and his involvement as the rapist.
- [3] On imposing 20 years imprisonment as a sentence the court below found that the appellant was a possible candidate for rehabilitation and reiterated that life imprisonment was reserved for cases devoid of substantial and compelling circumstances.
- [4] In the heads of argument submitted for and on his behalf by Mr Makhene, the appellant effectively assails the conviction on, *inter alia*, the ground that the complainant's evidence with regard to the circumstances surrounding the rape and whether or not she reported the crime to her sister and/or mother was not satisfactory as it is not supported by her said sister and mother who, in fact, contradicted.

- [5] The State, through the mouth of Ms Giorgi, supports both the conviction and the sentence on, *inter alia*, the basis that the trial court was alive to applicable cautionary rules and accepted the complainant's version as credible and satisfactory. The court below, further, found that there existed no possibility of false implication of the appellant and rejected his version after adopting a holistic approach to the evidence before her.
- [6] It is effectively not in dispute that the complainant was a victim of rape insofar as there existed undisputed professional evidence to the effect that she was sexually penetrated. The effective question before the trial court was whether or not the appellant was the culprit. It is, further, not in dispute before us that there existed contradictions between the evidence of the child complainant, her so-called sister (D[...]) and her mother. The parties are, furthermore, in agreement that the appellant changed his version before the trial court with regard to when the feast during which the rape is alleged to have taken place was held and whether or not he spent the night with his girlfriend on the day in question. The question was, in my view, whether or not the discrepancies and contradictions in the State's case compromised the complainant and rendered her evidence, as a single and child witness, unreliable on the appellant's involvement in the rape and the circumstances around it.

- [7] The relevant contradictions are apparent from the evidence presented to the trial court. The State throughout maintained that the relevant traditional feast was held during August 2011 at the complainant's maternal home in Welkom. According to the complainant, it was late in the evening on the day in question when her mother, who was about to sleep, sent her to call her brothers from the outside room occupied by the appellant. When her brothers went to their mother in the main house the appellant locked her inside his room, switched off the light and raped her by inserting his penis into her vagina. She demonstrated how the rape took place through anatomically correct dolls provided to her by the appointed intermediary. She remained locked in that room until dawn the next day when she went to the main house. Her mother had already gone to work when she got into the house. D[...] saw her when she entered the main house and she related the full story about the rape and the appellant's role in it. She was crying as she related the story. D[...] promised to take her to the clinic. The appellant's girlfriend was not present on the night of the rape and she, thus, could not have shared his bed. D[...] took her to the clinic where she was medically examined. She did not report the incident to her mother because the appellant threatened her and stated that he would kill her.
- [8] The complainant's so-called sister, D [...], testified that she was present during the relevant feast, but left after 20h00 for her boyfriend's place when she felt tipsy. She only returned after

two days. One morning, between the 24th and 26th August 2011, she was giving the complainant, who had not gone to school, a bath when the latter protested that she should not touch or wash her vagina because she was hurting her. She, thereupon, concluded that the complainant had developed a rash in her vagina and she, thus, did not ask her what the problem was. She was very close to the complainant and they used to talk about everything. The complainant would tell her even when she was ill, but she never told her about the rape incident.

- [9] The complainant's mother testified that on the night of the feast she was working nightshift as a nurse and, as such, she left at 18h45 for work and got home the following morning at 7h20. When she got home she went to check on the complainant, as usual, and learned from her nanny that she was asleep. When she saw the complainant later that morning she was fine. In January 2012, after she had relocated to Johannesburg with the complainant, she returned home from work to find the complainant waiting for her at the bus stop. The complainant complained that it was sore in her vagina because she had been playing with a 12-year old boy who undressed her panties and tried to insert his penis into her vagina. She took the complainant to the police who took them to the hospital for a check-up. At the hospital the nursing sister in attendance informed her that the complainant was nearly penetrated but that she could see scars in her vagina indicating that she had

previously been raped. She, thereupon, remembered that at some stage, after the feast and in Welkom, the complainant got sick and was taken to the clinic by the nanny and one Pulane. At the clinic it was found that the complainant was raped and a referral letter was issued to that effect referring them to the hospital. She, however, took the complainant to a private doctor as she had her own doubts. The doctor examined her and said that she was not raped but that it was only a rash in her vagina. After hearing the nursing sister out she made an enquiry from the complainant and the latter confirmed that she was raped by the appellant on the occasion of the traditional feast. The complainant, further, advised her that on the day in question she went to the appellant's room and found him sitting with her brothers. She remained with them for a while and left to go back to the main house. The appellant, however, later went to the house and took her to his room, gave her traditional beer to drink and afterwards undressed and raped her. The complainant stated that she was afraid to report the incident to anyone and she also forgot.

- [10] The appellant's case, as put to state witnesses, was that on the night in question he slept with his girlfriend in his room and could, as such, not have raped the complainant. His evidence in court was, however, to the effect that his girlfriend was only present during the earlier feast and did not attend the one held in August 2011 because they were no longer together having separated in July 2011. On the night of the relevant feast he

shared his room with friends. He even called one of those friends as a witness. The said friend corroborated his evidence with regard to sleeping arrangements but added that the appellant's girlfriend was present at the feast although she did not share the appellant's room for the night.

- [11] Contradictions are material if they relate to material aspects of the point at issue and they reflect on the credibility of the witness. The question in the case of such contradictions is whether or not, despite any shortcomings, the truth has been told.

(See: **S v Mafaladiso en Andere** 2003 (1) SACR 583 (SCA) at 593e – 594h.)

- [12] In dealing with the contradictions between the evidence of the complainant and that of D[...] relating to whether or not the complainant reported the rape to the latter, the trial court found that D[...]’s evidence on this aspect could not really be regarded as inconsistent to that of the complainant because the complainant merely testified that she told D[...] and she could, as such, very well have considered the report of the pain in the vaginal area to D[...] as a report she was supposed to have made.

- [13] The complainant’s evidence on this aspect goes as follows:

“Now who saw you entering the big house? --- My sister.
 Is it your sister D[...]? --- Yes.
 And what did you tell D[...] when you entered? --- I said to her
 they raped me.
 Did you gave (sic) her a name? --- Yes.
 Which name did you gave (sic) her? --- Lucas.
 Yes but you yourself what did you tell D[...] what happened
 when you were raped did you explain to her what happened? --
 - I told her.
 Did you tell her, the same version that you gave us yesterday?
 --- Yes.”

See: Page 22 lines 4 – 25 of the transcribed record.

- [14] It is, in my view, clear from the above exchange between the appellant’s legal representative and the complainant that the latter testified that she gave full particulars of the rape as well as the particulars of the rapist to D[...]. She could, therefore, not reasonably possibly have regarded mention of pains in the vaginal area as such details. The context in which the particulars of the rape were allegedly disclosed to D[...] also differs materially from that in which D[...] testified that she discovered that the complainant was not comfortable with being touched on her private parts. Where D[...] stated that she was giving her a bath, the complainant testified that she had just entered the house from the appellant’s room the morning immediately after the rape. The two incidents not only differ in content, but are also unrelated in time insofar as, according to D[...], she did not return to the complainant’s maternal home

until after two days from the date of the feast. The complainant would have made the report to D[...] on Sunday early in the morning because the feast was on Saturday. According to D[...] she tried to bath the complainant on the day she (the complainant) did not want to go to school indicating that she was ill.

[15] The possibility of the complainant ever having made a report to D[...] and immediately on her return to the main house after the rape, is also not accommodated by the complainant's evidence on why she did not tell her mother about the rape. Her response to the prosecutor in this regard was that the appellant had threatened her and told her that he would kill her. If the alleged threat was so effective in her mind that she did not tell her mother because of it, she would not reasonably possibly have told D[...] about the incident and so soon after it was made.

[16] With regard to inconsistencies or discrepancies between the complainant's evidence and that of her mother, the trial court felt that the explanation of the latter defined certain aspects pertaining to how the complainant landed at the appellant's room, but the gist of the evidence pertaining to the act of sexual intercourse was consistent. It is true that the complainant's version before the trial court and her previous statement to her mother are similar with regard to how the appellant allegedly closed the door, undressed the complainant and raped her.

Conspicuously omitted from her version before the trial court is that the appellant gave her traditional beer, whereafter, undressed her and raped her.

- [17] That the complainant consumed alcohol that night was significant and material because it could possibly have affected her young mental faculties to the extent of compromising her recollection and account of events. It is also clear that her account of events to her mother differed from her evidence in court with regard to how she got to the appellant's room on the occasion of the rape. She did not mention to her mother that the latter was sleeping in the house when the rape took place and that she was the one who had sent her to call her brothers from the appellant's room. The trial court found that the complainant gave an intelligible answer when she testified about the time when she left the appellant's room in the morning pointing out that it was before the morning and one could see the sun making its appearance. If the complainant was capable of giving such intelligible answers it could reasonably be expected of her to know if she made a report and to stick to one version with regard to how she got to the appellant's room. Whether she was running an errand for her mother when she went there or the appellant fetched her from the main house she would, in my opinion, be able to distinguish between the two.
- [18] On her mother's evidence the complainant attributed failure, on her part, to report the rape to her to the fact that she was

scared and she further forgot. While it is both possible and understandable that she could have been scared, it is hard to accept that she forgot about such a harrowing and painful experience especially when the appellant shared her maternal premises. On the evidence of her mother before the trial court the rape could not reasonably possibly have taken place on the night of the August 2011 feast because she would not have sent the complainant to call her brothers from the appellant's room as she was at work. D[...] did not take the complainant to the clinic on her evidence and that of the complainant's mother because according to the latter it was the nanny and one Pulane who undertook that task.

- [19] The complainant was both a child and a single witness on the alleged involvement of the appellant in the rape. Her evidence had to be approached with caution in order for the trial court to satisfy herself that the truth had been told. In my judgment it cannot be said, from recorded evidence, that the trial court could have been satisfied that the complainant was reliable on the appellant's involvement and that the truth, in that regard, had been told. In my view the trial court misdirected herself when she found that no inference could be drawn from the numerous contradictions involved. The complainant not only contradicted her report to her mother but she also contradicted other witnesses. It is true that she was not confronted with these contradictions in order for her to explain the same but that omission cannot fairly be placed at the door of the

appellant. The trial court was at all times free to recall her for that purpose after such discrepancies came to light.

[20] In conclusion I am not persuaded that the appellant was disingenuous in his version and that the contradictions in his evidence emanated from mendacious intentions on his part regard being had to his attribution of such contradictions to confusion on his part. A reading of his evidence in context confirms that he was confused as to when the rape was alleged to have taken place. He even enquired from the prosecutor, when he was under cross-examination, after the date of such an incident but the prosecutor expressly declined to assist. The learned trial magistrate also did not intervene to assist. The appellant kept changing his evidence with regard to whether or not he knew about the feast held in August 2011. That he was confused about the date of the rape incident is, further, borne out by the fact that he had undisputedly secured the attendance at court of his ex-girlfriend, with whom he severed love relations in July 2011, to confirm his alibi. The said intended alibi witness, however, left without testifying after it became clear that the State's case was that the incident related to the feast held in August 2011 when they were no longer together. In my view he would not reasonably possibly have expected any favours from someone with whom he no longer shared amorous intimacy, especially the kind of favour that involved lying to the court by playing the role of an alibi witness. Even if he had failed to provide an acceptable explanation for the

contradictions such discrepancies could not, in my judgment, supplement the State's case against him to the extent of curing its shortcomings. The State was throughout the trial saddled with the burden to prove its case beyond reasonable doubt, which burden it failed to discharge.

ORDER

[21] The appeal succeeds.

[22] The conviction and sentence are set aside.

L. J. LEKALE, J

I concur.

N.P. JAJI, AJ

On behalf of appellant:

Adv J.S. Makhene
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv S. Giorgi

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