

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: A13/2023

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

04/11/2024

In the matter between:

ABRAHAM GOITSEMODIMO MONNAGADISE

Appellant

and

THE STATE

Respondent

JUDGMENT

van der Westhuizen, J

[1] The appellant was arraigned in the Regional Court, Benoni, on two charges of the rape of a minor. He pleaded not guilty to both charges.

However, he was convicted on one charge of rape and acquitted on the second charge of rape. The appellant was sentenced to life imprisonment.

The appellant enjoyed legal representation throughout the trial. The appellant has an automatic right to appeal where life imprisonment was imposed.¹

[2] The appeal is against both conviction and sentence. The three main grounds of appeal are that:

(a) the Trial court did not duly apply the cautionary rule pertaining to the evidence of a single minor child witness and erroneously accepted the complainant's evidence without sufficient corroboration;

(b) the complainant of sexual abuse was not voluntarily made and subsequently erroneously accepted by the trial court as evidence against the appellant

(c) the trial court erred in rejecting the appellant's evidence as not being reasonable true in the circumstances.

[3] At the time of the alleged rape the minor child was 10 years old when the alleged sexual deed was committed. She was 12 years old when she testified. Her evidence was presented through an intermediary. Due process was followed prior to admitting the intermediary. In admitting the intermediary, due process was followed.

[4] It was submitted on behalf of the appellant that the record patently indicated that the learned regional magistrate had clearly misdirected himself during the trial and in his judgment on important issues.

[5] It is clear from the record that the learned regional magistrate neglected to ascertain whether the minor fully comprehended the distinction between right and wrong, the difference between the truth and a lie, and what was expected of her when testifying. In this regard the record reveals the court's approach as follows prior to hearing the evidence of the minor:

¹ Section 51(1) of the Criminal Law Amendment Act, 105 of 1997. No your Whorship objection.

“Court: Can we have the child’s name please?”

MS M[...]: M[...] M[...] (through interpreter) (through intermediary)

Court: How old are you?

MS M[...]: I am 12 years old. Your Whorship.

Court: Do you know what it means to take the oath?

Ms M[...]: Yes I do know, Your Whorship.

Court: Do you have any objections to taking the oath?

Ms M[...]: No objection. Your Whorship.”

[6] From the foregoing it is apparent that the learned regional magistrate did not enquire whether the minor understood right from wrong and the difference between telling the truth and telling a lie. It was not determined whether the minor understood the concept of what it meant to take the oath. In my view this constituted a fundamental and material misdirection on the part of the learned regional magistrate. That material misdirection tarnished the evidence of the minor throughout the trial.

[7] In my view, that misdirection warrants the appeal against conviction to be upheld. Furthermore, in what follows, that misdirection was

exacerbated by other misdirections perpetrated by the learned regional magistrate.

[8] In respect of when determining whether the first report of the alleged rape was voluntary made, the following is of importance.

- [9] The minor testified that she had voluntarily and of her own accord reported the commission of the alleged rape to her grandmother where after her grandmother went to confront the appellant.
- [10] The grandmother testified that the minor did not report the alleged rape to her. The minor refused to say what had happened at the appellant's home. Due to the silence on the part of the minor, the grandmother approached the appellant and confronted him. The appellant denied raping the minor, despite being told by the grandmother that she would report him to the police.
- [11] On the grandmother's return to her house, she found that an uncle of the minor had beaten the minor with a sjambok. She was allegedly beaten because she did not speak of the alleged rape and remained silent when questioned. Only after being severely beaten did the minor report being raped by the appellant.
- [12] The grandmother remained adamant that the minor did not report the alleged rape to her prior to the grandmother approaching and confronting the appellant. The grandmother testified that only after being beaten did the minor report the alleged rape. The grandmother's evidence was accepted. The clear discrepancy was glibly glossed over by the learned regional magistrate.
- [13] The learned regional magistrate's acceptance of the minor's evidence unreservedly under the foregoing circumstances constitutes a fundamental and material misdirection.²
- [14] In his judgment, the learned regional magistrate, in respect of the cautionary rules that should find application, paid mere lip service thereto. A mere gloss over the cautionary rules applicable to single and child witnesses was made, a mere casual reference thereto. The learned magistrate failed to properly apply the trite rules in respect thereof and did not venture into the how the rules were to be applied and failed to consider the effect thereof in the present

² *R v Mandla* 1951(3) SA 158 (A) at 163D-E

instance. The learned regional magistrate casually recorded in his judgment that all that a court sitting in a matter where the cautionary rules apply is “*that it: means that the Court must find guarantees for reliability of her evidence, Guarantees for reliability of the child’s evidence can be found in any evidence presented to the Court.*”³

- [15] Further in this regard, the evidence led in this matter were replete with important contradictions. The point at which the report was made was subject to material contradictions. The manner in which the report was made was further in dispute. The evidence revealed that the report was not made voluntary. A severe beating preceded the report. The J88 relied upon by the learned regional magistrate was inconclusive in respect of whether a sexual assault was perpetrated upon the minor. The findings were merely that it could not be excluded. In this regard, the respondent did not present the evidence of the person who compiled the report.⁴ The J88 confirmed the physical assault on the minor by the uncle with a sjambok. A clear indication that she had been struck with a weapon, in this instance the evidence revealed that the minor was

beaten with a sjambok.⁵ The J88 recorded bruises on the private parts of the minor with no further detail being provided.

- [16] In my view the recorded misdirections on the part of the learned regional magistrate constitute fundamental and material misdirections. The reasonings of the learned regional magistrate in his judgment are consequently flawed. The recorded material misdirections impacts negative upon the learned regional magistrate’s findings and the subsequent conviction. The State had miserably failed to prove the alleged rape perpetrated by the appellant.

³ *S v Hanekom* 2011(1) SACR 430 (WCC) at [15]; *S v Mahlangu et al* 2011(2) SACR 164 (SCA) at [21]; *S v Gentle* 2005(1) SACR 420 (SCA)

⁴ *NS v THE State* (20642/2014) [2015] ZASCA 139 (30 September 2015); see in particular *S v MM* 2012(2) SACR 18 (SCA) at [15]

⁵ *S v MG* 2010 (2) SACR 66 (ECG) at [73]

[17] Accordingly, the conviction of the appellant on the charge of rape of a minor stands to be set aside. It follows that the sentence also stands to be set aside.

I propose the following order:

1. The appeal against conviction and sentence is upheld;
2. The conviction and sentence is set aside;
3. The order of the court *a quo* is substituted with the following order:

“The accused is found not guilty”

4. The appellant is to be released immediately.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

I agree,

H KOOVERTJIE Ms
JUDGE OF THE HIGH COURT

On behalf of Appellant: Adv F van As
Instructed by: Legal Aid S A

On behalf of Respondent: Adv E Mafunisa (Ms)
Instructed by: DPP

Date of Hearing: 29 October 2024

Judgment Delivered: 04 November 2024