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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
20 August 2024

DATE

SIGNATURE

CASE NUMBER: A69/2022

In the matter between:

ANTON WOUTER VAN WYK

Appellant

and

THE STATE

Respondent

Coram: DOSIO J and MATHUNZI AJ

Heard: 5 August 2024

Delivered: 20 August 2024

ORDER

The appeal in respect to conviction is upheld. The conviction and sentence are set aside.

JUDGMENT

DOSIO J:

Introduction

[1] The appellant was arraigned in the Regional Court on a count of rape in contravention of s3 of The Sexual Offences and Related Matters Act 32 of 2007 ('Act 32 of 2007'), read with s51 (1) of The General Law Amendment Act 105 of 1997 ('Act 105 of 1997'). The charge alleged that on 16 April 2018 at Primrose in the Regional Division of Gauteng, the said accused did unlawfully and intentionally commit an act of sexual penetration with a female person, to wit T[...] N[...] Z[...] ('the complainant'), who was seven years old, by inserting his penis into her vagina without her consent.

[2] The appellant pleaded not guilty but was convicted as charged and was sentenced to life imprisonment as per s51(1) of Act 105 of 1997.

[3] The appeal is in respect to conviction and sentence.

[4] The appellant was legally represented.

[5] Condonation for the late filing of the appeal was granted.

Evidence

[6] Three witnesses testified for the State, namely, the complainant, W[...] Z[...] ('the complainant's father'), Cynthia Khubeka (a forensic social medical welfare officer) and doctor Efadzwa Mayu Tipoy.

[5] It is common cause that this complainant was raped as the medical J88 states that there is evidence of forceful penetration, in that the fossa navicularis is not intact, exhibiting a fresh tear at three o' clock. The crisp issue is one of identity.

Ad conviction

[6] It is trite law that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. If his version is reasonably possibly true, he must be acquitted.

[7] In considering the judgment of the Court a quo, this Court has been mindful that a Court of Appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.¹

[8] Counsel for the appellant contends that the Court a quo misdirected itself in finding that the accused raped the complainant by not taking into account that:

- (a) The complainant never physically pointed out the appellant as the person who raped her during the appellant's arrest. Furthermore, that no identity parade was held to confirm the perpetrator's identity.
- (b) The complainant can't remember during cross-examination how the 'guy' looks like who 'hurt' her.
- (c) The complainant never testified that she was penetrated or raped and merely stated that the 'person' put his private part 'on hers'.
- (d) During cross-examination, the complainant was asked if she could dispute that the 'man' had blonde hair, to which the complainant answered she couldn't remember.

¹ See *S v Francis* 1991 (1) SACR 198 (A) at 198 J – 199A and *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 E-F

(e) During cross-examination the complainant was asked if the 'man' had a moustache and beard, to which the complainant answered 'yes',² yet there is no evidence before the Court a quo that the appellant ever had a moustache.

(f) There are several other white contractors working on a regular basis at the block of flats where the complainant resides.

(g) There is no DNA linking the appellant to the offence.

(h) The Court a quo did not take into account that the complainant is a single witness and therefore failed to consider the necessary caution and rules in analysing her evidence.

(i) The evidence of the appellant that he did not commit the offence was reasonably possibly true and that he was a credible witness.

(j) The appellant's sexual orientation is homosexual and has no interest in the female gender.

[9] There were additional aspects raised by the appellant pertaining to the evidence of the medical practitioner who testified, as well as the medical J88 report. This Court will not deal with this as it is clear that the child was indeed raped. The only question to determine is whether the Court a quo correctly found that the appellant was the person who did this.

Evidence led

The complainant

[10] The complainant testified that on Monday 16 April 2018, she was sent home due to a burglary that had occurred at her school. Two men arrived at her residence to fix the security gate. One was a white male and the other was an African male. After they were finished, she saw the African man leave, however, the white man came to her parent's bedroom, took off her clothes, started kissing her and then licked her private parts and put his private parts on her private part. When he finished, she saw white things on her private parts. The man then wiped off the 'white things' off his private part and around her private part with a tissue and then flushed the tissue in the toilet and left. She reported the incident to her mother and

² CaseLines 003-183 line 16-17

father that evening and described the perpetrator to her father as being the man whom her father called to fix the gate. The complainant indicated that she did not know the perpetrator's name and could not describe what he looked like except for the allegation that he was white and that he had a moustache and a beard.

The complainant's father

[11] He testified that on Sunday 15 April 2018 he sent a WhatsApp to the appellant, requesting him to fix the burglar door at his house. When he arrived home that evening the complainant informed him that the guy who came to fix the door came into the bedroom, took off her clothes and licked her private parts. The complainant further informed him that after licking her private parts, the preparator kissed her and had sexual intercourse on her. The complainant then informed him that the person who committed the offence was '*...the guy you asked to come to fix the door, the one who wears glasses, the white guy*'.³ This witness questioned the complainant about the identity of the perpetrator and whether or not he was the person who previously assisted them with the gate remote. According to this witness, the complainant answered positively.⁴ He reported the matter to the Primrose Police Station and took the complainant to the doctor. On the following day, Tuesday 17 April 2018, he lured the appellant to the flat under the auspice that he needed repairs done to restore his electricity supply. It was there that the appellant was arrested and taken into custody. The complainant did not see the appellant on 17 April 2018, nor did she point him out.

Captain Khubeka

[12] This witness did not take the evidence any further.

Doctor Tipoy

[13] He testified in respect to the J88 medical report which was completed on 16 April 2018 by doctor Masango. In the gynaecological examination, doctor Masango

³ CaseLines page 003 – 202 lines 12-13

⁴ CaseLines page 003 – 203 lines 3-4

noted tears on the labia majora, posterior fourchette, fossa navicularis and that the hymen was not intact and had fresh tears with minor bleeding. Doctor Masango found that there was evidence of forceful penetration.

[14] Although a DNA swab was taken, no conclusive evidence in this regard was led by the State.

The appellant

[15] He testified that he is homosexual and is in a relationship with Pieter Botha for the past twenty years. He stated that he received a WhatsApp message from the complainant's father on 15 April 2023 requesting him to fix the burglar gate. He responded to the message and indicated that he would be there the following morning around 8 am.

[16] He indicated that he saw the complainant's father once before the incident and that was when Pieter Botha handed over the keys to the house when the complainant's father moved in. On 16 April 2018 the appellant and a man referred to as Isaac attended at the complainant's father's residence to fix the gate. It took approximately twenty minutes whereafter they both left and they went to Lamton to perform other work duties. The first time the appellant saw the complainant was on 16 April 2018 and only again thereafter in court.

[17] He stated that he never sported a beard or a moustache and was never asked to attend an identity parade. He denied molesting or raping the complainant.

Identity

[18] In the matter of *S v Mthetwa*,⁵ the Appellate Division as it then was, stated that:

'Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying

⁵ *S v Mthetwa* 1972 (3) SA 766(A)

witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as *R. v Masemang*, 1950 (2) SA 488 (AD); *R. v Dladla and Others*, 1962 (1) SA 307 (AD) at p. 310C; *S. v Mehlahe*, 1963 (2) SA 29 (AD).’ (at 768A-C)

[19] In volume 18 of LAWSA, the learned authors state as follows:

‘Judicial experience has shown that evidence of identity should, particularly in criminal cases, be treated with great care. Even an honest witness is capable of identifying the wrong person with confidence. Consequently, the witness should be thoroughly examined about the factors influencing his or her identification, such as the build, features, colouring and clothing of the person identified. An early identification before the trial (which is admissible as an exception to the rule prohibiting previous consistent statements) lends credibility to the evidence. Particular care should be taken if the only evidence connecting the accused with the crime is that of a single identifying witness; then the cautionary rule relating to single witnesses should also be taken into account.’⁶
[my emphasis]

[20] It is accordingly important to consider the complainant’s evidence and whether her observations of the person who raped her, were reliable.

[21] The complainant contradicted herself and stated that she always saw him fixing the gate, yet later she stated ‘*it was the first time*’.⁷

⁶ Volume 18 of LAWSA para 263

⁷ CaseLines page 003-100 line 22

[22] The record reflects the following answers during cross-examination:

Ms Van Der Heever: *Now this man that came into the bedroom on this day that you told the Court about, did you see this man ever before that day?*⁸

Ms Z[...]: *No.*⁹

Court: *Before what? Have you seen him on any other day than the day when he came into the bedroom?*¹⁰

Ms Z[...]: *No.*¹¹

[23] Her answers were confusing as she stated that it was the security man at the gate who is always there.¹² Then she cleared this up and said it is not the security man who came to fix the gate.

[24] A very important part of her evidence was that she said it is '*the one who wears glasses, the white guy*'.¹³ Neither the State prosecutor, the defence attorney or the Court a quo cleared this up. Nowhere in the court record can one establish if this appellant in fact wears glasses or not.

[25] When a reasonable possibility of error with regard to identity has not been excluded at the end of the State's case, it cannot be said that the state has proved its case beyond reasonable doubt. In the matter of *S v Sithole and Others*,¹⁴ the Appellant Division as it then was, warned that:

'there must be no reasonable doubt that the witness is not mistaken . . . that will generally require something more than the mere assertion by the witness that he has correctly identified the culprit, if the inherent risk of error is to be guarded against.'¹⁵

⁸ CaseLines page 003 – 116 lines 6-8

⁹ CaseLines page 003 – 116 line 9

¹⁰ CaseLines page 003 – 116 lines 10-11

¹¹ CaseLines page 003 – 116 line 12

¹² CaseLines 003-145 lines 22-23

¹³ CaseLines 003-202 lines 17-18

¹⁴ *S v Sithole and Others* 1999 (1) SACR 585 (W)

¹⁵ Ibid page 591

[26] In the matter of *S v Weeber*,¹⁶ the Appellate Division as it then was, stated that:

‘A conviction is possible on the evidence of a single witness. Such witness must be credible, and the evidence should be approached with caution. Due consideration should be given to factors which affirm, and factors which detract from the credibility of the witness. The probative value of the evidence of a single witness should also not be equated with that of several witnesses.’

[27] It is unclear why the complainant was never asked to attend an identification parade. In the matter of *S v Nyabo*,¹⁷ the Supreme Court of Appeal criticised the State for not holding an identification parade. Misidentification is a major cause of wrongful convictions. The court should generally seek some form of corroboration. In the matter in casu there was no corroboration in the form of identity and the court a quo erred by diluting the weight of the contradictions in the State’s case.

[28] The reliability of the complainant’s observation remains of paramount importance. She could not recall any particular features of the perpetrator. In light of the contradictions highlighted above, the evidence of the complainant was unreliable.

Failure to call further witnesses

[29] It is clear that there were three other white men that work with the appellant, namely, Pieter Botha, Mannetjie and Paul. In addition, it is alleged by both the complainant and the appellant that Isaac accompanied the appellant on 16 April 2018. The defence never called any of these men to testify. In addition, the Court a quo never called Isaac to come and explain whether he left with the appellant after the job was completed.

[30] Section 186 of the Criminal Procedure Act 51 of 1977 (‘Act 51 of 1977’), as amended provides that:

¹⁶ *S v Weeber* 1971 (3) SA 574 (A)

¹⁷ *S v Nyabo* 2009 (2) SA 271 (SCA)

'The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.'

[my emphasis]

[31] In a situation like the matter in casu, the identity of the perpetrator was in issue. It was crucial to exclude anyone else being at the premises and to confirm whether the appellant stayed behind. In the absence of the defence calling Isaac, the Court a quo should have called him to testify. Isaac would have been able to confirm whether the appellant wears glasses and whether he had a moustache and beard at the time of this incident. It was essential for a just adjudication of the case. Isaac would either have supported the complainant's version that he left the appellant alone with the complainant, or that he was with the appellant the whole time.

[32] The failure of the Court a quo to invoke the provisions of s186 of Act 51 of 1977 has led to an irregularity resulting in a fundamental failure of justice. The use of the words 'must' in s186 of Act 51 of 1977 is peremptory and the failure by a Court to make use of this section is fatal to the administration of justice.

[33] On this ground alone, the appeal ought to succeed.

[34] In the matter of *S v V*¹⁸ 2000(1) SACR 453 (SCA), the Supreme Court of Appeal stated that:

'It is trite that there is no obligation upon an accused person, where the State bears the onus, to convince the court. If his version is reasonably possibly true, he is entitled to his acquittal although his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably true but one subjectively believes him is not the test.'

[my emphasis]

¹⁸ *S v V* 2000(1) SACR 453 (SCA)

[35] In the matter of *S v Combrinck*,¹⁹ the Supreme Court of Appeal stated that:
'It is trite that the State must prove its case beyond reasonable doubt and that no onus rests on the accused person to prove his innocence.'²⁰

[36] The appellant's version was consistent throughout the trial that he was asked on Sunday 15 April 2018, via a Whatsapp message from the complainant's father, that he must come and fix the gate at his residence. The appellant and Isaac attended to the residence of the complainant's father just after 08h00 and twenty minutes later, both the appellant and Isaac left.

[37] In the matter of *S v Musiker*,²¹ the Supreme Court of Appeal stated that once an alibi has been raised, the alibi has to be accepted, unless it can be proven that it is false beyond a reasonable doubt.'²²

[38] The appellant's version that Isaac and himself attended at the property, repaired the gate and left thereafter together was not broken down by the State prosecutor. The finding by the court a quo that the appellant's version was improbable, is incorrect. The State did not prove the guilt of the appellant beyond reasonable doubt, and the Court a quo incorrectly rejected the version of the appellant as not being reasonably possibly true. The court, a quo materially misdirected itself in assessing the evidence and erred in rejecting the appellant's version.

[39] After a thorough reading of this record, this Court has doubt as to the correctness of the Court a quo's factual findings. I find there is a misdirection that warrants this Court disturbing the findings of fact and credibility that were made by the Court a quo.

[40] In the premises I make the following order;

¹⁹ *S v Combrinck* 2012 (1) SACR 93

²⁰ *Ibid* para 15

²¹ *S v Musiker* 2013 (1) SACR 517 (SCA)

²² *Ibid* para 15-16

- (a) The appeal in respect to conviction is upheld.
- (b) The conviction and sentence are set aside.

D DOSIO
JUDGE OF THE HIGH COURT

I agree, and it is so ordered

A. MATHUNZI
ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 20 August 2024.

APPEARANCES

ON BEHALF OF THE APPELLANT: Adv. W.C Carstens
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