

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: CA&R131/2024

In the matter between:

LINDIKHAYA DYIFILI

Appellant

and

THE STATE

Respondent

JUDGMENT

Govindjee J

[1] The appellant exercises an automatic right to appeal against his conviction for the rape of a female complainant, aged 11, and sentence of life imprisonment.

[2] The basis of the appeal against conviction is that the trial court erred in its assessment of the evidence, failed to apply the necessary caution to the evidence of the single witness complainant, and erroneously concluded that the appellant's guilt had been proved beyond reasonable doubt, particularly in respect of the element of sexual penetration. On sentence, the appellant argues that his cumulative circumstances were such that a deviation from the prescribed minimum sentence was warranted.

The evidence

[3] Following a plea of not guilty, the state relied on the evidence of the complainant (LD), her grandmother and a policeman, as well as the report of the doctor who examined her after the incident.

[4] Before turning to the assessment of the evidence of the complainant, it is useful to summarise the evidence of the other two state witnesses and consider the medical report. The incident occurred on 28 October 2019. The following morning, the complainant was examined by a medical practitioner, who concluded that there was 'no evidence of fresh injuries seen, however, this does not exclude the possibility of vaginal penetration'.

[5] KG, the complainant's grandmother, lived with the complainant at the time of the incident. She had noticed the child's absence on the day of the incident and searched for her. KG was particularly concerned given that the child suffered from a mental condition and received treatment to assist her thinking process. Community members informed KG that the complainant had been seen with a young man entering a particular container. After dark, she reported the matter to the police, who accompanied her to the area in a police van. She was not with the police when they found the complainant with the accused and returned to the police van. The complainant reported to KG that she had been raped by the accused.

[6] KG explained that the complainant was initially overwhelmed by anger and refused to talk after the incident. Her condition improved after treatment by a clinical psychologist, so that she was in a position to testify at the time of the trial. KG testified that the complainant had previously been raped by a person who was now in prison.

[7] Sergeant Rutywa testified that he had been on duty at the time of the report of the missing child. He and another officer had proceeded to a 'shack' where loud music was playing. The door was locked and they had knocked for approximately 30 minutes. The appellant had opened the door wearing only boxer shorts. The complainant was found hiding behind the door and wearing only her panties. She explained to the police that the appellant had instructed her to stand behind the door

and that she had been raped. Her clothes, and that of the appellant, were placed near his bed and she appeared to have been crying.

[8] Prior to the trial, the complainant, who was now 14 years of age, was assessed by a clinical psychologist as a person capable of speaking the truth and testifying. She had previously been assessed as unable to do so. The expert's view was that her evidence needed to be assessed 'in terms of an unstable mental health history, including previous psychotic mental disorder, and continued cognitive impairment'. Her so-called mental age was assessed as seven.

[9] The complainant's evidence was that the appellant had grabbed her by the hand while she was walking and she had smacked him with an open hand. The appellant subsequently bought her cooldrink and took her involuntarily to his shack. He was telling her that he loved her and cooked for her at the shack. The two sat together until nightfall and conversed. At some point he had enquired about her age and was told that she was 11 years old. The appellant undressed her pants and panties and undressed himself. He grabbed her and placed her on top of the bed, climbed on top of her and raped her. Thereafter, he increased the volume of the radio. The complainant was still inside the shack when the police arrived. The appellant dressed when the police arrived and opened the door.

[10] The complainant confirmed that she had been raped on a previous occasion by another person. During cross-examination, she testified that the door had been open earlier in the evening, when the appellant had cooked for her. She had made no attempt to run away and was in no rush to return home when they ate food and conversed. The crux of her testimony was repeated during cross-examination:

'Caps [the accused] called me to the bed. I refused. He came and took me to the bed...he got on top of me...he was not wearing clothes...he undressed me...he's the one who suggested that [I sleep with him]...I refused...he climbed on top of me inserting his urinating part into my urinating part...it was painful, and I was sent to hospital...I will say, Your Worship, why will he insert his private part in mine, when I was only 11. Can you please ask him that?'

[11] The complainant initially testified that she and the appellant had been found naked by the police, but conceded that they had in fact been wearing underwear. By then, she said that the intercourse had been completed. At some point she testified that her grandmother had told her that she had been raped, which was why she had said so. She clarified, during re-examination, that she had told the police that she had been raped even before she had narrated the story to her grandmother, who was in the van at the time. When it was put to her that the appellant would testify that she had told him she was 16 years of age, she retorted that he was 'sick'.

[12] The appellant's version was that he had 'proposed love' to the complainant, who was his 'girlfriend'. This occurred after he had called the complainant on the street and before they had walked together to his shack. Once there, they had slept and he had then started cooking. When asked, she told him that she was 17 years of age. They sat and lay on the bed for some time until the police arrived. At that stage there was no radio music playing. The appellant and the complainant were underneath the blanket and undressed.

[13] During cross-examination, the appellant was shown a photograph of the complainant that had been taken at the time of the incident. He estimated that the complainant was aged 13 at the time. He later explained that, despite her appearance, he did not consider her to be that age because of their discussion. Still, he had asked her about her age soon after they met '...because I just like doing that ... [and] I cannot have sexual intercourse with a person that is very young.'

[14] On his version, he had begged her to accompany him to his home. They had an agreement that she would do so after he proposed love to her. He wanted her to sleep over. His version changed in material respects during cross-examination. His evidence was initially that he had asked the complainant about her age before they had proceeded to his home. Later he testified that he had asked her age when they were already at his house. More significantly, he testified that he had not touched the complainant even though they were both lying at least semi-naked in his bed. He became aroused during their conversation, which turned to matters of love. This was the root of why they had been together. He later admitted that they had been touching each other and kissing, and specifically that he had touched her upper

body, breast and neck area with the intention of having sexual intercourse with her. Her hand blocked him or would be removed every time that he wanted to touch her vagina. During that time, he asked her if they could have sexual intercourse. He had refrained from doing so because he did not wish to force her 'if she is not ready'. Simultaneously with that decision, the police knocked at the door at approximately 21h00. By that time, he had been with the complainant for approximately five or six hours.

The judgment of the trial court

[15] The trial court concluded that the appellant had cooked for the complainant and purchased a drink for her in order to reduce her resistance to his advances. There could be no mistaking the reality that she was a young child at the time, particularly considering the long period of time the appellant had spent in her company. This assessment was also confirmed to some extent by the appellant's assessment of her age when shown her picture in court. Coupled to this, the complainant's mental condition and cognitive challenges must also have been readily apparent. As such, the 'love proposal' was a fiction. The concessions made by the appellant in respect of his physical interaction with the complainant, contrary to the position he had adopted earlier, weighed heavily with the trial court. The complainant's version was accepted, the court concluding that the state had proved its case beyond reasonable doubt. As indicated, the appellant was sentenced to life imprisonment in the absence of substantial and compelling circumstances sufficient to justify the imposition of the prescribed sentence.

Conviction

[16] The key question on appeal is whether the complainant's evidence was sufficient proof of the appellant's guilt beyond reasonable doubt, bearing in mind the danger of relying on the single uncorroborated evidence of a child witness also suffering from cognitive impairment and with a history of unstable mental health. The

appropriate approach to adopt was summarised by Jones J, on behalf of a full court, in *Leve v The State*:¹

‘The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a re-hearing because otherwise the right of appeal becomes illusory, 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 of evidence reveals that those findings are patently wrong. The trial court’s findings of fact and credibility are presumed to be correct because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies ... If the trial judge does not misdirect himself on the facts or the law ... but instead demonstratably subjects the evidence to careful scrutiny, a court of appeal will not readily depart from his conclusions.’

[17] The same judge noted as follows in *S v Dyira*:²

‘In our law it is possible for an accused person to be convicted on the single evidence of a competent witness (section 208 of the Criminal Procedure Act No 52 of 1977). The requirement in such a case is, as always, proof of guilt beyond reasonable doubt, and to assist the courts in determining whether the onus is discharged they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution (*Rex v Mokoena*, 1956 (3) SA 81 (AD) 85, 86). This means that the courts must be alive to the danger of relying on the evidence of only one witness because it cannot be checked against other evidence. Similarly, the courts have developed a cautionary rule which is to be applied to the evidence of small children (*R v Manda*, 1951 (3) SA 158 (AD) at 162E to 163E). 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

¹ 2011 (1) SACR 87 (ECG) para 8.

² Unreported Eastern Cape High Court, Grahamstown, Case No CC 222/07 dated 2 June 2009.

judgment, immaturity, inexperience, 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 (*Viveiros v S* [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).’

[18] In *S v Manda*, the Appellate Division noted inherent dangers in relying upon the uncorroborated evidence of a young child, including their imaginativeness and suggestibility, so that their evidence must be scrutinised with care to the point of suspicion.³ The cautionary rule that the evidence of a single witness must be clear and satisfactory in every material respect does not imply, however, that any criticism of that witness’ evidence, however slender, precludes a conviction.⁴ The court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true, and notwithstanding that the testimony was unsatisfactory in some respect.

[19] The magistrate made various efforts to explain the basis for her conclusion. The complainant was found to be an honest witness and there was no basis for rejecting her evidence in respect of the sexual penetration. The evidence was weighed by considering its merits and demerits before the magistrate determined whether the complainant had told the truth. Although there was no explicit reference to the application of the necessary caution in the assessment of the complainant’s testimony, the trial court cannot be faulted for the manner in which the evidence was analysed.

³ *S v Manda* 1951 (3) SA 158 (A) at 162E – 163F.

⁴ *R v Bellingham* 1955 (2) SA 566 (A) at 569. It has often been said that the exercise of caution cannot be allowed to displace the exercise of common sense.

[20] There are various reasons for this conclusion. LD, despite being a child witness with a cognitive impairment, consistently described the sexual penetration at the hands of the appellant. The record reveals that LD's testimony was guileless and not brought into question in any material respect during cross-examination. It must also be noted that the complainant had previously been a victim of rape, her description of being sexually penetrated by the appellant can hardly be mistaken. While she may have been persuaded to eat, drink and sit in his presence during the course of that evening, having initially resisted his company, she certainly did not invite or consent to sexual penetration leaving aside the reality that any perceived consent would have been legally irrelevant given her age and mental condition. Her evidence in respect of the music, and state of undress, was corroborated. The unsatisfactory components of her testimony were limited to immaterial matters which were explicable considering her age, level of communication and the period of time that had elapsed. The result is that the trial court analysed the evidence holistically⁵ and correctly concluded that the state had proved the guilt of the accused beyond reasonable doubt.

[21] As for the appellant's version of events, there can be no doubt that his shifting recollection of what had transpired was a desperate attempt to avoid responsibility for his actions. His version of events was simply not reasonably possibly true when considering the impression he made in the witness box, the contradictions in his testimony and the striking improbability of much of what he suggested in the light of all the evidence considered holistically. In particular, his testimony in respect of his discussions with LD regarding her age, his supposed love proposal, and his subsequent self-restraint over a period of hours while he lay undressed with the complainant, was correctly rejected. His guilt was proved beyond reasonable doubt.

Sentence

[22] The appellant argued that the sentence of life imprisonment was disproportionate when considering his personal circumstances. In particular, he placed reliance on a clean record and the possibility of rehabilitation. He also argued

⁵ *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

that the rape did not fall within the worst category of such cases, emphasising that the complainant had not suffered major injuries and that no gratuitous violence was used.

[23] The imposition of sentence is pre-eminently a matter for the discretion of the trial court. The trial court is free to impose whatever sentence it deems appropriate provided that it exercises its discretion judicially and properly. Accordingly, the trial court must impose a sentence on the correct facts and must take the correct legal position into account. The test to determine whether a trial court's discretion has been exercised 'judicially' and 'properly' is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

[24] The trial court properly considered the interests of the appellant, the nature of the offence and the interests of society in coming to its conclusion on sentence. The appellant's lack of remorse was emphasised, bearing in mind that he had falsely denied even touching the complainant until cross-examination revealed the contrary. The trial court also viewed what had transpired in its proper context: a child walking in the street was accosted by an adult who took advantage of her innocence and vulnerability and ultimately raped her. The offence is abhorrent and this court has time and time again lamented the pandemic of sexual violence that appears to plague this part of the country, seemingly without any respite. The complainant will likely live with the consequences for the rest of her life. The magistrate determined that the appellant's clean record was not, on its own, sufficient basis to deviate from the prescribed minimum sentence. That decision cannot be faulted as the exercise of an improper discretion in the circumstance. Nor indeed was there any other factor, viewed in isolation or in totality, which would result in that conclusion. The sentence imposed was proportionate to the crime and not vitiated by any impropriety. As a result, the appeal against sentence must be dismissed.

Order

[25] The following order is issued:

The appeal against conviction and sentence is dismissed.

A GOVINDJEE
JUDGE OF THE HIGH COURT

I agree

M LOWE
JUDGE OF THE HIGH COURT

Heard: 14 August 2024

Delivered: 22 August 2024

Appearances:

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