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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: A90/2024

In the matter between:

NICK KANTOLO NQANA

Appellant

and

THE STATE

Respondent

HEARD ON: 18 NOVEMBER 2024

JUDGMENT BY: MHLAMBI, J

CORAM: MHLAMBI, J *et* VAN RHYN, J

DELIVERED: 28 FEBRUARY 2025

[1] The appellant was convicted and sentenced to life imprisonment on a charge of rape. This appeal is against the conviction and sentence. At the same time, the appellant seeks the reinstatement of the appeal and condonation for the late filing and prosecution of the appeal.

[2] The application for condonation is not opposed, and I am satisfied that a proper case has been made for condonation. Condonation is therefore granted for the late filing and prosecution of the appeal.

[3] The appeal is based on the following grounds:

“AD CONVICTION

1. *The court failed to approach the evidence of I[...] M[...] ("complainant") with the requisite caution which was teased in two fold instances, she was a single witness and also a child witness.*
2. *Furthermore, the court a quo erred in failing to consider the contents of the J88 report when making a credibility finding on the complainant. Column C: Medical History on the J88 reveals that the complainant had a possible impairment and an intellectual disability. The court therefore had to exercise great caution prior to making a finding that the complainant was a credible witness.*
3. *The evidence of I[...] was characterized with material contradictions between her oral testimony in chief, cross-examination and the account she allegedly gave to her mother. It was also riddled with improbabilities and inconsistencies in that: -*
 - (i) *She claims to have slapped the accused and thrown him to his bed. Thus, complainant claims to have in essence overpowered the accused having enough time to put on her clothes and then run home yet when she gets home, she fails to report to her mother about the alleged incident;*
 - (ii) *She claims that she reported the incident and was examined in August 2022 however the evidence is clear that she was only examined in November 2022;*
 - (iii) *At the time that I[...] was to lead evidence in chief it was clear that she struggled to differentiate between right and wrong and the magistrate flimsily dismissed this aspect as but ignorance of youth.*
 - (iv) *The complainant testified that when she came back from the shop, she found the Appellant naked on the bed. However, the complainant's mother (P[...]) testified that she was informed by the complainant that she found the Appellant wearing a short pant when she returned from the shop.*
 - (v) *P[...] further testified that the complainant informed her that the accused told her "I am going to kill you". This alleged threat is not mentioned at all by the complainant in her testimony.*

4. *The court erred in rejecting the evidence by the Appellant that he is employed and is at work from 07:00 and ordinarily arrives at home at 18:00 and that he had no knowledge of the alleged rape. The Appellant disputed each and every allegation made against him. It is trite that an accused in criminal proceedings need not prove his innocence however it is the state's duty to do so beyond a reasonable doubt.*
5. *The State did not adduce any conclusive medical evidence pointing to the guilt of the Appellant.*

AD SENTENCE

6. *The sentence of life imprisonment in gaol is shockingly inappropriate herein. The court misdirected itself and over emphasised the seriousness of the offence, the interest of the society and down — scored the mitigating factors in favour of the Appellant. The said factor when cumulatively taken amount to compelling and substantial reasons for deviation from the applicable minimum sentence.”*

[4] The state opposes the appeal and supports the conviction and sentence.

[5] The complainant, who was 13 years old at the time, testified that on the day in question, she was on her way to the shops when she was called by the appellant, who asked her to buy him some cigarettes. Upon her return, she went to deliver the cigarettes to the appellant, whom she found naked in his children's bedroom. She testified that the appellant grabbed her, threw her on the bed, undressed her, and inserted his penis in her vagina. He tried to kiss her, but she slapped him, threw him on the bed, quickly dressed herself, and ran home. There were people at her home, but she told no one about the incident because the appellant had warned and threatened her not to say anything. In August 2020, she felt ill and went to hospital, where she reported the incident for the first time during her examination.

- [6] The state's second witness, Mr SPP Mokoena, testified that he was a professional nurse employed by the Department of Health and was stationed at the Botshabelo District Hospital. On 19 November 2020, he examined the complainant and completed the medico-legal examination report, which was handed to the court as exhibit "A." On examination, he observed that the complainant did not have any physical injuries and came to the conclusion that the absence of injuries did not exclude the possibility of child abuse. He noted that the alleged complainant's assailant *"ordered her to undress, and when she refused, he undressed her dress and panties and subsequently abused her sexually on the bed."*
- [7] The hymen configuration was annular, meaning it was round, and at the margin or the edge of the hymen, there was a notch at 9 o'clock. He noted under the complainant's medical history and intellectual disability that there was a possible impairment, and he queried her intellectual disability.
- [8] The complainant's mother testified as the third state witness. Her testimony is that she was called to the hospital, where she was told that Mr Nqana must have done something to the complainant. She only knew then of the complaint's alleged rape. She and the accused had a romantic relationship, which was terminated. The complainant is, *"My child is just like me mentally, because I have a challenged mentally due to an injury...I was stepped or hacked with a spade, and I only attended school up to standard 6."*
- [9] The appellant confirmed the romantic relationship with the complainant's mother, which no longer exists. He denied sending the complainant to buy him cigarettes from the shop. He denied having raped the complainant as he was at work. He worked weekdays and knocked off at 18h00 daily. He spent weekends at home. He did not rape the complainant.

- [10] The court found that the accused's version was a bare denial and that his version was not reasonably, possibly true and was rejected as false. The court found that the state had successfully proved its case beyond reasonable doubt. The court believed that the complainant's mother, P[...], would not have used the complainant to implicate the accused falsely. If she had needed to do so, she would have involved the forensic nurse in being "*complicit in the scheme*." The complainant could not have "*self-inflicted the injury*," which the nurse described as "a notch, a healed tear in the female genitalia of the complainant."
- [11] This reasoning is alarming because, by implication, the court concluded that the accused caused that injury. The court found that the contradictions between the complainant and her mother did not, in the light of the totality of the evidence, negate the credibility of the state case. It is so that the state must prove its case beyond a reasonable doubt and that the accused must present a reasonably, possibly true version. There are several material cracks in the state case on perusal of the transcribed record.
- [12] The charge sheet, before the case was finally transferred to the regional court, alleged that the rape occurred on 2 November 2020. It was later amended to reflect that the alleged rape occurred during July 2020 without a specific date. The evidence of Mr Mokoena was that on 19 November 2020, on examining the complainant, he found a notch on the hymen at 9 o'clock. His conclusion was that the absence of injuries on the vagina and surrounding areas "*did not exclude a possibility of child sexual abuse; if it was, it happened maybe two or three days within that period. Hence I said we, I do not know what happened from July because the survivor or the child could not recall the date, what, on the day, what or the date. So, from July to November, before I examined the child, I do not know what happened*".

- [13] The court failed to consider the discrepancies between the complainant and her mother. Though the complainant testified that she was threatened by the accused, she never said that the accused was going to kill her, as suggested by her mother's testimony. What is interesting and remarkable is the mother's testimony when she said, *"At the hospital where I was called, I was told this child of mine, Mr Nqana must have done something to her."*
- [14] The accused's counsel was correct that the court misdirected itself in not placing sufficient weight on the significance of the day or date of the incident. The thrust of the state's cross-examination was aimed at ascertaining the date of the incident from the accused. According to the charge sheet, the incident occurred *"on or about July 2020"*. This goes right to the heart of the complainant's credibility. Did this incident happen during July, November, or in between, as testified by the forensic nurse? Why did the complainant not inform the mother of the incident for about four months? Why did the mother exaggerate her evidence? Is her evidence reliable, taking into account the cautionary rules and the fact that she was mentally handicapped?
- [15] It is evident from her testimony that the complainant was more substantial than her assailant, as she could quickly dispose of him when he tried to kiss her after allegedly penetrating her with his penis. The question is, why did she easily allow herself to be undressed when she could so easily get rid of him? As far as the evidence relating to the rape is concerned, the complainant is a single witness. Her age at the time was thirteen years. The mother's evidence and the medical report (concerning the complainant) indicate that both are mentally challenged.

[16] It was stated in *S v VAN DER MEYDEN*¹ that “*The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.*”

[17] It is trite that a conviction is possible based on the evidence of a single witness, but such evidence must be credible and approached with caution.² I am of the view that the court failed to apply the cautionary rules, especially given the lacunae in the state’s case, the unclear evidence of the minor complainant with a mental impairment, and conflicting versions of the state’s witnesses. The appellant’s version is reasonably possibly true and cannot be rejected as false. He was not shown to be a mendacious witness and stuck to his version in cross-examination.

[18] The conviction and sentence cannot stand in the circumstances and should be set aside.

[19] The following order issues:

1. The appeal succeeds.

¹1999 (1) SAC R447 (W); *S v Trainor* 2003 (1) SACR 35 (SCA).

² *S v Webber* 1971 (3) SA 574 (A).

2. The conviction and sentence are set aside.

MHLAMBI, J

I concur.

VAN RHYN, J

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