

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

Case Number: A021/2024

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

In the matter between:

M[...] P[...] S[...]

Appellant

and

THE STATE

Respondent

JUDGMENT

MALINDI J

Introduction

[1] The appellant was charged with rape in terms of Section 3 of the Criminal Law Amendment Act¹, read with the provisions of Section 51(1) of the Criminal Law

¹ Act 32 of 2007.

Amendment Act² (“the Minimum Sentences Act”), in the Regional Court held at Pretoria

[2] The State alleges that on or about 24 June 2019 at or near White City in Soweto, the appellant did unlawfully and intentionally commit an act of sexual penetration with a minor female person, NMT by inserting his penis or an unknown object into her vagina without her consent. The minor child was six years old at the time.

[3] He pleaded not guilty and tendered no plea explanation in terms of Section 115 of the Criminal Procedure Act.

[4] On 21 August 2023, the appellant was found guilty as charged. On 1 September 2023 he was sentenced as follows: twenty (20) years imprisonment of which five (5) years are suspended for a period of five (5) years on condition that the accused is not again convicted of rape, attempted rape, or sexual assault committed during the period of suspension. He appeals against conviction only.

[5] The appellant has an automatic right to appeal against his conviction and sentence as he was sentenced after 31 December 2007, being the date of coming into effect of the Minimum Sentences Act.

Background

[6] The following are common cause facts:

[7] It is common cause that the complainant was born on February 13, 2013, and was therefore aged 6 at the time of the alleged incident. It is also common cause that at the time of the alleged incident the complainant was visiting her grandmother, referred to M[...], who was also in a romantic relationship with the accused. It is also common cause that on the date of the incident, the grandmother M[...] had gone to do her odd jobs, leaving the complainant, her sibling and the complainant’s cousin in

² Act 105 of 1997.

the care of the accused. It is also common cause that on the evening in question the complainant had reported some discomfort to her mother when she arrived at the accused's home and that she was only taken for medical attention at Stratford Clinic in Orange Farm the following day.

[8] The complainant's mother reported the matter to the police.

Evidence

[9] The complainant was taken to the Stratford Clinic at Orange Farm, where she was examined by Dr Venkatesh on 25 June 2019. The J88 that she completed as part of her examination was handed in without objection. Dr Santana was called to explain the findings.

[10] The examining doctor recorded his medical findings as contained in the medical form J88 which was admitted as Exhibit A.

10.1. The J88 records that:

10.1.1. It was completed on June 25, 2019, at 15h25 at Orange Farm Stratford Clinic. According to this doctor, in the medical J88.

10.1.2. The complainant had been born prematurely and was aged six at the time of examination.

10.1.3. During the medical examination the child's panty was collected for forensic examination.

10.1.4. During the medical examination the treating doctor had utilised the services of a chaperone and Zulu and Sesotho languages were used during the consultation.

10.1.5. The child had reported that Mkhulu (grandpa) had placed induku (a stick) in her private part while she was in his bedroom in White City.

10.1.6. The child was crying during the medical examination and there was no evidence of drugs or alcohol in her system.

10.1.7. There was some discharge that was observed in her genitalia during the medical examination.

10.1.8. The urethra was observed to be swollen and the clinical conclusion was that the said injuries are consistent with vaginal penetration.

10.1.9. The child was also referred to social workers for further intervention.

10.1.10. There was no anal examination conducted on the child during the medical examination.

10.1.11. There were no external physical injuries noted during her medical examination.

[11] Doctor Santana, who testified on behalf of the examining doctor who was no longer available, was not cross-examined on the contents of the J88.

[12] Ms I[...] T[...] (Ms T [...]), the complainant's mother testified that the appellant and her aunt were in a love relationship, and they lived together in White City. She testified that at the time of the incident, the complainant and her brother, Jabula, had been visiting her aunt (who was referred to as grandma or M [...]) for a period of 2 weeks.

[13] She testified that on the day of the incident she had finished work and proceeded to White City to fetch the complainant and her younger brother so that they could go to Orange Farm to visit relatives. She testified that she was in a hurry and packed the complainant's and her younger brother's clothes. Her cousin, R [...], asked her to wait for her boyfriend who is an Uber driver who will take them to Orange Farm.

[14] Ms T [...] testified that while they waited for the Uber driver the complainant reported that she had pains in her private part. She testified that she smeared Vaseline on the complainant's private parts and in between her thighs as she thought it was a skin irritation.

[15] Ms T [...] testified that she was about to check the complainant, but the complainant's grandmother dismissed the complainant's complaint as that of a "spoilt

brat". She testified that she eventually left with her children and their cousin, her cousin, R[...], and her aunt, to Orange Farm.

[16] The complainant persistently complained about the pain in her vagina on the following morning at Orange Farm. She also appeared very restless.

[17] It was because of the complainant's restlessness while they were in Orange Farm that she only at this stage decided to check up on the complainant as to what was the problem. Ms T[...] observed that the complainant had a gaping hole in her vagina that a child of her age should not have.

[18] When questioning the complainant, she reported that the appellant had placed "indoco in her genitalia while they were in his bedroom". She further testified that the complainant reported to her that she had informed her grandma who threatened to slap the complainant.

[19] The mother testified that she immediately took the complainant to Dr Vinketesh, and thereafter reported the matter to the police. The appellant was subsequently arrested.

[20] Dr Vinketesh examined the complainant at the Orange Farm Stratford Clinic on 25 June 2019 and compiled the J88 medical report. Dr Vinketesh has since retired from the service of the State. Dr Vinketesh's J88 medical report was handed in as Exhibit "A". Its contents were testified to by Dr A Santana as set out above.

[21] The complainant testified that the appellant is her grandpa. She was visiting him at White City during 2019 when the incident occurred. She testified that on the day of the incident her grandma was at work and they were left in the care of the appellant (grandpa).

[22] The complainant testified that she was playing outside on the street with her cousin and sibling brother when the appellant called her to come inside the house. She testified that she asked the appellant why he had called her, and he responded by saying "not to worry why".

[23] She testified that she was under the impression that the appellant wanted to send her somewhere as he had done so on other occasions.

[24] The complainant testified that once she was inside the bedroom, the appellant went outside to collect a stick and he returned to the bedroom. When she was left in the bedroom, the appellant had closed the door but it was not locked. She further testified that while she was left alone in the bedroom she was scared to leave as she thought the appellant would see her sneak out or leave. The appellant did not tell her that he was going to get a stick, he left the bedroom and closed the door.

[25] The complainant testified that when the appellant returned to the bedroom he lifted her and placed her on the bed and undressed her of her trousers and panty. She testified that the appellant placed the stick in her “bambasi” (a colloquial reference to a vagina) while she was seated on the bed. She testified that when the stick was inserted in her genitalia she was in a sitting position lying slightly on her back with her thighs set apart. She estimated that the stick was approximated 60 cm in length.

[26] When the appellant inserted the stick into her genitalia, this caused her to scream, and the appellant told her to keep quiet. The appellant did not inform her why he had inserted the stick into her genitalia. After he stopped inserting the stick she kept quiet as instructed.

[27] The complainant testified that her sibling and cousin returned to the house as it was getting late, and at that stage she was already dressed and seated in the sitting/living room but crying. The complainant testified that her cousin told her that they had seen the appellant when he took the stick from the tree, and they thought that he was going to chastise her.

[28] The complainant testified that later on her grandmother had returned home and asked her why she was crying. She told her that the appellant had inserted a stick into her vagina.

[29] After her report to her grandma, her mother arrived and instructed her to pack her clothes so that they could get to Orange Farm for a pre-arranged visit with all the children. She told her mother that her private parts were sore without explaining why.

[30] The complainant testified that when they (her mother, sibling, grandmother and Amahle's mother) were in Orange Farm they all slept on the floor. She further testified that she only reported to her mother what the appellant had done the next day, and her mother took her to the clinic. She further testified that no one else had inserted anything into her genitalia while she was at Orange Farm.

[31] This constitutes the evidence in respect of the facts surrounding the incident.

The appellant's evidence

[32] The appellant denied the allegations against him and proffered the following version.

[33] The appellant admits that he lived in White City at the time of the incident with his girlfriend (also known as M[...]) as well as her grandchildren. However this relationship ended in 2020.

[34] The appellant testified that he, and the complainant's mother had a good relationship.

[35] He testified that he had displayed a grandfatherly attitude to the child, and that he would babysit her and the other children when his girlfriend was at work, and he would prepare food for them.

[36] On 24 June 2019 his girlfriend "M[...]" went to work, and he had the duty to look after the children. At all material times he remained outside in the sun, as it was winter, and they had no electricity. He further testified that at no point did he call the complainant inside the house. She played outside in the disused car with her friends.

[37] The appellant testified that M[...] called whilst at work to check up on the children and on her return from work she boiled water to bath the children. After her bath the complainant never complained or made any report. She continued playing with the other children.

[38] The appellant testified at approximately 19h00 the complainant's mother arrived with her boyfriend.

[39] The appellant testified that he does not know why the complainant would accuse him of rape instead of the grandfather from Diepkloof whom M[...] told him is the culprit. He testified that he believes that the complainant was influenced to lie about him and make false accusations.

[40] After the close of the State's case and M[...] was made available to the defence, the appellant indicated his intention to call M[...] as a defence witness. After many postponements occasioned by her non-appearances she eventually arrived at Court. However, when she was called to testify, she had left and the defence closed their case.

The Court Below's findings

[41] The Learned Magistrate considered the issues for determination and held as follows in respect of each.

Single witness and cautionary rule

[42] The Learned Magistrate considered that the complainant is a single witness to the incident and her evidence was evaluated with the necessary caution.³

[43] A court is entitled to convict an accused person on the evidence of a single witness.⁴

³ *R v Mokoena* 1932 CPO 79; *S v Stevens* 2004 JDR 0505 (SCA).

⁴ Section 208 of Act 51 of 1977.

[44] It was submitted on behalf of the appellant that a Court should not easily convict upon the evidence of a single witness unless the evidence is substantially satisfactory in all material respects or unless it is corroborated.⁵

[45] The rule laid down in *R v Mokoena* is not an arbitrarily rule. Even when a single witness has an interest or bias adverse to the accused it does not necessarily mean that the witness should not be a credible witness.⁶

[46] In *S v Webber* Rumpff JA held that it is not possible to prescribe a formula in terms whereof every single witness' credibility can be determined, but it is essential to approach the evidence of a single witness with caution and to weigh up the good qualities of such a witness against all the factors which may diminish the credibility of the witness.⁷

[47] Whilst it is trite law that the evidence of children and single witnesses should be approached with necessary caution due to the inherent dangers therein⁸, the exercise of the cautionary rule must also not be allowed to displace the exercise of common sense.⁹ Even though a single witness' evidence might be criticised in some aspects, it still does not exclude the fact that a Court might despite the criticism levelled against the witness, find the witness a credible witness.¹⁰ Corroboration that implicates an accused or corroboration in material aspects strengthens the evidence of a child or single witness even though subject to criticism.

Corroboration

[48] The evidence of the complainant was corroborated by the evidence of the State witnesses to the effect that:

48.1. The complainant and her siblings were playing under the watch of the appellant who was the only adult present on the day in question.

⁵ *S v Ganie* 1967 (4) SA 203 (N).

⁶ *S v Webber* 1997 (3) SA 754 (A); *S v Kubeka* 1982 (1) SA 534 (W).

⁷ *S v V* 2000 (1) SACR 453 (SCA); *Maema v S* 2011 2A SAC 175; *S v Rugunan* 2013 (1) SACR 389 (SCA).

⁸ *Woji v Santam Insurance Company Ltd* 1981 (1) SA 1020 (A).

⁹ *S v Sauls & Others* 1981 (3) SA 172 (A) at 180E-G; *S v Artman & Another* 1968 (3) SA 339 (SCA).

¹⁰ *S v Abdoorham* 1954 (3) SA 163 (N); *S v Sauls & Others* (*supra*).

48.2. The complainant testified that her cousin told her that they saw the appellant when he took the stick from the tree.

48.3. The complainant reported to her mother the evening in question that she had pains in her genitalia and she reported that she was raped by the appellant the following morning at Orange Farm. The complainant further reported to her mother that she told M[...] who said that she will slap her.

48.4. The medical evidence (J88) records swelling of the vulva which is consistent with vaginal penetration.

48.5. The complainant's behaviour at Orange Farm of being restless, not playing and crying indicated discomfort, if not pain.

48.6. The complainant's evidence was corroborated by her mother's evidence on the pain and discomfort the complainant was in.

Credibility of witnesses

[49] The state submits that the credibility of a witness' evidence was based upon the presiding officer's assessment of the full conspectus of the evidence, who concluded that the complainant made a very good impression on the Court. She came across as an intelligent and honest witness. There was nothing improbable about her evidence and there was nothing to indicate that she made up her evidence.

[50] I agree with the state's submissions that the contradictions in the evidence of the State witnesses are not material to the extent that it vitiates the State's case in its totality.¹¹ Not every contradiction affects the credibility of a witness. The Court looks at all the evidence to see if even with the contradictions it is satisfied that the truth has been told. The Court *a quo* found that the issue whether the other children came in the house while the complainant was in the bedroom while being raped by the appellant or afterwards when she was already in the dining room area was not a material contradiction. This is not a misdirection in the assessment of the evidence where the evidence as a whole points to the conclusion reached.

¹¹ *S v Mafaladiso & Andere* 2003 (1) SACR 583 (SCA).

[51] The court below rejected the appellant's evidence and proceeded to assess whether the state had proved its case beyond any reasonable date. The Court may only reject the evidence of the appellant if it is satisfied that in the light of all the evidence before it their evidence is so untrue and so improbable that there is no reasonable possibility of it being true. Viewed holistically and taking into account probabilities and improbabilities, the Court below was accordingly correct in finding that the appellant's version is false and not reasonably possibly true.¹²

Powers of the Appeal Court

[52] An Appeal Court's powers to interfere on appeal with the findings of fact of the Trial Court are limited. In the absence of demonstrable and material misdirection by the Trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.¹³

[53] The following order is made:

1. The appeal is dismissed.

MALINDI J
JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree

MIA J
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Appellant: Adv S Hlazo instructed by Legal Aid South Africa

For the Respondent: Adv L R Surendra instructed by Office of the

¹² *S v Chabalala* 2003 (1) SACR 134 (SCA) 142D-J.

¹³ *R v Dhlumayo* 1948 (2) SA 677 (A) at 705-706; *S v Manyane & Others* 1997 (2) SACR 641 (SCA).

Director of Public Prosecutions

Date of Hearing: 26 August 2024

Date of Judgment: 21 July 2025