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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION: MTHATHA**

CASE NO: CA&R 58/2024

In the matter between:

T[...] M[...]

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

MHAMBI AJ

[1] This appeal, with leave of this Court on petition, emanates from the conviction and sentence of the appellant on 09 May 2023 by the Mthatha Regional Court on one count of rape. Since the appellant was convicted of raping a victim that was younger than 16 years of age, the minimum sentence applicable on conviction was life imprisonment. This is in terms of section 51 (1) of the Criminal Law Amendment Act 105

of 1997. The sentence now appealed against is 15 years' imprisonment which the trial court imposed on the appellant after it found that there were substantial and compelling circumstances which justified a deviation from the prescribed sentence of life imprisonment.

THE APPEAL AGAINST CONVICTION

[2] The appellant contends, as the basis of his appeal that:

3.1 The court erred in concluding that the evidence of the complainant, who was a single witness, passed muster of the principles that govern single witness testimony.

3.2 The court erred in convicting the appellant on a charge of rape whereas the State failed to establish beyond reasonable doubt that the appellant raped the complainant.

3.3 The court erred in convicting the appellant on rape, whereas, at best for the prosecution, the evidence tendered by the complainant, would, if proven to be true, establish sexual assault.

3.4 The court erred in exercising its discretion on the issue that required expert evidence.

3.5 The court erred in finding that the version of the appellant was not reasonably true, more in particular that it found corroboration from the State witnesses. It ought to have found the appellant's version to be reasonably possibly true.

APPEAL AGAINST SENTENCE

[3] The appellant challenges the sentence imposed by the court a quo on the basis that the victim or complainant testified that she had no grudges against him, therefore the appellant contends that a rehabilitative sentence ought to have been imposed instead of direct imprisonment.

THE FACTUAL BACKGROUND

[4] In the court *a quo*, the appellant was charged with rape of his biological daughter. The evidence led in the court *a quo* was to the effect that the appellant touched the complainant on her breasts, as a result of which she was uncomfortable. He allegedly hit, pulled and caused the complainant to lie on her back, and inserted his penis into her vagina. The complainant's description of the alleged act of sexual penetration by the appellant was that 'she felt something inside', and her thighs were wet. It was further her evidence that she first reported the incident to one Pamela, who appears to be her mother's friend. The record further indicates that, when reporting the alleged incident to Pamela, the victim asked her how long it normally takes to open a sexual assault case. According to Pamela, the complainant did not tell her how the rape happened, except that the appellant massaged her head and touched her back while she, her mother and the appellant were lying in bed. Subsequently, the matter was reported by the complainant at Mthatha Central police station as rape. Pamela accompanied the complainant to have the matter reported.

[5] The court *a quo* accepted the version of the complainant and also accepted the legal principle that such evidence has to be accepted with caution. In that regard, it correctly cited authorities regarding the relevant cautionary rule. The court *a quo* accepted as the undisputed fact that the victim and the appellant are father and daughter. They were living together in a single rented flat and they were together on the day of the incident. It reasoned that there was no evidence before it that the complainant had ever made false allegations against the appellant, further accepting the complainant's evidence that she has no reason to lie about the appellant whom she trusted.

[6] The court *a quo* rejected the submission on behalf of the appellant that, it is Pamela who persuaded the complainant to open a charge of rape instead of sexual assault in keeping with what the complainant asked Pamela regarding the process of

reporting a case of 'sexual assault'. It took into account the age of the victim, that she was about fourteen years at the time of the alleged rape, and concluded that, from her age, it was impossible for her to be influenced by a third person, in this regard Pamela.

[7] Dr. Linda Mtshulana, who completed the J88, testified. According to him, on his observation of the victim, he observed a whitish discharge on the private parts of the victim, he took a sample of that discharge for DNA analysis. The DNA conclusions were that "no semen was detected". Dr Mtshulana's conclusion in the J88 report was that sexual assault probably occurred. The Dr was not called to give evidence that would elucidate his conclusion in the light of the fact that the results of DNA analysis were that no semen was detected from the vaginal samples that were obtained from the complainant.

[8] In the appeal before this Court, the appellant contends that the trial court ought to have exercised caution in considering the young witness's evidence on two grounds, namely, on the ground of being a child witness and secondly, on the ground of being a single witness. Further according to the appellant, the fact that victim reported the incident to Pamela as that of sexual assault, but later, a charge of rape was laid, ought to have been considered by the trial court as a ground for casting doubt in the case for the prosecution.

THE LEGAL PRINCIPLES

[9] The law is trite that a court of appeal will interfere with the factual findings made by the trial court where the trial court materially misdirected itself insofar as its factual and credibility findings are concerned.¹ It has also been held that in the absence of demonstrable and material misdirection by the trial court, its findings of fact are

¹ *R v Dhlumayo and another* 1948 (2) SA 677 (A).

presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.²

[10] I now turn to deal with what the law requires in the consideration of the evidence of a single witness, specifically when that witness is a child. This Court is mindful that in the appeal before it, the issue of competence and reliability of the complainant's evidence as a child was not canvassed as basis of this appeal, therefore no finding need be made in that regard. I will proceed on the basis that the victim was a competent witness.

[11] In *S v Sauls and Others*³, the court laid down the principles to be applied in assessing the evidence of a single witness when it said:

‘There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Pumpff JA in *S v Webber* 1971 (3) SA 754(A) at 758). The trial Judge will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.’

[12] With regard to the evidence of a single witness, section 208 of the CPA states that an accused may be convicted of any offence on the single evidence of a competent witness. It is apparent from the record that the trial court was alive to the need to apply caution in assessing the complainant's evidence as a single witness, hence its reference to the cautionary rule. It also considered the totality of that evidence while being mindful of the fact that firstly, the State was saddled with the burden to prove the guilt of the appellant beyond reasonable doubt while simultaneously bearing in mind that if the version of the appellant is reasonably possible true, he is entitled to an

² *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f. See also: *S v Monyane and Others* 2008 (1) SACR 543 (SCA) at para 15; *S v Francis* 1991 (1) SACR 198 (A) at 204e.

³ 1991 (3) SA 172 (A), at 180E.

acquittal. In the end, the court a quo found that the evidence of the complainant was satisfactory in material respects.

[12] In *Wojj v Santam Insurance Co. Ltd*⁴, the court said the following:

‘The question which the trial court must ask itself is whether the young witness’ evidence is trustworthy. Trustworthiness ... depends on factors such as the child powers of observation, his power of recollection, and his power of narration on specific matters to be testified on. In each particular case the capacity of each child is to be investigated. His capacity of observation will depend on whether he appears intelligent enough to observe, whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion to remember what occurs while the capacity of narration or communication raises the question whether the child has capacity to understand the question put, and to frame and express intelligent answers’.

[13] However, a different approach was suggested in *S v M*⁵, where Shakenovsky AJ held that the correct approach is to not to apply the general cautionary rule, but to look at the evidence as a whole and the reliability of what had been placed before the court. I agree with this approach.

[14] The essential question in any criminal matter is whether the State has proven its case beyond reasonable doubt. The cautionary rule should not be allowed to be a substitute for the test of proof beyond a reasonable doubt. The court is in any event enjoined to weigh trustworthy and unreliable evidence before it makes its determination or finding.

[15] There is only one test in a criminal case, and that is whether the evidence establishes guilt of the accused beyond a reasonable doubt. The accused is acquitted

⁴ 1981(1) SA 1020 (A) at 1027 H-1028A.

⁵ 1999 (2) SACR 548 (A) at 501.

only if there is a reasonable possibility that an innocent explanation which has been proffered by the accused might be reasonably true.

[16] The approach to be followed in order to determine whether the accused version is reasonably true, was laid down by the SCA in *State v Trainor*⁶ where it stated that: -

‘A conspectus of all evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently variable evidence, if any, should be weighed to see if it supports any evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity, be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in it’s entirety’.

[17] The trial court, in its assessment of evidence and application of caution relating to the evidence of the complainant failed to consider two crucial aspects. Firstly, that the victim gave evidence as a single witness and a child, her evidence should have been analyzed with caution. It overlooked the fact that on Pamela’s showing, no details were given to her by the complainant regarding how the rape took place. It further disregarded the fact that Pamela recommended that a charge of rape be laid when on her version she was asked by the complainant how long it took to report sexual assault, not rape.

[18] Had the magistrate carefully considered the complainant’s evidence against the conspectus of the evidence that was adduced at trial, he would have recognized that the complainant’s evidence does not find support from that evidence, at least not to the standard of proof beyond reasonable doubt that the law requires in criminal case. He would have recognized that Dr Mtshulana’s conclusions on whether there was rape did not as much relate to the offence of rape but to ‘sexual assault’ and even so, they were inconclusive. For this reasons, Dr Mtshulana ought to have been called to elucidate the

⁶ 2003 (1) SACR 35 (SCA) at 9.

conclusion made in the J88, that 'sexual assault' probably occurred. I may add that section 5 of the Sexual Offences and Related Matters Amendment Act 32 of 2007 provides that the offence of sexual assault is committed when a person unlawfully and intentionally violates the complainant without their consent. Significantly, the definition of 'sexual violation' explicitly excludes sexual penetration which is an element of the charge of rape that the appellant faced in the court a quo. Furthermore, the DNA results which manifestly excluded the existence of semen in the vaginal swabs that were obtained from the complainant ought to have been a weighty indicator in the magistrate's assessment of evidence, that the complainant's version that she was sexually penetrated hence 'her thighs were wet,' could not be the truth.

[19] All of these factors, ought to have been considered in the light of the fact that it was Pamela who suggested to the complainant that she needed to open a case of rape in circumstances where the complainant enquired from her how long it would take 'to report sexual assault. This was an example of the suggestibility of a child which is a part of the rationale behind the cautionary rule applicable to child testimony. Furthermore, Pamela told the trial court that at the time of her interaction with the complainant, she did not know the difference between "sexual assault" and "rape". During the hearing of this appeal, Mr *Mfihlo*, who appeared for the respondent conceded that the DNA findings and the J88 report do not support the allegations of rape.

[20] I find it strange that, even though the trial court accepted that the DNA results were negative as far as detection of the semen in the complainant's vaginal swabs, it proceeded and commented that, 'somebody failed to do his duty' as a way of justifying its disregard of this crucial aspect of the evidence and the effect it ought to have had on the case for the prosecution. The trial court erred and misdirected itself on this aspect too.

[21] The law is settled as far as the approach to be applied in evaluation of evidence in a criminal matter is concerned. In *S v Van der Meyden*⁷, Nugent J said:

⁷ 1997 (2) SA 79, 2001 (2) SACR 97 at 80 H-81B.

'The onus of proof in a criminal case is discharged by the State if evidence establishes the guilt of the accused beyond reasonable doubt. The collar is that he is entitled to be acquitted if it is reasonably possible that he might be innocent, (see, for example, R v Difford 1937 AD 370 especially at 373,383). In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. . . A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true'.

[22] Having considered the record of this appeal, it is clear that the trial court misdirected itself and erred in convicting the appellant. In this case, the State failed to prove the guilt of the appellant beyond any reasonable doubt. This Court is at liberty to interfere with the findings of the trial court. In the circumstances, this appeal against conviction should succeed. The sentence imposed on the appellant axiomatically falls away.

ORDER:

[23] In the result, I would make the following order:

1. The appeal is upheld.
2. The conviction and sentence imposed on the appellant are set aside.
3. The appellant shall be released from incarceration forthwith.

M. MHAMBI

JUDGE OF THE HIGH COURT (ACTING)

I agree

L. RUSI

JUDGE OF THE HIGH COURT

Appearances:

For the appellant : *Adv. S Sintwa*

Instructed by : Siphumeze Khwaza Inc.
Mthatha

For the respondent : *Adv. S Mfihlo*

The Office of the Director of Public

Prosecutions

Mthatha

Date heard : 19 February 2025

Date delivered : 19 August 2025