



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMATITZBURG**

AR No.: 89/2024

In the matter between:

MTHOKOZISI NKANYISO BUTHELEZI

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: the Ntuzuma Regional Court (sitting as court of first instance):

1. The appeal against conviction is upheld.
 2. The conviction and sentence are set aside.
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JUDGMENT

Sibiya AJ (Harrison J concurring)

[1] On 1 December 2023, the appellant was convicted in the Regional Court, sitting at Ntuzuma, on a charge of compelled self-sexual assault of an eight year-old

complainant, in contravention of s 7(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“the Act”). He was sentenced to five years’ imprisonment, wholly suspended for a period of five years. Aggrieved by his conviction, he unsuccessfully applied for leave to appeal. However on petitioning this court, he was, on 7 March 2024, granted leave to appeal against his conviction only.

[2] The charge preferred against the appellant was that on or about 23 October 2022, and at or near KwaMashu, the appellant unlawfully and intentionally attempted to commit a sexual offence with the complainant, without her consent, to engage in a sexually suggestive act, by telling the complainant to touch her vagina while, he was rubbing his penis.

[3] The appellant pleaded not guilty to the charge. In convicting the appellant, the court a quo accepted the evidence of the complainant as credible and reliable. The complainant was a single witness to the alleged offence.

Grounds of appeal

[4] In his grounds of appeal the appellant raises two central issues, firstly, the competency and admissibility of the evidence of a child witness, as contemplated in s 164 of the Criminal Procedure Act 51 of 1977 (“the CPA”), and secondly, the reliability and sufficiency of the evidence of State witnesses to sustain a conviction beyond a reasonable doubt.

[5] Mr *Pillay*, on behalf of the appellant, submitted that the court a quo misdirected itself by failing to conduct a proper preliminary enquiry to determine whether the child complainant understood the nature and import of the oath, before proceeding to an assessment of her understanding of the truth and lies. He contended that the sequence contemplated in s 164 of the CPA was not followed, that the complainant was inadequately admonished to speak the truth, and that both the State and the defence were denied an opportunity to participate in the competency enquiry. On this basis, he argued that the complainant’s evidence was improperly admitted.

[6] With regards to the merits, Mr *Pillay* submitted that the court a quo erred by attaching undue weight to the evidence of the State witnesses despite material contradictions and inconsistencies. He argued that these discrepancies were not peripheral, but went to the heart of the State's case, rendering the evidence unreliable and insufficient to meet the requisite standard of proof.

[7] The respondent contended that the trial court did not misdirect itself in respect of the competency enquiry. It submitted that the court engaged the complainant on her ability to distinguish between truth and lies, correctly found her competent to testify, and duly admonished her to tell the truth. The respondent further argued that the appellant's criticism of the nature and depth of the questions posed during the competency enquiry was unsubstantiated. It emphasised that the appellant failed to demonstrate what additional or alternative questions ought to have been asked in order to satisfy the requirements of s 164 of the CPA.

[8] Mr *Moolman*, on behalf of the respondent, submitted that the record does not support the contention that either party was precluded from participating in the competency enquiry. He argued that a purposive interpretation of s 164(1) makes it clear that the responsibility rests with the court a quo, as a creature of statute, to satisfy itself that the witness is competent to testify, and that the enquiry need not assume a rigid or formulaic form, provided its purpose is fulfilled.

The competency test

[9] Section 164(1) of the CPA provides:

'Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.'

[10] The complainant was nine years old at the time of her testimony. The record reflects that the competency enquiry was triggered by the complainant's response when the learned magistrate introduced himself and explained that his task was to establish whether she understood the difference between truth and lies. Her assertion that she did not know the difference necessitated the enquiry in terms of s

164. The magistrate was accordingly obliged to satisfy himself that the complainant appreciated the duty to tell the truth before permitting her to testify upon admonition.

[11] It is settled that the object of s 164 is to ensure that a child witness who does not understand the nature and import of the oath nevertheless appreciates the duty to speak the truth. The enquiry is functional rather than formalistic. The record must demonstrate with sufficient clarity that the trial court applied its mind to the statutory requirements and was satisfied that the witness possessed the requisite capacity and understanding to speak the truth.

[12] As stated by the Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others*,¹ the purpose of questioning the child, as envisaged in s 164, is not to get the child to demonstrate knowledge of the abstract concepts of truth and falsehood, but to determine whether the child understands what it means to speak the truth.

[13] In casu, the learned magistrate posed simple, age-appropriate questions concerning the complainant's personal circumstances, followed by hypothetical questions designed to test her understanding of truth and lies. The complainant was questioned about her age, the location of her school, the people with whom she resided, her grade at school, and the names of her teacher and friend. When confronted with a deliberately false proposition about her gender and the day of the week, she correctly identified them as lies. She further indicated that telling lies was a bad thing and explained that she would be punished by her mother if she lied. Her responses demonstrated not only an intellectual distinction between truth and lies, but also a moral appreciation of the duty to tell the truth.

[14] In *S v Mokoena*,² the court stated:

'By the very nature of things, such a witness would more often than not be a young child, who could explain, with the help of devices such as anatomical dolls, whatever harm might have befallen him or her, without knowing what the word "truth" means.'

¹ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* [2009] ZACC 8; 2009 (2) SACR 130 (CC) para 165

² *S v Mokoena* 2008 (5) SA 578 (T) para 140.

The questions directed at everyday experiences and concrete examples are often the most effective means of assessing a child's competency.

[15] The appellant's complaint that the questions were "elementary" is therefore misconceived. The discretion with regards to the nature of questions to be posed remains the discretion of the presiding officer.

[16] Once the magistrate was satisfied that the complainant understood the difference between truth and lies, he correctly proceeded to enquire whether she understood the nature of the oath. Upon her indication that she did not, she was admonished to tell the truth. This sequence accords with the approach endorsed in *S v Matshivha*,³ where it was stressed that the failure to administer an oath is not fatal where a witness is properly admonished in terms of s 164 and the record reflects a clear finding of competency.

[17] There is moreover nothing in the record to suggest that either party was prevented from participating in the competency enquiry. In any event, the ultimate responsibility for conducting the enquiry rests with the presiding officer. As long as the record discloses that the court applied its mind to the statutory requirements and reached a reasoned conclusion, an appellate court will not lightly interfere.

[18] In the circumstances, it is found that the learned magistrate exercised his discretion judicially, applied the correct legal test, and committed no irregularity in finding that the complainant was competent to testify upon admonition in terms of s 164.

The evidence

[19] In proving its case the respondent led the evidence of two witnesses. The complainant testified that she knew the appellant as a neighbour at L[...] T[...] S[...] (L[...]), where their respective homes were situated, one house apart. On 23 October 2022 she was playing near the appellant's home in the company of her six-year-old brother and her eight-year-old friend when the appellant called them and asked that

³ *S v Matshivha* [2013] ZASCA 124; 2014 (1) SACR 29 (SCA).

they go purchase cigarettes on his behalf. Upon their return, he instructed them to go back and buy rolling paper, commonly referred to as “rizla”.

[20] After they returned from the shop, the appellant instructed the complainant’s brother and her friend to go and play outside the house, while directing the complainant to remain behind in the bedroom with him. While inside the bedroom, the appellant instructed the complainant to touch her “front”, which she assumed meant her private part because the appellant was pointing at her private part. She refused to comply with his instruction, despite the appellant persisting and shouting at her to do so.

[21] The complainant testified further that when her brother and friend later entered the house, her brother enquired from the appellant why the complainant had been kept inside the bedroom. This created an opportunity for the complainant to leave the house. The appellant called her back and informed her that he could not give her money in the presence of her brother and friend. He then gave her a R2 coin, which she used to buy chips that she shared with her brother and friend. She testified that she reported the appellant’s conduct to her mother, older sister M[...], and one of her neighbours.

[22] Under cross-examination the complainant explained that she had purchased cigarettes from Magwala’s shop, notwithstanding that cigarettes and chips were also sold at her home. She stated that her 15-year-old sister M[...], who was the only person responsible for selling items on the day, was unavailable at the time as she was taking a bath.

[23] She confirmed that members of the community confronted the appellant alleging that he had raped her. However, she informed them that the appellant had not raped or done anything to her. She further confirmed that members of the community sought the appellant’s eviction from L[...].

[24] The complainant’s mother testified that on 23 October 2022 she was at her workplace when she received a telephone call from her daughter M[...] informing her that the appellant had tried to rape the complainant. She had then engaged one

M[...]1, from the neighborhood, to confront the appellant in the presence of the three children. Upon returning home the complainant related to her that the appellant had called her and the other two children to his house to guard it while he went to bath. After returning from bathing, the appellant sent the children to buy cigarettes.

[25] When they returned, the appellant instructed the complainant to remain behind while her brother and friend were sent to buy rizla paper. Upon their return, the appellant told the two children to go play outside the house, while the complainant remained inside. The appellant then directed the complainant to touch her vagina. He further asked the complainant whether she hated him, to which she responded in the affirmative. He also enquired whether she wanted money to which she declined. The complainant managed to run away when the other two children questioned the appellant as to why the complainant was kept inside the house.

[26] The complainant's mother further testified that when she asked the complainant why she hated the appellant, the complainant explained that it was because the appellant had instructed her to touch herself.

[27] Under cross-examination the complainant's mother testified that the appellant had admitted the allegations to M[...]1, who was in the company of a woman from the neighborhood, Ms November. She confirmed that following the emergence of the allegations, the appellant was evicted from L[...]. She denied that cigarettes and chips were being sold at her house at the time and testified that she only began selling goods from her house after she had lost her employment.

[28] The appellant testified that he stayed at L[...], two houses away from the complainant's home. He denied that he met the complainant on 23 October 2022, stating that he had been in the company of one Hadebe and Mchunu. On 27 October 2022 he learnt for the first time from M[...]1, M[...] and November that he was accused of having raped the complainant. November had reported that she had found the complainant crying behind a house and on questioning her the complainant had reported that the appellant had raped her.

[29] He testified that he never saw the complainant on the day he was confronted as she was not at the meeting at M[...]1's house. He saw M[...]1 leave the house and later return to relay what the complainant had stated. M[...]1 reported that the complainant had said she was not raped. He did not know the complainant prior to the day he met her in court; however, he knew the complainant's mother and older sister, Sli, with whom he used to smoke cigarettes.

[30] He testified further that he had been falsely implicated by M[...]1 and November, whose motive, according to him, was to secure his eviction from L[...] so as to deprive him of a government subsidized, low-cost house (commonly referred to as an RDP house). He stated that he had signed the requisite documentation and contended that they preferred the allocation of the house to be diverted to a person of their own choosing.

Judgment of the court a quo

[31] The court a quo, having acknowledged that there were two mutually destructive versions before it, found that the complainant, even though she was a young child and a single witness to the compelled sexual assault, was a credible and reliable witness. It found that she did not exaggerate her testimony because she had informed community members that the appellant did not rape her but had merely instructed her to touch her vagina. The court found that her account was not one that could reasonably have been fabricated by a child of her age stating that what she said she experienced inside the appellant's house does not fall within the field of experience of an eight-year-old child.

[32] The court a quo found that the complainant's evidence was reliable, stating that she reported the incident to M[...] immediately after it had happened, without being placed under any duress.

[33] The court a quo further noted several contradictions and inconsistencies between the complainant's testimony and the report she made to her mother. It held that they were not material, but natural and expected considering the age of the complainant. It considered the following inconsistencies:

- (a) The complainant stated that cigarettes and chips were sold at her home at the time however her mother disputed that.
- (b) The complainant did not testify about the appellant requesting them to guard his house while he bathed.
- (c) The complainant testified that she was instructed to remain in the bedroom with the appellant when they returned from purchasing rizla, whereas the mother's testimony is to the effect that the complainant did not go with the other two children to purchase rizla.
- (d) The complainant did not mention that the appellant had enquired from her whether she wanted money and whether she liked him.

[34] The trial court rejected as false and improbable the appellant's defence of a conspiracy to evict him from L[...] and deprive him of an RDP house. It further drew a negative inference from the appellant's failure to call witnesses in his alibi defence.

The charge

[35] Mr *Pillay* submitted that the charge against the appellant was defective and incapable of sustaining a conviction for a contravention of s 7(a) of the Act, in that it failed to allege that the appellant "compelled" the complainant to engage in the conduct complained of. He further contended that the complainant's evidence that she refused to comply with the appellant's instruction reduced the allegations at most, to an attempt to commit the offence. On this basis, he argued that the court a quo misdirected itself in convicting the appellant on a contravention of s 7(a).

[36] Mr *Moolman* submitted that the charge was read with s 256 of the CPA which provides that in the event the evidence proves only an attempt to commit the crime rather than the completed act, a competent verdict of attempted commission can follow. He contended that the court a quo did not misdirect itself in convicting the appellant for a contravention of s 7(a).

[37] Section 7(a) of the Act provides that a person who unlawfully and intentionally compels a complainant, without the consent of the complainant, to engage in sexually suggestive or lewd acts, with the complainant himself or herself, is guilty of the offence of compelled self-sexual assault.

[38] The Act does not define the word “compel”. The Oxford English Dictionary defines compel as:

‘bring about (something) by the use of force or pressure’.

[39] In *BC v S*⁴ the court in dealing with the offence of compelled self-sexual assault held:

[49] Count 6, compelled self-sexual assault has yet different elements and the intent is different. The elements of the offence are: (1) compelling another person; (2) to engage in conduct in the definition of the crime; (3) unlawfulness; (4) without the consent of the compelled person; and (5) intention. It is to: (a) engage in-(i) masturbation; (ii) any form of arousal or stimulation of a sexual nature of the female breasts; or (iii) sexually suggestive or lewd acts, with B himself or herself; (b) engage in any act which has or may have the effect of sexually arousing or sexually degrading B; or (c) cause B to penetrate in any manner whatsoever his or her own genital organs or anus. This is the offence of compelled self-sexual assault.

[50] Smythe, Pithay & Artz remarked that prior common law on indecent assault has included forced self-masturbation. It is clear that this offence is a catch-all meant to *cover any remaining aspects of indecent assault not covered by the previous offences set out in the Act or any other degrading sexual behaviour that was previously not covered under common law.* (Accentuation added) The crime is thus different than any other offence in the SORMA. This includes the intent. It is for the complainant to “self-sexual assault”. (Footnote omitted.)

[40] The act of compelling someone to do something is often defined by the result of the coercion whereas “an attempt” occurs when the coercion did not result in the desired behavior. If the evidence establishes coercive conduct and intent, but the complainant did not ultimately comply, the appropriate conviction is attempted compulsion.

[41] In casu, the evidence of the respondent was that the complainant did not touch herself. In convicting the appellant of contravening s 7(a) of the Act, compelled self-sexual assault, the court a quo misdirected itself. At the most, and in the

⁴ *BC v S* [2020] ZAFSHC 180.

absence of material contradictions in the respondent's case, the appellant was supposed to be convicted of an attempt to commit compelled self-sexual assault.

Analysis of the merits

[42] I now turn to deal with the merits of the case. It is trite that the onus rests upon the State to prove the guilt of the accused beyond a reasonable doubt. Where the version of the accused is reasonably possibly true, he is entitled to an acquittal.

[43] It is equally well established that a court of appeal will not lightly interfere with the factual findings of a trial court, unless it is shown that such findings are vitiated by a material misdirection. In *S v Monyane and Others*,⁵ Ponnann JA, in emphasising the powers of a court on appeal, stated as follows:

'This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. 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 (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-f). This, in my view, is certainly not a case in which a thorough reading of the record leaves me in any doubt as to the correctness of the trial court's factual findings. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (*S v Francis* 1991 (1) SACR 198 (A) at 204e).'

[44] The complainant was a single witness to the charge of compelled-sexual assault. Section 208 of the CPA provides that an accused may be convicted on the evidence of a single witness provided same is satisfactory in all material respects.⁶

[45] In *Cele v S*⁷, the dissenting judgment of Pillay J, the court, in dealing with the evidence of a single child witness, held as follows:

'[1] How does an appeal court approach the evidence of a single witness, a child testifying at the age of eight years about an accused allegedly raping her three years earlier? With caution and common sense, the authorities say. Children are both "highly imaginative" and

⁵ *S v Monyane and Others* [2006] ZASCA 113; 2008 (1) SACR 543 (SCA) para 15.

⁶ *Sekoala v S* [2024] ZASCA 18 para 35.

⁷ *Cele v S* [2016] 2 All SA 75 (KZP).

open to “suggestions by others”. Caution in the context means applying common sense to assess whether the truth has been told and the evidence is trustworthy. Caution cannot displace common sense. Credibility must be assessed “in the light of all the evidence”. Caution is exercised not inflexibly but practically to avoid “injustice to the innocent” and, I add, the injured. The trier of fact should be aware of the risks of a wrongful conviction arising from the evidence of a single witness in the prosecution of a sexual offence and, I add, a guilty person being erroneously let loose on society. The traditional assumption that the motive to falsely implicate an accused is prevalent in sexual offences must be balanced with the ever-increasing prevalence of rape, particularly of children, often by people they know. Corroboration as independent evidence that confirms the testimony of a witness provides a safeguard. To be relevant and material such corroboration must point to the guilt of the accused.

[2] Consistency is another safeguard, bar the rule against self-corroboration.³³ Reporting the offence is not corroboration but goes to consistency of the complainant’s version. Demeanour is not decisive of a witness’s credibility but could reinforce an objective assessment on the possibilities...’ (Footnotes omitted.)

[46] In *S v Sauls and Others*,⁸ the following was held:

‘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 Rumpff 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. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean

“that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence were well-founded”

(per Schreiner JA in *R Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 at 569). It has been said more than once that the exercise of caution must not be allowed to displace the existence of common sense.’

When was the offence committed?

[47] At the commencement of her evidence in chief, and on being led by the prosecutrix about the date of the incident, the complainant testified that it occurred

⁸ *S v Sauls and Others* 1981 (3) SA 172 (A).

on 23 October 2022. Under cross-examination she stated that on the day cigarettes and chips were sold at her home as well. Her evidence regarding the date of the incident was at odds with her mother's evidence, who testified that she only started selling from her house after she lost her employment. This inconsistency is material because it affects the appellant's alibi defence that he was in the company of Hadebe and Mchunu on the said date and never met the complainant.

[48] The respondent, upon hearing the appellant's defence during the cross-examination of the complainant, bore a duty to establish the exact date of the incident to rebut the alibi.

The first report

[49] It is common cause that the complainant's mother was not the first report. The complainant's testimony was that she had reported the incident to her mother, her sister M[...] and a neighbour. The respondent did not establish from her who the first report was made to or the name of the neighbour she had mentioned. The prosecutrix, on calling the complainant's mother, had informed the court that she was the first report, however it is common cause that the mother was not the first report. The respondent led the evidence of the complainant's mother to prove previous consistent statements.

[50] Another consideration is that the court a quo found that the complainant had immediately made the report to M [...], however no such evidence appears from the record. The court, in its analysis of evidence, stated that M [...] was the first report without that evidence having been led. The court further made a factual finding that the complainant's report to M [...] was not made under duress. In the absence of the said evidence on record, the court misdirected itself.

The appellant's version

[51] It is common cause that the appellant was evicted from L [...] after the allegations had emerged. It was not disputed that he was on the list of RDP house allocations and that he had signed for it. The respondent did not lead any evidence explaining November's involvement with the complainant. The court a quo rejected as improbable the appellant's contention that his eviction was a product of

conspiracy aimed at falsely implicating him in the offence and to deprive him of the benefit of a house allocation, which he had already signed for.

[52] The court a quo appreciated that the onus at all times rested with the respondent to disprove the appellant's alibi defence, it however emphasised that the appellant's failure to call witnesses in support of that alibi, in the face of direct evidence, was a factor to consider. I understood it to mean that an adverse inference would be drawn. The court did not, however, in the same breath, draw any adverse inference from the respondent's failure to call M[...], M[...]¹ and November and neither of the two children who were in the company of the complainant to testify. In my view the court misdirected itself in this regard.

[53] The appellant's undisputed evidence was that he learnt for the first time on 27 October 2022 of the allegations against him. If the respondent had called M[...]¹, M[...] or November to give evidence, the date of the commission of the alleged compelled self-sexual assault would, in my view, have been easily ascertained. The appellant's evidence was that he was only arrested on 1 December 2022. In the absence of evidence explaining the reason for the delay in arresting the appellant after he was confronted by M[...]¹ and others, the appellant's evidence of a collusion to disqualify him from obtaining an RDP house remains reasonably possibly true.

Contradictions in the respondent's case

[54] It is common cause that there were several contradictions in the respondent's case as alluded to in the court a quo's judgment. When the evidence is considered in its totality, the contradictions and inconsistencies in the respondent's case go to the heart of the appellant's defence and are accordingly material. For the court to reject an alibi defence, it must be satisfied that the State has succeeded in proving the precise date of the commission of the offence. In *Cele v S*,⁹ the dissenting judgment of Pilla J, the court held that: 'Evidence of credibility cannot be approached in a piecemeal manner. All the evidence for and against each party has to be viewed holistically.'

⁹ *Cele v S* para 69.

[55] The court a quo materially misdirected itself by failing to consider a glaring inconsistency in the respondent's evidence. The complainant testified that she managed to flee from the appellant's house when her brother and a friend entered yet inexplicably returned thereafter to receive money from the appellant, who had directed that it will only be given to her in the absence of her brother and a friend. This inconsistency strikes at the heart of her version and was wholly ignored in the assessment of her credibility.

[56] Another consideration is the respondent's failure to call M[...], M[...]¹ or November to clarify the discrepancies in its case. Their non-appearance at court leaves a material and unexplained lacuna in the respondent's case. In the absence of an explanation for their non-appearance, an adverse inference is drawn in favour of the appellant.

[57] In the circumstances, it is found that the appellant's version is reasonably possibly true. The respondent failed to prove its case beyond a reasonable doubt.

Order

[58] In the result the following order will issue:

1. The appeal against conviction is upheld.
2. The conviction and sentence are set aside.

Sibiya AJ

I agree.

Harrison J

Case Information

Date of appeal: 14 November 2025

Date of judgment: 13 February 2026

Appearances

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