



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

CASE NO.: CA 82/25

In the matter between:

NTSIKELELO MBIKO

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

CENGANI-MBAKAZA J

Introduction

[1] On 5 May 2020, IK, a 4- year- old girl, complained to her mother during bath time that her vagina was tampered with by a person she identified as Bamba or Tuba's brother or Bamba's brother/uncle and was therefore painful. Pursuant thereto, the appellant was arrested and prosecuted in Butterworth Regional Court (the trial court) on one count of rape. The state alleged that on

or about May 2020, the appellant did unlawfully and intentionally commit an act of sexual penetration with the complainant by inserting his penis into her vagina without her consent.

[2] The appellant was convicted and sentenced to 15 years' imprisonment following the trial court's finding that substantial and compelling circumstances existed justifying a deviation from the prescribed sentence of life imprisonment. Aggrieved by the conviction, the appellant applied for leave to appeal, which was subsequently granted by the trial court. Therefore, this appeal is against conviction only.

The facts

[3] Around May 2020, the appellant was a student residing in a rented flat in Butterworth. He arrived in the flat in 2018 when he was doing his first year. In the same yard, the appellant stayed with the landlord and, apparently, other residents. His primary residence was in Mputhi location, Dutywa. This is where his parents stayed, specifically his father. Although he resided not far from IK's place, he testified that he did not know IK prior to the proceedings, and only saw her for the first time when she testified in court.

[4] To a large extent, IK's testimony is common cause, save for the issues relating to vaginal penetration and identity. She testified via closed-circuit television and through an intermediary. IK testified that she used to play with

other children at Tuba's home. On the unspecified date in May, she was playing with two other children, namely O, T and I. Tuba's brother then instructed the other children to go and buy bread from a nearby shop.

[5] He took her to a bedroom, undressed her skirt and underwear. He also removed his shorts and underwear. He got on top of her, took out his penis and inserted it in her urinary organ. IK testified that she cried, and Tuba's brother warned her that should she inform her mother about the incident, he would assault her.

[6] She then went home, whilst her mother was bathing her, she disclosed the incident. They went to Tuba's place but did not find his brother. She pointed out the room where the incident had taken place. She was later taken to hospital where she was examined.

[7] IK's mother, PK, testified that following IK's disclosure that her genitals had been tampered with by a person known as Bamba, she went to Bamba's place. She went to the main house and reported to the elders what IK had told her. There was another child in the house who was asked to call Ntsikelelo. Ntsikelelo could not be found. PK told Bamba's mother that she could not wait any longer as she was going to the police station. She proceeded to the police station and thereafter to the hospital. She was informed that the doctor was not available.

[8] On the following day, while on her way to hospital, PK again went to Bamba's place. Whilst she was there and about to leave, Ntsikelelo entered through the back door. That is when Bamba's father said: "Here is Ntsikelelo". When asked if she knew Ntsikelelo before the incident, PK testified that she did not know him at all. Although the appellant's legal representative raised some reservations regarding the medical report in the trial court, the report was subsequently handed in as an exhibit. IK was examined by a forensic nurse who noted no other abnormalities in her vagina except bumps at 6 o'clock.

[9] In his defence, the appellant gave the same version that was put to IK's mother. He testified that on 2 May 2020, which was a Saturday, he left Butterworth around 13h00 heading to his primary residence in Mputi location, Dutywa. Before he left, he had locked his rented flat, and the key was in his possession. On the following Monday, he received a report via Facebook from his landlord's daughter that his father's contact numbers were requested.

[10] Because he thought this was in relation to possible rental arrears, he enquired if his father had paid rent. His father confirmed that he had. It transpired, however, that there was a R50 shortfall in the payment of the rent. Because he wanted to pay the outstanding money, he asked his father, who was going to East London, to drop him off at his flat in Butterworth. He therefore parted ways with his parents on 6 May 2020.

[11] Upon arrival, the landlord called him into the dining room. He asked his wife to narrate the story of what had happened. This was in relation to the rape allegations against him. Later that day, he received a call from the detectives instructing him to go to their offices, which he did. He was subsequently charged and detained. The appellant testified that despite locking his flat when leaving, he would sometimes find his items missing. He basically stated that his flat was easily accessible. The appellant testified that although he was a suspect in this case, he was never identified by IK or pointed out.

[12] To sum up, the appellant's version was that between 2 May and 6 May 2020, he was at his primary residence with his parents. He called his father to testify in his defence. The appellant's father, MM, confirmed that the appellant was his son. He testified that the appellant arrived home in Dutywa before 5 May 2020 and left on 6 May 2020.

[13] When asked how he could remember the date, he testified that he had planned a trip to East London (kuGompo City) with his wife on 6 May 2020. The appellant asked him to drop him off at his flat in Butterworth, which he did. He later received a call from the appellant reporting what the landlord had told him. He did not take the allegations seriously. He later received another call from the appellant informing him that he was arrested. It was then that he dropped everything and proceeded to Msobomvu Police Station where the appellant was detained. With this evidence, the defence closed its case.

The grounds of appeal

[14] The appellant relies on the following grounds of appeal:

- 14.1 That the learned magistrate erred in finding that the state had proved the guilt of the appellant beyond reasonable doubt, more specifically in relation to the elements of the crime and the identity of the perpetrator.
- 14.2 That the learned magistrate erred in not having regard to the evidence of PK, who stated that he did not know the appellant until he was introduced to the state witness. Essentially, the fact that no identification parade was held was not taken cognisance of by the trial court.
- 14.3 In addition, the learned magistrate was incorrect in dismissing the evidence of the appellant's father who confirmed the appellant's alibi.
- 14.4 The appeal also focuses on the magistrate's failure to take cognisance of the fact that the flat was a rented residence with other people having access to it.

The legal principles

[15] It is a well-established principle that the state must prove the guilt of an accused person beyond reasonable doubt. The accused may only be acquitted if his version is reasonably possibly true. In *S v T*,¹ the court held that:

"The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. The high standard of proof- universally required in civilized systems of criminal justice- is the core component of the fundamental right that every person enjoys under the Constitution and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond a reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was indeed, the perpetrator of the crime in question."

[16] In this instance, it is necessary to examine whether the trial court properly applied the cautionary rules relevant to single-witness evidence², the alibi, as well as the special caution required when identification is in issue.³ Bearing in mind that the correct approach to the evaluation of evidence requires it to be considered objectively and as a whole.⁴

Discussion

¹ 2005 (2) SACR 318 (E) para 37.

² Section 208 of Act 51 of 1977 entails that an accused may be convicted on the evidence of a single and competent witness; see also *S v Sauls* 1981 (3) SA 172 (A) at 180E-G.

³ *S v Mthethwa* 1972 (3) SA 766 (AD) at 768A-C.

⁴ *S v Chabalala* 2003 (1) SACR 134 (SCA).

[17] It is clear from the trial court record that the fact that IK's vagina was tampered with was never an issue. However, before us, counsel for the appellant argued that there were no admissions that IK had been raped. In essence, the argument was that the issue of penetration was not properly canvassed and established beyond reasonable doubt. Furthermore, the truth and correctness of the contents of the medical report (J88) was not admitted by the defence.

[18] While counsel's position may be correct in relation to the manner in which the J88 was submitted, it is at least common cause that IK's vagina was tampered with. The undisputed evidence is that she complained of pains while being bathed by her mother. Furthermore, even in his evidence in chief, the appellant did not dispute this fact. To put issues into perspective, it is apposite to extract the relevant portions of the record, which are as follows⁵:

“...MR TUTU: You said it is one of the reasons that you may think have driven this toddler to say you raped her the children of the landlord could then make yourself a duplicate key and do what they think in your flat.(sic) What is that...[indistinct]

ACCUSED: Also, I am not disputing that there is something that happened to the child. I think it could happen that since they saw or they knew that I was funding him, they could use that to their advantage (sic)”(my underlining)

[19] For these reasons, *inter alia*, I directed the parties to focus on the issue of identity which in my view constitutes the central dispute and the main issue in

⁵ Transcribed record, page 13, lines 8-15/page 98 of the index bundle.

this appeal. In brief, the parties advanced contrary submissions. The appellant's counsel argued that the appeal ought to succeed on the basis that the state had failed to prove the identity of the perpetrator beyond reasonable doubt. Counsel was critical of the manner in which the investigation and subsequent prosecution were conducted. These points of criticism will be ventilated in the course of this judgment.

[20] Conversely, counsel for the state persisted with the submissions in the heads of argument contending that IK pointed out the appellant's flat and that she was acquainted with him prior to the incident. Since the incident occurred during the day, so she argued, IK had sufficient opportunity to observe the perpetrator.

[21] In the heads of argument, counsel referred to *Woji v Santam Insurance Company Ltd*⁶ and submitted that IK's evidence, despite her age, was consistent and clear. She answered questions put to her with certainty, clarity and intelligence and without any difficulty. Essentially, counsel contended that the trial court had correctly applied the cautionary rules applicable in the evidence of a single witness. She further submitted that the alibi was not timeously disclosed; hence, it was rejected by the trial court. On those bases, so the argument went, the appeal should be dismissed.

⁶ 1981 (1) SA 1020 (A).

Analysis

[22] This court acknowledges the trite principle that its powers to interfere with findings of fact made by the trial court are limited. In *Rex v Dhlumayo and Another*,⁷ (Dhlumayo) Schreiner JA set out the principle as follows:

‘Ordinarily the appellant in a criminal appeal has to satisfy the appellate court that the verdict was wrong, at least to the extent that the trial court should have had a reasonable doubt as to his guilt. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that it is wrong.’

[23] Most significantly, as enunciated in *Dhlumayo*,⁸ “*the trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked. Consequently, the appellate court is very reluctant to upset the findings of the trial Judge.*”⁹

[24] Notably, the Constitutional Court (CC) in *Makate v Vodacom (Pty)(Ltd)*¹⁰, emphasised that regard to be had to a trial court’s credibility findings cannot be overstated. The CC added:

⁷ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706; *S v Monyane* 2005 (1) All SA (SCA) at 539.

⁸ See *Dhlumayo* fn 6 above, paras 3 and 4.

¹⁰ 2016 (4) SA 121 (CC) (26 April 2016) at para 40.

‘[40] If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case. In *Bernert*, this court affirmed:

“What must be stressed here is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by the trial court is not an inflexible rule. It is recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from the observing and hearing the witnesses as opposed to reading ‘the cold printed word’. The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to ‘tie the hands of the appellate courts. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.”¹¹

[25] I am in agreement with the submissions made by the appellant’s counsel. I add that for a matter to be fully placed before the court, it is imperative that a thorough investigation be conducted. This is so because, as indicated above, an accused bears no onus to prove his guilt in criminal proceedings. This accords

¹¹ *Bernet v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) at para 106.

with s 35 of the Constitution,¹² which protects the rights of accused persons, more specifically the right against self-incrimination. Therefore, the high threshold of proof beyond reasonable doubt remains the burden of the state throughout.

[26] Most significantly, where the investigation and presentation of the case is fraught with deficiencies on material issues, the court cannot safely convict as the state would not have discharged its onus. Reverting to the facts of this case, when IK made a disclosure to her mother, she stated that Tuba's or Bamba's brother or uncle had raped her. However, when she testified in court, she stated that Tuba's brother was a perpetrator.

[27] A further material discrepancy that was not clarified during the trial proceedings relates to the stage at which IK's mother went to report the incident to the landlord. According to the evidence, just before IK's mother left the premises, the landlord remarked, "Here is Ntsikelelo."

[28] This brings me to the question that I posed to the parties during the hearing of this appeal, which in turn gave rise to a number of other questions. On what basis and how was the appellant arrested? Was he arrested because he is Tuba's brother or Bamba's brother or Bamba's uncle? Alternatively, was he

¹² Constitution of the Republic of South Africa, 1996 as amended.

arrested because he resided in a flat pointed out by IK? Or was he arrested because he was pointed out by IK to the police or to her mother?

[29] In response to the latter question, IK's mother confirmed in cross-examination that IK never pointed out the appellant. Furthermore, the evidence which was corroborated by the appellant was that IK never pointed out the appellant to the police or elsewhere. Another question that arises: Where does Ntsikelelo feature in all this? Was his implication based solely on the fact that he resided in a flat identified by IK? And what about other people who had access to the flat? The significance of mentioning Ntsikelelo's name when he emerged was never explored; no evidence was led to establish where and how Ntsikelelo featured in the rape charge. All these questions give rise to a reasonable doubt as to whether the appellant was indeed the perpetrator of the crime.

[30] These questions further raise serious concerns as to the significance of an identification parade which the state contended was not necessary. Although IK indicated that she knew Tuba's brother, her mother did not. In addition, the appellant also did not know this family. Furthermore, while the appellant had resided in the flat since 2018, IK and her mother had only recently arrived in the area in January 2020. Given the short period they had spent there, the issue of identification ought to have been properly investigated by all means possible before any arrest was effected.

[31] A further issue concerns the fact that IK was playing with other children at the time of the incident. She mentioned them by name in her evidence in court. From the record, it appears that the magistrate had anticipated that these young witnesses would be called to testify. At page 22 lines 12-13 of the record, he states:

“COURT: Thank you. Thank you, I...And do you have another child witness? Do you have another child witness?

PROSECUTOR: No, I do not have another child witness. Your Worship”

[32] Despite the obvious significance of the evidence of other young witnesses who were playing with IK, no valid explanation was proffered by the state for not calling them. Arising on this issue is the further question as to why the landlord was not called, at the very least to rebut or assist the court with regard to the defence of alibi raised.

[33] While on this point, a lot needs to be said regarding the manner in which the trial court evaluated the defence of alibi. The legal principle is trite: the state bears the onus of disproving alibi beyond reasonable doubt.¹³ The issue of alibi has to be assessed holistically. In *Thebus and Another v S*¹⁴, a case referred to by counsel for the state in his heads of argument, the CC considered the effect of a late disclosure of an alibi defence on the accused person’s right to remain

¹³ R v Hlongwane 1959 (3) SA 337 (A) 341A; S v Majiame n Andere 1999 (1) SACR 204 (O) p213 g-h.

¹⁴ (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC); 2003 (2) SACR 319 (CC) (28 August 2003).

silent. It held that although pre-silence cannot find an adverse inference of guilt, the accused may be cross-examined on the late disclosure of an alibi for purposes of assessing the weight and credibility thereof.¹⁵ The CC cautioned, however, that such cross-examination must be exercised with due regard to fairness towards both the accused and prosecution, and without unduly encroaching upon the right to remain silent or limiting a proper enquiry into the delayed disclosure of an alibi.¹⁶

[34] The submission by the state regarding the late disclosure of alibi is, in my view, misplaced. In fact, the authority relied upon by the state is not on all fours with the facts before this court. In the present instance, no such cross-examination took place to establish why this alibi was not disclosed to the police.

[35] Instead, the record reflects that the alibi defence was put forward from the outset. To that extent, the defence objected to the charge sheet on the basis that it failed to particularise the specific date of the incident. Notwithstanding the trial court's failure to address the objection, the cross-examination of IK's mother attempted to cure the defect. She belatedly testified that it was 05 May 2020 when IK complained of pains in her vagina. However, on her own version

¹⁵ Fn 14 above at para 69 [paraphrased].

¹⁶ Fn 14 above, para 70.

and according to the report conveyed to her by IK, the incident occurred the previous day.

[36] Notably, the appellant's father testified and corroborated the appellant's alibi. Such evidence remains uncontroverted and was never challenged in any form by the state. Therefore, there was no basis for the trial court to find that the appellant's father was a witness of convenience. Most significantly, IK's mother honestly informed the court that she could not dispute the appellant's version, especially on the issue of alibi.

[37] Basically, considering the fact that IK was a single witness on the issue of identification, the trial court misdirected itself in the manner in which it applied the cautionary rules. It failed to evaluate the evidence in totality when dealing with the issue of alibi and all other relevant issues. Had the trial court done so, it would have appreciated that the unchallenged alibi evidence raised a reasonable possibility that the state's version regarding the identity of the perpetrator was mistaken. Its failure to do so constitutes a material misdirection.

[38] Gleaning from the record of the trial proceedings, the state also harboured serious doubts with regard to the identity of the perpetrator. What is concerning is the manner in which that doubt was addressed. In the middle of the trial proceedings and despite the scepticism expressed by the trial court, it nevertheless directed IK to leave the room where she was with the intermediary, to come forward to point out the assailant from among a group of other people

inside the courtroom. IK complied with the instruction and pointed out the appellant. Below is the extract of the court record outlining the procedure adopted by the court in conducting the dock identification:

“PROSECUTOR: Your Worship, the only thing that the state wishes to deal with is the issue of identity. With the leave of the court, I did canvass this issue with my learned friend that perhaps when the child is done, then if the child may just come and be asked. Your Worship, if she can see the person whom they...[indistinct] that day? I am at the hands of the court as the court guiding us how to proceed (sic)

COURT: I am just careful with a dock identification. What I am going to ask them is that we have...[intervenes](accentuation added)

PROSECUTOR: Him sitting there maybe with her or...[intervenes]

COURT: With Mr Tutu and Mr Sani[?] and with the officer?

PROSECUTOR: Yes

COURT: So that because...[indistinct] in the dock.

PROSECUTOR: I do not have a problem with that, Your Worship

COURT: Okay. Mr Tutu.

MR TUTU: Your Worship, I also do not have a problem, but I am equally concerned about...[indistinct], Your Worship.

COURT: Yes, Mr Sani-officer, do not leave. Mr Sani, will you go and sit with Mr Tutu? Officer, take a chair and sit with Mr Tutu please. Officer, take a chair and sit

with Mr Tutu please. Okay, the child can come into the court. Ms Sekupa, you can bring the child into the court. Just wait a minute sir. Your witness, Ms Tsofela.

RE-EXAMINATION BY PROSECUTOR: I..., remember you told this court that the person who did this to you is Butika [?] Tuba, you remember?

MS K...: Yes

PROSECUTOR: Now I want you to help us and tell us if you see Butika Tuba here in court. If you do not see us clearly go that side. Do not be afraid. Now I want you to look at all of us here in court. If you see Butika Tuba here, please point and say this is Butika Tuba? (emphasis added)

INTERPRETER: Pointing, Your Worship to the accused..."

[39] While this court accepts that dock identification is permissible and admissible in law,¹⁷ where a child witness is involved, it ought to be discouraged. There are sound reasons why a child is permitted to testify by means of closed-circuit television and in camera. The rationale underlying this practice is that the interests of justice demand that a child need not be subjected to undue psychological distress or a possible secondary victimisation through exposure to a person she believes to be the perpetrator.

[40] Section 170A of the Criminal Procedure Act 51 of 1977(CPA) empowers the court to safeguard the interests of the child or even adult witnesses who suffer from physical, psychological, mental or emotional conditions to testify

¹⁷ S v Matwa (CA&R520/01) [2002] ZAECHC 8; [2002] 3 All SA 715 (E); 2002 (2) SACR 350 (E) (24 April 2002).

through an intermediary. In addition, s 153 (3) of the CPA permits in camera proceedings in instances where a charge relates to any sexual offence as contemplated under s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 against a minor.

[41] Therefore, in this instance, the state ought to have employed other means of identification to limit the child's exposure to the formal and intimidating atmosphere of a courtroom, which is generally not conducive to child witnesses. In any event, in light of the serious doubts surrounding the identification of the perpetrator, the dock identification conducted in this matter carries no evidential weight and should be disregarded.

[42] Lastly, it would be remiss of this court not to address the irregular manner in which the J88 was admitted. The record reflects that the medical report was not admitted by the defence, more specifically, the truth and correctness of the contents thereof. Indeed, the appellant's counsel raised serious concerns regarding the injuries sustained by IK. Although the defence sought to have the forensic nurse called to clarify the nature of the injuries and to explain whether IK's vagina had been penetrated, the trial court dismissed this proposition.

[43] This court regards the failure to allow the forensic nurse to testify as an irregularity, given the fact that penetration is an essential element of rape. While it is accepted that the mere production of a J88 together with a supporting affidavit compiled by a medical practitioner in the employ of the state

constitutes a prima facie proof of the facts stated therein, that does not absolve the court of the duty to have proper regard to what the J88 actually states.

[44] Penetration was an issue and remained unresolved. While it is acknowledged that even slight penetration constitutes penetration in terms of the definition of rape, it was material to allow the forensic nurse to clarify this aspect. The trial court's failure to allow the forensic nurse to testify meant that the state's proof on this key element rested solely on an untested document. That deprived both the state and the appellant of a fair trial and leaves a reasonable possibility that penetration may or may not have occurred. The trial court erred in acting on a disputed document. Resultantly, the appeal must succeed.

[45] The appellant's appeal against conviction is upheld.

1. The order of the trial court is replaced with the following:

“The accused is found not guilty and discharged”.

N CENGANI-MBAKAZA
JUDGE OF THE HIGH COURT

I agree:

D.V. PITT
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Appellant : *Adv Hobbs*

Instructed by : HS TUTU & SONS
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Counsel for the Respondent : *Adv Maarman*

Instructed by : Director of Public Prosecutions
Mthatha

Heard on : 05 August 2026

Judgment Delivered on : 18 August 2026