

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: **A 592 / 2015**

(1) REPORTABLE: YES / **NO**

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: YES/**NO**

DATE 03/09/2026

SIGNATURE

In the matter between:

P[...] T[...] S[...]

Appellant

vs

Respondent

THE STATE

JUDGMENT

MATLAPENG, AJ (STRIJDOM J CONCURRING)

Introduction

[1] Mr P[...] T[...] S[...] (the appellant) stood trial in the Regional Court at Benoni on a charge of rape which was read with the provision of section 51(1) of the

Criminal Law Amendment Act 105 of 1997¹, he pleaded not guilty to the charge but notwithstanding his denial of the charge was convicted as charged and sentenced to life imprisonment after the trial court found that there are no substantial and compelling circumstances justifying it not to impose the minimum prescribed sentence of life imprisonment.

- [2] The appellant was legally represented during the proceedings.
- [3] The appellant enjoys an automatic leave to appeal against his conviction and sentence in terms of section 309 (1) (a) of the Criminal Procedure Act hereinafter the CPA².
- [4] May I hasten to point out that on the 10 September 2025 this matter appeared before this court, it was then postponed *sine die*, the court ordered that the record should be reconstructed.
- [5] The court ordered Mr B Nkuna the Court Manager at Benoni Magistrate's Court to cause the record to be reconstructed and to furnish the Registrar of this court with the reconstructed record on or before the 10 November 2025.
- [6] Mr P Mulaudzi was the prosecutor in this matter during the trial, she compiled a statement under oath to the effect that she resigned as a prosecutor on the 15 of December 2023 and as a result is not in a position to assist with the reconstruction.
- [7] Justice Takalani Magayi was an attorney who represented the appellant during the trial, he was employed by the Legal-Aid South Africa based in Benoni. He states in the affidavit that he resigned from Legal-Aid South Africa on the 28 February 2022 and that he is unable to assist the court to reconstruct the record.
- [8] The Regional Magistrate to wit Mr Cox states that after numerous searches for his notes he could not find them and does not have an independent recollection of the case, the end result being that he cannot reconstruct the record.

¹ Act 105 of 1997

² Act 51 of 1977

[9] It appears that the available record as it stands consists of the charge sheet and its annexures A – N and that immediately thereafter are court proceedings that started on the 17 April 2013 until at page 93 which is the last page of the appellant's application for leave to appeal.

[10] It is evident that the only missing position of the record is the appellant's plea, but it is clear that the appellant pleaded not guilty to the charge preferred against him, testified under oath and maintained his innocence until a verdict of guilty was returned. Rule 51 (3) of the High Court Rules provides that:

“the ultimate responsibility for ensuring that all copies of the record on appeal are in all respects properly before the court shall rest with the appellant or his attorney”

[11] Mr Nkuna the Court Manager, Magistrate's Court Benoni states in clear terms that the relevant parties are not in a position to reconstruct the missing portion (the plea) of the record. I am not in agreement with Mr Botha for the appellant that the record as it stands is not sufficient for this court to adjudicate and or to entertain the appeal of the appellant.

[12] The matter will be entertained on the basis that the appellant pleaded not guilty to the charge of contravening the provisions of section 3 of the Sexual Offences and Related Matters Act 32 of 2007,³ that he pleaded not guilty to the charge and denied having committed the offence levelled against him and put the State to the prove thereof, this is regard being had to his evidence in chief whilst in the witness stand that the allegations against him are false.

[13] I hold the view therefore that the available record is sufficient for this court to adjudicate and or to entertain the appeal.

[14] The decision of the trial court is assailed on the following grounds:

1. That the *court a quo* misdirected itself in accepting the complainant, N[...] S[...] as being a competent witness,
2. Finding that the state proved its case beyond reasonable doubt,

³ Act 32 of 2007

3. Finding that the witness could be relied upon to convict the appellant,
4. Not properly applying the cautionary rule applicable to single witnesses, not adding enough weight to the contradictions and improbabilities in the state case,
5. Finding that the appellant's version is not reasonable possibly true,
6. By imposing a sentence that is shocking and disproportionate to the facts of the case,

[15] May I interpose to state that some of the heads are intertwined and will be dealt with simultaneously.

[16] Competency of the Complainant

It is argued that the learned magistrate misdirected himself in finding or accepting that the complainant who was 9 years old when she testified was a fit and competent witness as required by section 193 read with section 162 of the CPA.⁴

[17] Section 162 of the CPA provides:

- (1) subject to the provisions of section 163 and 164 no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or in the case of a superior court, by the presiding judge or the registrar of the court and which shall be in the following form

“I swear that the evidence that I shall give shall be the truth the whole truth and nothing but the truth so help me God”

- (2) If any person to which the oath is administered wishes to take the oath with uplifted hands he shall be permitted to do so

⁴ Act 51 of 1977

[18] It is argued by Mr Botha for the appellant that the trial court did not established whether the complainant is capable of distinguishing between the truth and lies and therefore capable to take an oath, I disagree.

[19] Section 193 of CPA provides as follows “*The Court in which criminal proceedings are conducted shall decide any question concerning the competency or compellability of any witness to give evidence*”

[20] The purpose to comply with sections 162 and 193 is to ensure that the evidence to be given is reliable and to admit the evidence of a child who does not understand what it means to tell the truth is to violate the accused’s right to a fair trial, it is my considered view that the *court a quo* complied with the provision of section 162 and 193 of CPA, that there is no force in the appellant’s argument that the complainant was not a competent witness and that this argument falls to be rejected see *Nedzamba v S (911/2012) (2013) ZASCA 69 (27 May 2013)*.⁵

[21] N[...] testified through the assistance of an intermediary and as a 9 year old child, right at the outset the *court a quo* gave thought to the fact that she is a child and at page 3 to 5 of the record put questions to her with a view to determining if she understood the difference between the truth and lies and she answered them with distinction, whereafter the court administered the oath.

[22] It is my considered view therefore that regard being had to the above that the asserssion by the defence that the complainant was not a competent witness does not hold water and is rejected.

[23] Findings that the State proved its case beyond reasonable doubt:

The departure point is that it must be borne in mind that the proper approach to be adopted by a court of appeal when it deals with factual findings of a trial court is informed by a collective principle laid down in the pathfinding and seminal judgment of *R v Dhlumayo* ⁶ where the following was said:

⁵ (911/2012) (2013) ZASCA 69 (27 May 2013)

⁶ 1948 (2) SA 677 (A)

“a court of appeal will not disturb the factual finding of a trial court unless the court had committed a misdirection, where there has been no misdirection of fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion then it will uphold it”

[24] The onus in a criminal rest on the State to prove the charge(s) against the accused beyond a reasonable doubt this rule was succinctly stated as follows in the epoch-making decision of *R v Difford*⁷

“ It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives, if he gives an explanation even if that explanation is improbable, the court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false, if there is any reasonable possibility of his explanation being true then he is entitled to his acquittal”

[25] It is trite law that an accused’s version need not be the truth it is sufficient if it is reasonably possibly true and can only be rejected on the basis that it is so impossible that it cannot reasonably possibly be true see *S v Shackell*.⁸

[26] According to the case of *S v Van der Meyden*⁹:

“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he or she is entitled to be acquitted if it is reasonable possible that he or she might be innocent. These are not separate and independent tests, but the expression of the same test (the proper test) when viewed from the opposite perspectives. 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

⁷ *R v Difford* 1937 AD 379 at 373

⁸ *S v Shackell* 2001 (2) SACR 185 (SCA)

⁹ *S v Meyden* 1999 (1) SACR 447 (W)

reasonable possibility that an innocent explanation which has been put forward might be true”

[27] The evidence of the State as regards the rape charge levelled against the appellant is of a single witness to wit N[...] M[...], in terms of section 208 of the CPA an accused may be convicted of any offence on the single evidence of any competent witness. The court can base its findings on the evidence of a single witness as long as such evidence is satisfactory in every material respect see *R v Mokoena*,¹⁰ *R v Mokoena*,¹¹ *S v Sauls and Others*.¹²

[28] In the case of *S v Sauls and Another Supra*, the court held:

“There is no rule of thumb test or formula to apply when it comes to a consideration of credibility of the single witness, 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 had been told”

In the case of *S v Kubeka*¹³, it was held that the evidence of a single witness ought not to be looked at piecemeal and in isolation, all of it should be analysed and weighed together in determining whether the State has proved its case beyond a reasonable doubt.

[29] The evidence of the State pertaining to the rape charge levelled against the appellant is of a single witness to wit N[...] who is the appellant’s biological daughter of 9 years and the incident is alleged to have occurred when she was six years of age.

[30] It is of cardinal importance to mention that the version of N[...] is diametrically opposed to the evidence of the appellant who vehemently denies the charge against him.

¹⁰ *R v Mokoena* 1932 OPD 79 at 80

¹¹ *R v Mokoena* 1956 (3) SA 81 (A) at 85

¹² *S v Sauls and Others* 1981 (3) SA 172 (A) at 180 E-G

¹³ *Sv Kubeka* 1982 (1) SA 534 (WLD) at 537

- [31] The State case is riddled with material contradictions inconsistencies improbabilities and is devoid of all credence, I am just going to scratch the surface to demonstrate these inconsistencies.
- [32] The complainant's grandmother to wit R[...] M[...] in response to questions by the appellant's legal representative stated: "The accused person used to come weekends to see how deceased was doing and N[...] - yes he used to come". P21 line 21 - 23
- [33] "Yes and that time or during that time he was staying alone at Kingsway – Yes. He was staying alone at Kingsway", P21 line 24 - 25
- [34] "During his visits over weekends, he would visit and leave your daughter and N[...] in Daveyton – Yes N[...] was attending School then". P22 line 1- 3
- [35] The appellant's evidence in a nutshell is that the grandmother took N[...] and her mother to Daveyton long before the mother passed away, the above exposition confirms the appellant's version.
- [36] When S[...] M[...] was being led by the Prosecutor in her evidence in chief the court interjected and said, "where are you going with this? I just wanted to see because I do not understand. Because all these things that you ask now is not in dispute, that she was in Kingsway she was in School there, she came to Daveyton.....". P25 line 12 – 14
- [37] The above exposition demonstrates in clear and unequivocal terms that the trial court committed another misdirection in finding that it was not in dispute that N[...] was staying with the accused in Kingsway.
- [38] The complainant was asked by the legal representative, "your father used to come and check you in Daveyton – No". P11 line 24 - 25
- [39] But R[...] M[...] (the grandmother) during cross-examination by the legal representative contradicted this portion of the complainant's testimony. "Madam would I be correct in saying that during that period madam the accused person would come over weekends to see how she was doing together with N[...] madam – Yes he used to come your worship". P21 line 21 - 23

[40] This court is aware of the decision of *S v Mkhohle*¹⁴ where it was stated that contradictions per se do not lead to the rejection of witness' evidence, they may simply be indicative of an error, not every error made by a witness affects his credibility, in each case the trier of fact has to make an evaluation taking into account such matters as the nature of the contradictions, their number of importance and their bearing on the other parts of the witness' evidence.

[41] The trial court had this to say about the contradictions in the complainant's testimony. "not finding any probabilities in the version of the child, neither was there any material contradictions in her evidence where she contradicted herself or any of the witness the court finds that there are sufficient guarantees for reliability of her evidence" P62 line 25, P63 line 1- 4

[42] I am in agreement with Mr Botha for the appellant that the court committed a misdirection, it did not apply the cautionary rules applicable to the evidence of a single child witness and did not attach much weight to the material contradictions alluded to above.

[43] S[...] M[...]’s testimony is that “after the death of N[...]’s mother we never saw the accused again. S[...] M[...]’s testimony is that, “The accused’s father we never saw him again your worship, the last time we saw him it was on Sunday after the funeral” P25 line 24 – 25. This evidence of S[...] M[...] is in agreement with the version of appellant who testified, “I have never taken the child, the last time I saw the child was a day of funeral of the grandmother” P47 line 1-5.

[44] It is evident from the above that the version of S[...] that the appellant never came to fetch N[...] after the death of the mother is at loggerheads with the version of the grandmother.

[45] The complainant was asked by the appellant’s legal representative “so then you are saying your father killed your mother – yes your worship”, P11 line 11- 12.

“Would I be correct in saying that you were told by your grandmother – No nobody told me”, P 11 line 9 – 10

¹⁴ *S v Mkhohle* (639/88) (1989) XASCA 98 (7 September 1989)

The complainant was asked by the legal representative, “now moving on madam would I be correct in saying that before your mother or mommy died she was very ill or sickly – your worship she died because my father used to steal her money your worship and then he poisoned her with the poison that they used for rats your worship”, P 11 line 5- 8.

The complainant was further asked, “would I also be correct N[...] in saying that granny that is R[...] M[...] also feels that your father is to blame for your mother’s death – yes”. P11 line 13 – 15. P12 line 19 – 21.

[46] On this aspect the grandmother had this to say, “Sorry Madam before you proceed just keep it short yes or no. Did you blame the accused for your daughter’s death yes or no. Do not go into details - after she took the tablets your worship, I blamed him your worship”. P21 line 1- 4.

[47] It is of cardinal importance to note that not long after the grandmother testified that she blamed the appellant for having caused the death of her daughter she changed the tune, “For having caused her death – I never blamed him for killing my daughter your worship I said that he is the cause of my daughter drinking tablets your worship”. P21 line 5 – 7

[48] The principal’s evidence is that she called the complainant after she was informed that she was behaving inappropriately, and that N[...] informed her that she slept with three (3) different boys in the neighbourhood and at times she was the one who was initiating the sexual act and that the grandmother confirmed that she is obsessed with the neighbourhood boys. P38 line 1 – 9

[49] It is the testimony of the principal that the grandmother said she once saw N[...] having sex with another boy – Yes, P40 line 5 - 11

And that N[...] also puts her fingers in her vagina, P37 line 11 - 19

[50] It is difficult to fathom why the complainant and the grandmother were not confronted about this critical issue, it is inconceivable that the grandmother kept as silent as a rock and did nothing after having witnessed N[...] at her age engaging in a sexual act

[51] Sheryl Gomes testified that she is a registered nurse, she examined the complainant, it is her findings that there were repeated forced penetration with an erect penis over a period of times, P31 line 5- 7.

Gomes's evidence is further that the scars were healed and that she is not in a position to say how long ago were the injuries inflicted. P32 line 11- 19.

Regard being had to Gomes' testimony it is not known as to when did the complainant have intercourse with the boys in her neighbourhood.

[52] Before the Regional Court the legal representative of the appellant adopted a very supine attitude, he made no effort to challenge the grandmother and N[...] about the principal's evidence that the complainant slept with three boys and that at one stage the grandmother caught her red handed busy having sex with another boy.

[53] The witnesses whose evidence is relevant as to the events that led to the conviction of the appellant are N[...], her grandmother and S[...] and the evidence of these witnesses is not sufficiently corroborative of each other to confirm the overall scenario and to eliminate collusion, in fact their evidence as demonstrated in the proceeding paragraphs is at loggerheads on material aspects and in fact differs like day and night

[54] It is also worthy to note that the court a quo was not alive of the fact that the appellant and the grandmother are at loggerheads I am saying so because of what follows and "it appears that the problem between the accused and the grandmother already happened on the day of the next say when the grandmother was buried which was March 2011", P 61 line 5 – 8

Accused had already left the house which he occupied which allegedly belonged to the deceased, why would any person then influence this child to try to get the accused out of the way because he was no longer in their way, P61 line 9-12

[55] I find that the court committed a misdirection in arriving at this conclusion regard being had to the appellant's version which is to the effect following: " Now Sir

kindly enlighten the court, your worship after death of my wife your worship after N[...]’s mother passed away your worship I had an argument with the grandmother your worship”

“What kind of argument your worship the grandmother alleged that I am the person who killed her daughter your worship and that I should move out of the house the house belongs to her daughter your worship I then asked her where should I move to because I also spent money your worship to extent the house your worship what was her reaction to you saying that she said to me I must go....”. P46 line 5 - 15

- [56] It is my finding that the court a quo committed another misdirection when it found that the problem between the appellant and the grandmother ended when the appellant vacated the house in question, I find that it had not ended because the appellant states that he spent money to extent the house this may be the reasons sufficient enough to “get the accused out of the way”
- [57] According to *R v Dhlumayo supra*. An appeal court will not interfere with credibility finding unless they are vitiated by a material misdirection.
- [58] It is my finding that the misdirection in this matter committed by the trial court are apparent and that this court is entitled to interfere with the credibility findings regard being had to the fact that the misdirection committed are material
- [59] Although section 208 of the CPA provides that a court may convict on the single evidence of a single competent witness, it does not make an alteration to the state of the law in regard to the cautious approach to be adopted in evaluating the evidence of a single witness.
- [60] It is my finding that regard being had to the case of *R v Mokoena 1932 supra* that the complainants’ evidence is not clear and satisfactory in every material respect
- [61] I am aware of the fact that not every error made by the witness affect his or her credibility that in each case the trier of fact has to make an evaluation taking

into account matter such as the nature of the contradiction, their number of importance and their bearing on the other parts of the witness' evidence.

[62] I have demonstrated in meticulous detail many material contradictions in the State case internal and external and that the number and nature of these contradictions warrant the rejection of the state case

[63] It is my considered view that the credibility finding by the trial court are not supported by the record.

[64] It is my finding further that the State did not succeed to proof it's case beyond a reasonable doubt.

[65] The material contradictions referred to above render the conviction and sentence liable to be set aside.

[66] In the result the following order is made:

1. The appeal is upheld
2. The conviction and sentence are set aside
3. The appellant must be released from custody with immediate effect.

MATLAPENG AJ
ACTING JUDGE OF THE HIGH COURT
PRETORIA

I agree

STRIJDOM J
JUDGE OF THE HIGH COURT
PRETORIA

For the Appellant:

For the Respondent:

Mr Botha
The Legal-Aid South Africa

Adv Khoza
The National Prosecuting Authority