REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)

CASE NO: A237/2013

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

21 NOVEMBER 2013 **FHD VAN OOSTEN**

In the matter between

BHEKINKOSI EMMANUEL MNGUNI **APPELLANT**

and

THE STATE **RESPONDENT**

Criminal law - Appeal against conviction of rape and sentence of life imprisonment - evidence of state witnesses analysed - material defects in evidence – court a quo erred in accepting evidence of state witnesses - medical evidence found to be inconclusive - appellant entitled to benefit of doubt - conviction and sentence set aside.

J U D G M E N T

VAN OOSTEN J:

[1] The appellant was convicted in the Roodepoort Regional court of rape and sentenced to life imprisonment. The appeal is directed against conviction and sentence and is with leave of the court a quo.

[2] There are essentially two issues for determination by this Court. The first is whether the complainant had in fact been raped, and if so, the second, whether the appellant had raped her. The complainant in this matter was born on 8 July 2000. She was therefore 9/10 years old when she was allegedly raped and 12 years old when she testified. Her testimony was given through an intermediary. The State in addition to the complainant, called a number of witnesses to testify. Central to the issue as to whether the complainant was raped is the evidence of Dr Thompson who on 17 December 2010 conducted the medical examination on the complainant. Concerning the allegations of rape the evidence of three further state witnesses is relevant for purposes of this appeal: firstly, the complainant's mother, S Z, secondly, the complainant's close friend and the daughter of the appellant, Z M, and thirdly, the appellant's common law wife, P M. The appellant testified and called his second wife, G M, to testify in his defence. His defence was a denial. The Regional Magistrate accepted the evidence of the state witnesses and rejected the version of the accused as false. The evidence of the defence witness she further held, did not take the matter any further.

[3] A brief outline of the evidence for the State is the following: the complainant, who was a single witness as to the alleged rapes, testified that the appellant had raped her on altogether four separate occasions. The first was in 2009 and the second, third and fourth occasions in 2010. The date June 2010 featured prominently in the evidence of all the state witnesses which of course marked the time of the World Soccer Cup event taking place in South Africa. For the rest as will soon become apparent, it is difficult if not impossible to place the events within a timeframe of any exactitude. The complainant made reports concerning the events to her mother, Z and Ms M, which is what they dealt with in their testimony. I do not consider it necessary to traverse the evidence of the state witnesses in any detail save to refer thereto where necessary. Lastly, I propose to deal with the medical evidence and in particular the weight to be attached to the opinions expressed by Dr Thompson.

[4] The complainant was a young immature child both at the time of the events occurring and testifying. Due allowance for the child's inexperience, imaginativeness and susceptibility to influence must therefore be made in the evaluation of her evidence. Consequently caution must be exercised when considering the evidence of a child (see *R v Manda* 1951 (3) SA 158 (A) at 163C-E; *Viveiros v S* 2000 (2) ALL SA 86 (SCA). For reasons which will presently emerge the present case is plainly one which calls for caution.

[5] The complainant testified that she was at the appellant's house in Snake Park visiting Z there as she was accustomed to do, when the first incident occurred. It was in 2009. She knocked on the door, the appellant opened, held her by the hand, opened a drawer and took a knife in his hand, pulled her to Z's bedroom, undressed himself, took out his penis, inserted it into her vagina and raped her in 'bumping on top of me'. She went home and never reported the incident to anyone as the appellant had threatened to kill her should she do so. In this regard she is contradicted by her mother who testified that the complainant had in fact in June 2010 mentioned three incidents to her the first of which had happened 'during Easter time in the year 2009'. Significantly, although she felt sad, she was adamant that she experienced no pain, as opposed to the subsequent events when she did experience pain. The complainant's evidence in this regard cannot be reconciled with the medical evidence. Dr Thompson testified that only the tip of his small finger was allowed on labia traction during his examination (which it must be remembered occurred 12 – 18 months after the first alleged incident). It is clear from his evidence that penetration by a male organ would definitely have caused internal vaginal injuries and resultant pain similar to a speculum that is used to dilate the vaginal opening for internal examination of the vaginal vault. For this very reason he regarded it crucial not to use a speculum without the complainant being under anaesthetic. Regrettably the complainant's version as to the absence of pain was not put to Dr Thompson but I am satisfied that as a matter of plain logic the complainant's evidence in this regard, on the probabilities, cannot be accepted.

[6] This brings me to the second, third and fourth incidents as described by the complainant. These incidents, on a plain reading of her evidence occurred one after the other in the course of a few successive days. The last of the incidents she

associated with the World Cup and therefore in June 2010. There is considerable corroboration for this date to be found in the evidence of the other state witnesses. It has this significance: although the medical examination was conducted some 6 months later, she made mention to Dr Thompson of only one incident of rape by 'a known male' who had 'forced her into his house and had non-consensual sex with her'. Dr Thompson noted at the time that the complainant was 'emotional', which he was unable to explain what he meant by it. Be that as it may, I find it difficult to believe that the complainant, having regard to the way in which she gave her evidence, would only have mentioned one incident if there in fact had been three successive incidents more or less in the same period of time.

[7] A striking feature of the complainant's evidence is the way in which she described the incidents: each incident followed exactly the same pattern. The irresistible impression I formed is that it was a rehearsal of the incidents in almost the exact same wording. The Regional Magistrate was impressed with her evidence and remarked that her evidence 'emerged so naturally from her and that points away from the suggestion by the defence that she was coached into falsely incriminating the accused'. I am unable to agree. I say this for the following reasons. The complainant's mother was an unsatisfactory witness. Her inattentiveness, indifference and ignorance in dealing on the one hand with the most disturbing overt sexual misconduct conduct of the appellant she had observed, which I will revert to, and on the other the reports made to her by the complainant, are aspects of concern. But, it goes further. On the day in June 2010 when the report was made to her by the complainant, she demanded the truth from her and assaulted the complainant in hitting her with a belt which prompted the complainant to make the report. She did report it to some police officer who was doing his rounds in the area where she lived and later to two other police officers who had visited her, but they, according to her, refused to take the matter any further as they were of the view that there was 'no evidence'. She left at that and it did not enter her mind to have the complainant medically examined. It was only almost six months later when Const Mokwai of the Child Protection Unit of the SAPS questioned her about an anonymous complaint they had received by email from Bethany House Trust concerning the alleged sexual abuse of the complainant, that she reluctantly, adopting an attitude of 'it's not anybody's business', became involved in the investigation.

[8] It was only towards the end of cross examination of the complainant's mother that she, for the first time, revealed the following information:

'There is another day your worship where I and Mr Mnguni went to buy groceries. I asked a lift from Mr Mnguni and we travelled with the kids of Mr Mnguni. We came back from buying the groceries and Mr Mnguni had bought chocolates for his kids and there was another chocolate that he said he bought it for N. The very same day from buying groceries with Mr Mnguni I left my house to G's place but while still on the way something came to my mind, that I must turn back home. I did so. Having arrived at home when I arrived at my home I noticed Mr Mnguni touching the vagina of N and N at that time had bent her upper part of the body to the front part, bending to the front part of her body. (As demonstrated by the witness before court.)

COURT: She was bent forward? (Bent forward as she was being touched.)

MR MUSEKWA: Now what did you see? -- I said to N if somebody does something that you do not want you must inform me and never allow any person to do anything to you that you do not want.

Now did you ask accused what are you doing to my child? -- I never enquired from Mr Mnguni what he was doing. What I have noticed, his penis was erected already.

…

Now, despite you seeing that accused is touching the child you still allowed him to be with your child, to play with your child, to be in the company of your child? You had no problem with it? -- Your worship as I have already explained this is the manner Mr Mnguni was used to when playing with the kids. He would touch them in the vagina. All the kids there. And you had no problem with that (inaudible). When he touched your child's private part you had no problem with that? -- I did not have a problem your worship about that because he was also touching his kids' private parts.

So to you it was normal, it must continue? -- I do not know what to say your worship because he was used to touch the kids in that manner and it never came to my mind that at some stage he would end up raping the child.'

I am accordingly not satisfied that the real possibility of influence and suggestion can be disregarded in the consideration of the complainant's evidence. In the view I take of the matter I do not consider it necessary to express any final views on these aspects as the medical evidence, as I now turn to deal with, is decisive of the matter.

[9] Dr Thompson's evidence in my view was less than satisfactory. As I will presently deal with, he relentlessly pursued his own cause, without providing and enlightening the court with a balanced view concerning his observations and opinions, as he, as

an expert witness was in duty bound to do, It is at the outset of considerable assistance and guidance to refer to the judgment of the Supreme Court of Appeal in *Maemu v S* (147/11) [2011] ZASCA 175 (29 September 2011), which bears striking similarities to the present matter. In that matter the appeal against a conviction of rape which was based primarily on the evidence of a young child was upheld as the medical evidence was found to be inconclusive. In this regard the following considerations arose: the medical evidence likewise to the present matter, in the Form J88 under the subheading clinical findings, reflected that there was a small cleft on the upper edge of the vaginal wall and recorded that there was possible penetration with an object. In the medical evidence that was tendered no certainty was established as to the age of the cleft: whether it was old or fresh, natural or inflicted. In addition the complainant was examined some two months after the event.

[10] In the present matter the examination was conducted some six months after the alleged last event. Dr Thompson found two clefts on the hymen (which was annular in form and still intact) at position 3 and 9 o'clock. These he opined, were characteristics of old occurrences. No other injuries were found. Based on the existence of the two clefts, Dr Thompson concluded that his findings were consistent with previous vaginal penetration. He, unlike in *Maemu*, was not asked to nor did he express any opinion on the nature of the object that could have penetrated. More important however is the obvious question arising from his evidence that only the tip of his small finger was allowed, which was

'Now if I tell you that the fact that your finger could not go through, if I tell you that that fact would suggest that no penis could have gone in previously what would you say?'

Regrettably, although a flurry of words followed, no answer to the question was given. His response to the question was as follows

'No. I will say to you that, now I am going to put you through this. If you have a hymen and you penetrate it, if you get there you cause tears and that is proof that something passed there. It does not have to pass further than that. That is as far as it needs to go for me to see that something happened there. It does not have to be torn to shreds for me to realise something *has passed there*.

I just need to understand your response Dr Thompson. Do I understand you that you are saying there was penetration but not into the vagina? -- No, no, no. Do not mistake me now. I said what I saw, because I did not pass a speculum, that something had injured the hymen.

In other words something had penetrated the hymen. They make a distinction between hymenal opening and hymen, or vaginal opening and vagina. There is no distinction. It is just that this is the tissue in front of it. Alright. It is all; this is part of the same complex. So everything that you see there is female genitalia. They just distinguish for sake of description between clitoris and hymen and that. The fact of the matter is that is vaginal tissue. That is as simple as it is. So whether you hit the hymen or whether you hit the vestibule you have hit the vagina. Bottom line. Once you have it the hymen you have hit the vagina. Bottom line. It is just for us to distinguish is it in front *or is it deeper*. That is how we distinguish. So if I talk to a colleague and I say to him the injury is at the hymen he knows, he does not have to go and dig down there at the back to go and repair. He looks in the front and he repairs the front. If I tell him it is on the fourchette he knows it is external and he asks me is it first degree then I say. Well that is what you look for when you examine a patient.'

[Emphasis added]

It is clear from the excerpt of Dr Thomson's evidence that he conflated legal penetration and penetration beyond the hymenal membrane. His excitement and attempts to justify himself regrettably overtook sound reason and objectivity. As his evidence progressed he eventually proffered the opinion that the clefts were 'signs of healing' and therefore supported a finding that penetration occurred beyond the hymen, which is what the court a *quo* found. His opinion is self-destructive: he testified that a torn hymen does not heal itself. For penetration to occur beyond the hymen tearing will result. This was not observed. At best his evidence does not take the matter any further than that the clefts constituted evidence of long past penetration by an object. It does not prove 'sexual penetration' as was found by the court a quo, although it could include that.

[11] In conclusion the medical evidence, in my view, was inconclusive. In addition to the aspects I have already referred to the evidence shows that the complainant was involved with a boyfriend at the time. The appellant's version is not free from criticism. He alleged that a relationship existed between P M and Cnt Mokwai. This was denied by both and the appellant was clearly, for no apparent reason dishonest in this regard. In favour of the appellant however, is the attitude he displayed once he was informed of the allegations against him in December 2010. It is common cause that he denied the allegations, that he asked for the complainant to be medically examined, that the complainant's mother offered the complainant be examined, that the complainant's mother was unwilling to a lack of funds, that the

appellant then offered to pay for the costs of such an examination and the mother still refused for no apparent reason.

[12] Upon consideration of all relevant aspects a reasonable doubt as to the guilt of the appellant in my view, cannot be excluded. In *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15, the following was said concerning the approach to be adopted in the determination of a case:

'The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as a failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence.'

The appellant therefore should have been acquitted. It follows that the appeal must succeed.

[13] In the result the appeal is upheld and the conviction and sentence are set aside.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

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N MANAKA
ACTING JUDGE OF THE HIGH COURT

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DATE OF HEARING ***21 NOVEMBER 2013***
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