IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: ***3rd December 2019*** Signature: _____

REVIEW CASE NO: A61/2019

COURT *A QUO* CASE NO: 43/657/2015

DATE: 3rd December 2019

In the matter between:

RAPHELA: MAROBATHOTA ABRAM Appellant

- and -

THE STATE Respondent

Coram: Adams J *et* Ceylon AJ

Heard on: 21 October 2019

Delivered: 3 December 2019

Summary: Criminal law – rape of a minor – as a single witness, the complainant's testimony was required to be satisfactory in all material respects, or there had to be adequate corroboration for it – did the State prove appellant's guilt beyond a reasonable doubt –

Factual findings of trial court – absent demonstrable, material misdirections and clearly erroneous findings, an appeal court is bound by the trial court's factual

findings – discrepancies in the State's case – weight to be attached to defects in State's case – appeal dismissed and conviction confirmed.

ORDER

On appeal from: The Protea Regional Court (Regional Magistrate Moleleki sitting as Court of first instance):

(1) The appellant's appeal against his conviction is dismissed.

(2) The appellant's conviction by the Protea Regional Court and his sentence be and are hereby confirmed.

JUDGMENT

Adams J (Ceylon AJ concurring):

[1]. This is an appeal by the appellant against his conviction on a charge of rape of a ten year old minor girl child. In the court below the appellant was legally represented and he had pleaded not guilty. On the 10th of December 2013 he was convicted on the charge of rape and sentenced on the 16th of January 2014 to direct imprisonment for a period of twenty years. This appeal is with the leave of the court *a quo*, who granted leave to appeal the conviction but refused the appellant's application for leave to appeal his sentence.

[2]. The complainant was ten years old at the time of the rape and eleven years old when she gave evidence in the trial court during October and November 2013. The appeal against conviction principally turns on the reliability of the evidence of the complainant and the evidence of her witnesses as contrasted against the evidence of the appellant, who denied that he raped the complainant as alleged. Put differently, the main issue in this appeal is whether the state had succeeded in proving beyond a reasonable doubt that the appellant was guilty on the charge of rape of the little girl.

[3]. The conviction of the appellant was based in essence on the evidence of the complainant, S X, an eleven year old girl, who was ten years old at the time of the alleged rape. Her date of birth is […] 2002. She gave her evidence through and with the assistance of an intermediary.

[4]. The presiding Regional Magistrate made a determination in terms of sections 164 & 165 of the Criminal Procedure Act 51 of 1977 ('the CPA') in order to satisfy herself that the complainant was sufficiently intelligent to distinguish between truth and falsehood. She found that the complainant understood the difference between the truth and lies and therefore ruled summarily that the complainant had the necessary competency and capacity to give evidence in a court of law. This finding by the trial court is not disputed in any way by the appellant on appeal nor for that matter was it disputed during the proceedings in the Soweto Regional Court.

[5]. Thereafter, the complainant commenced with her evidence. She confirmed that she was at court on the day the trial commenced to testify 'in the case involving myself and Abram', who she said was a friend of […] and who went by the nickname of 'Absa'. On a direct question during her examination-in-chief she testified that it was Abram Raphela who raped her when she was ten years old. She could not remember on which day of the week the rape occurred, but she could recall that it was a school day as she was supposed to be at school on the day. She explained however that she was not at school at the time. She was playing truant, because she would have been late for school in the morning and so she had decided not to go to school rather than arrive there late. She had left home, dressed for school in her school uniform, but then diverted and went and sat in a 'scrap car' near her home and this, according to her evidence, is where she was raped. Before the rape incident happened, she had been 'hanging out' in this abandoned scrap vehicle parked in someone's yard.

[6]. At some point whilst she was sitting in the driver's seat of the scrap car, or as she put it, 'hanging out', the accused arrived and got into the car on the left front passenger side. He then asked her why she had not gone to school,

whereupon she explained that she would have arrived late at school and decided instead to ‘bunk’ school. He then suggested that they play a game of cards, and she responded that that would be difficult since he did not have cards. He in turn then indicated that he would go to the shop to buy playing cards, whereafter he alighted from the vehicle and locked the doors. At that point during her evidence there was a disjuncture in her testimony because at that stage the indications were that the complainant was taking strain and appeared extremely tired, which caused the trial court to adjourn for the day and to reconvene just more than a month later.

[7]. When the trial resumed her evidence continued. From the record, there appears to be no continuity in her evidence, because when she continues her evidence on the second day of the trial, it does not proceed from where she ended on the previous occasion. This was so despite the fact that the State Prosecutor had attempted to get her to simply continue on from where they had stopped on the previous occasion. She continues thus:

‘He took me and then he instructed me to go to the back of the motor vehicle. And then after that he told me to undress myself. I did not want to do that and then that is when he undressed me and he took of my panties. Then thereafter he also took off his underwear. After that, that is when he inserted his penis into my vagina. And then after he had finished doing that, he was on top of me and then he closed me with the black tape.’

[8]. The reference to the black tape, the complainant indicated was to the fact that the appellant closed her mouth with the black tape. Thereafter, so her evidence went, ‘he made an up and down movement on top of me. He was bumping’. Later on in her evidence, the complainant also confirmed that she felt pain when the appellant inserted his penis into her vagina. She could not scream because the appellant had taped close her mouth. After they were done, an unknown male passed by, and this person enquired from the appellant as to whether he had done that (presumably referring to the raping of the complainant) before and the accused simply ignored this individual. Thereafter, they got dressed and the appellant took her home. When they got to her house, the appellant reported to her aunt that he found her bunking school in an

abandoned scrap vehicle and the aunt agreed to him taking her to school, where he left her in the care of school personnel.

[9]. The evidence of the complainant was furthermore that at some point after her arrival at school, she told one J, who seemingly was a member of the school's administration staff, that the person who had brought her to school, meaning the appellant, had raped her. She said that she told J in response to a question by her as to why this person had brought her to school. This same J is the one who took her to the Dobsonville Clinic, where they were instructed to go to the police station, which they did. From there they were referred to Discovery for a medical examination.

[10]. During cross-examination, the complainant testified, contrary to what she had said in her evidence-in-chief, that she was in fact waiting in the scrap car for her sister, who had gone to the toilet, and on her sister's return they would have carried on to school.

[11]. Under cross-examination she remained adamant that she had been raped by the appellant. When it was put to her that the appellant, when he would give evidence, would deny that he had raped her, her response was a simple: 'I am saying it is the truth.' The complainant also confirmed under cross-examination that she initially told J that nothing had happened. She did this because, so she testified, she was scared. J, according to the complainant, is the one who by herself saw that something was wrong. She in fact saw 'some white marks'. She had only spilled the beans at about 13:00, after having resisted all morning the requests by J that she tells her everything. The complainant also only told J that she had been raped by the appellant after she had explained to her (J) that on a previous occasion or occasions she had been raped by six to nine males, who are known to her. Oddly enough, her evidence was that these six to nine thugs also taped her mouth close before raping her. Towards the end of her cross-examination she commented as follows when it was again put to her that the appellant denies that he raped her: 'Even the doctors confirm that … what he did to me … it was the truth'. Also, when it was suggested to her that it would have been impossible for the appellant to rape

her because he would have been seen by passers-by as the vehicle was in plain sight of members of the public, her answer was again plain and simple as follows: 'What I am saying is that he was able to rape me on that particular day and at that particular time'.

[12]. On a question by the court, the complainant, with reference to the white marks on her school pants which were noticed by J, said that it was semen. This answer I find a tad peculiar if regard is had to the age of the complainant. However, it may very well be that at age eleven she understood what this was about.

[13]. The second witness on behalf of the State was a Ms J M, an administrator at the […] Primary School in […] in Soweto, which was the school attended by the complainant at the time of the incident in question. She testified that on the 16th of August 2013 at about 10:45 she met the complainant, who had just been dropped off at the school by the appellant. She (the complainant) was not in a good space – '… she was frightened and shivering'. J thereupon took her to a room, gave her food and left her there so that she could warm up a bit and hopefully calm down. J left her in that room and went to run an errant, only to return after the lunch break. The complainant still seemed somewhat unsettled on her return and she resolved and instructed the other staff members that the complainant should not attend class for the rest of the day. Instead she let the complainant rest and settle in the storeroom.

[14]. At some point, whilst in the storeroom, the complainant, when asked by J what was going on, referring no doubt to the state that the complainant was in and to the fact that in the storeroom the complainant bizarrely was having 'a conversation' with loose planks and instructing the planks to 'open up', told her that six or nine men from her neighbourhood had raped her. Then, when J asked her about the white marks on her school trousers, she intimated that she would rather not talk about that, because, if she did, the person who had brought her to school, referring to the appellant, would kill her. J told the court that the white marks on the trousers to her looked suspiciously like 'sperm'. Her evidence was furthermore that shortly thereafter, and after some

encouragement by her, the complainant spilled the proverbial beans and told her that the appellant had raped her that morning in a scrapped motor vehicle not far from her home. Later on she took the complainant to the clinic, where she was examined and assessed, and at which point it was confirmed that the complainant was in fact raped. I shall revert to this aspect of the matter later on in the judgment when I discuss the Form J88 medical report by the doctor who examined the complainant that night at about 21:00.

[15]. The third witness for the State was the complainant's paternal aunt, one L N, who confirmed that at about 11:00 on the morning of the 16th of August 2012, the complainant, who was then supposed to be at school, and the appellant arrived at their home. At that time L and the complainant, as well as the complainant's father and some other people, were all living at his house. The appellant reported to her that he had found the complainant sleeping in a scrap vehicle in the area. She had covered herself with plastic. This report, according to her evidence, upset L, who then wanted to give the complainant a hiding for being naughty and for bunking school. The appellant however persuaded her not to beat the complainant and he agreed to accompany her to school. Importantly, this witness also testified that when the complainant arrived home with the appellant, she looked like someone who had been crying and seemed upset. She however did not ask the complainant why she looked upset.

[16]. Under cross-examination L stated that the complainant and her cousin, T, were in the habit of bunking school and when they were caught out, their explanation would be that the school locked the gates and denied latecomers entry onto the school premises. She (L) even went to school once to enquire why the kids would be denied access to the school premises and to their classes just because they were late. It transpired that the complainant was lying about the gates being locked. This witness painted a picture of mischievous ten year old girl, who, when caught out as a mischief-maker, would resort to telling fibs.

[17]. The medical evidence relating to the examination of the complainant by a medical doctor, Dr N Madonsela, was received and accepted into evidence in

the form of a Form J88 medical report and a certificate in terms of s 212(4) of the CPA. The defence did not object to this evidence and the contents of the report, including the facts contained therein and opinions expressed in the report, therefore became common cause. According to the medical report, the complainant was examined and assessed by the doctor at 21:06 on the night of the 16th of August 2012. The doctor recorded that the patient gave a history that on the 16th August 2012 she had been raped at Bram Fischer by a man who was known to her. At about 09:00 this male person had pulled her into a scrap yard because she had skipped school. He removed her trousers and proceeded to insert his penis without a condom. The doctor noted that there were no signs of any physical injuries. Her health and emotional status were reported as normal (not afraid). The report concluded that there was no clinical evidence of any physical injuries.

[18]. As regards the gynaecological examination, the findings by the doctor on examining the clitoris, the frenulum of the clitoris, the urethral orifice and the par urethral folds were to the effect that these were all normal. There was no scarring, no bleeding and no increased fallibility of the posterior fourchette. There were no injuries on the perineum. Importantly though there was a bruising of the fossa navicularis and the hymen, which had an oval configuration, had fresh tears and was bruised. The doctor concluded that her clinical and gynaecological findings accorded with the history taken from the patient that she had been sexually assaulted as evidenced by the bruising and the tears of the hymen and the vagina.

[19]. In his testimony, the appellant denied that he raped or attempted to rape the complainant. During his evidence in chief, he explained that on the day in question he was walking to a friend to go and ask for a cigarette. On his way to the friend he walked pass a scrap vehicle and noticed the complainant sitting in the vehicle. Being a concerned citizen, he approached the girl, opened the door and took her out of the vehicle. He then asked her why she had not gone to school. The complainant's response was that they, meaning the school, had 'dismissed her from school'. He then took it upon himself to take the child home and on his arrival at her home, he informed the aunt that the girl was playing

truant. This upset the aunt, who intended giving the complainant a good hiding. The appellant was able to dissuade the aunt from beating up the child and he agreed that he would ensure that the child gets to school. On their way to school they came across the father of the complainant, who, according to the appellant, was singularly disinterested in the fact that the child had 'bunked' school. The father confirmed though that the appellant should do what he was intending to do, namely to take the child to school.

[20]. On their arrival at school, the appellant enquired from the security guard as to why the school was turning children away just because they were late. This was denied by the security guard, whereupon the appellant requested to go and see the principal, who also confirmed that the school did not turn away children who arrive after the bell had gone. This was also confirmed by the complainant's class teacher, who stated that the child usually bunks school. Thereafter, the appellant left the school premises and returned to the home of the complainant and reported to the aunt what had transpired at the school

[21]. The appellant further testified that three to four days later he got word from people in the neighbourhood that the complainant accused him of having raped her. Obviously concerned about this, he went to her house and enquired from the father as to the rumours making the rounds. The father explained that it was his sister who would be able to shed some light on the matter, but she was not home at that stage nor at the stage when he returned at about 20:00 later that evening and so he decided to wait for her to come home. The aunt eventually did come home, except that she was then in the company of members of the South African Police Services who there and then arrested the appellant for rape.

[22]. Under cross-examination the appellant confirmed that for the duration of his interaction with the complainant on the day in question, starting when he took her out of the scrap vehicle and then accompanying her home and then to her school, there were no issues or disputes between the two of them. He was the 'good Samaritan' and she was at the receiving end of his good heart and his humanity. She ought to have been grateful for his concern, so it was put to the

appellant, and not turn on him, as she did, and falsely accuse him of having raped her. Importantly, at no stage during the time he was in the company of the child did she say to him that he had been raped, which, by all accounts, had been the case. I shall return to this aspect of the matter later on in the judgment when I analyse the possibility of the version of the appellant being true. When confronted under cross-examination with the improbability of the complainant falsely accusing him, the appellant's response was as follows: 'I do not know what to say about that. Maybe she is … protecting herself from issues like bunking school and now they are looking at her with that belief.'

[23]. That then was the evidence before the court *a quo*.

[24]. The complainant was a single witness and the cautionary rule was applicable to her evidence. In addition, at the time of the incident, she was ten years old and she was eleven years old when giving evidence during the trial in the Soweto Regional Court. The question in deciding this appeal is whether the court *a quo* applied and had regard to the cautionary rules which are applicable *in casu*. The cautionary rules obviously relate to the fact that the complainant, who was a minor child, was a single witness relative to the rape.

[25]. The uncontested medical evidence in the form of the medical report completed by Dr N Madonsela, as well as her s 212 certificate, irrefutably confirms that the complainant was raped on the day in question. There were fresh tears of the hymen and her vagina was bruised. There can therefore be no doubt that the complainant had been raped on the day. The question is whether it was the appellant who, beyond reasonable doubt, committed the rape. This question is asked in light of apparent discrepancies in the State's case, not the least of which is the fact that the child possibly had a reason to fabricate a story with a view to divert attention from her recalcitrant conduct on the day in question. In other words, the tough question which the appeal court should ask is this: Is it not reasonably possible that the child, who found herself in a spot of bother, made up the story of her being raped, which would then have meant that she would have been off the hook as far as her 'bunking' of school was concerned. This question should also be asked in the context of the admitted fib

and fibs which the complainant spun when, on a previous occasion she had been caught out in her truancy.

[26]. There is also a concern relating to the lack of DNA scientific evidence. The point is that, according to the evidence, there was semen, presumably that of the appellant, on the pants of the complainant when she arrived at school. If this substance had been subjected to a DNA test and was found to be that of the appellant, it would have linked him inextricably to the commission of the rape. The fact that no such evidence was presented by the State possibly raises question marks about the guilt of the appellant. There could have been no better corroboration for the complainant's version than such scientific evidence. Then there is also the fact that 'first report' evidence suggests that the story of the rape had been dragged out of the complainant by J.

[27]. What is the cumulative effect of these discrepancies in the State's case? Does this not mean that the guilt of the appellant had not been proven beyond a reasonable doubt?

[28]. As I said, the complainant was a single witness. In *S v Sauls* 1981 (3) SA 172 (A), it was held that when it comes to the consideration of the credibility of a single witness, the trial judge will weigh the evidence, consider its merits and demerits, and having done so will decide whether despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. Furthermore, the exercise of caution must not be allowed to displace the exercise of common sense.

[29]. As a single witness, the complainant's testimony was required to be satisfactory in all material respects, or there had to be adequate corroboration for it. The corroboration required is evidence implicating the appellant, not merely confirming what the complainant had reported. In that regard see: *S v Hammond* [2004] 4 All SA 5 (SCA) at paras 11 to 17. Such evidence must support the complainant's version and render the appellant's conflicting version less probable on the issues in dispute. (*S v Gentle* [2005] ZASCA 26; 2005 (1) SACR 429 (SCA) para 18).

[30]. As was pointed out by Majiedt JA in *Naidoo v S* (333/2018) [2019] ZASCA 52 (1 April 2019), it is essential for an appeal court to remain cognisant of the strictures on it as far as the trial court's factual findings are concerned. Absent demonstrable, material misdirections and clearly erroneous findings, an appeal court is bound by the trial court's factual findings. (*S v Hadebe & others* 1997 (2) SACR 641 (SCA) at 645E-F; *S v Modiga* [2015] ZASCA 94; [2015] 4 All SA 13 (SCA) para 23). As was held by the Constitutional Court in *Mashongwa v PRASA* [2015] ZACC 36; 2016 (3) SA 528 (CC) para 45, it is not for an appellate court 'to second-guess the well-reasoned factual findings of the trial court'. We, as the appeal court, are not the triers of fact at first instance.

[31]. I have above dealt with the two contradictory versions of the appellant, on the one hand, and that of the complainant, on the other hand. I have alluded to the perceived shortcomings in the State's case.

[32]. The appellant's version is a denial that he raped the complainant. The major difficulty with the version of the appellant is that it does not explain the common cause fact that the complainant was raped at or during the time when, by his own admission, he was in her company. There is also this very material improbability in his version that when he met up with the complainant she had probably been raped shortly before then. The improbability lies therein that the child did not say one word to him about this rape despite the fact that he was being *uber* kind to her and demonstrated a genuine concern for her well-being. Instead what the complainant did was to turn on her 'good Samaritan' and fabricated a story that he raped her. The inherent improbability in this narration is evident and manifest. The appellant's attempt at explaining away this material discrepancy by claiming that the child needed to protect herself against her own mischievous behaviour by fabricating a version against him does not hold water. If she really wanted to do that, she needed only to tell people, including the appellant himself, that she had been raped.

[33]. As I have already indicated, the appellant's account of events glaringly leaves the gynaecological findings of the doctor relative to the complainant

unexplained. As I see it, the J88 medical report is decisively against the appellant's version.

[34]. The Regional Magistrate gave a detailed judgment. She was mindful of the cautionary rules which applied to the complainant's evidence as a single, child witness. She was acutely aware of the shortcomings in the child's testimony. She enumerated the various contradictions in her evidence, notably the fact that she initially said that she was bunking school in the scrap vehicle and later changed her story and said that she was waiting for her cousin. She nevertheless found the complainant truthful, reliable and credible. She held as follows:

'Although the complainant was a single witness, the court found her to a truthful witness. She came across as frank and sincere and was able to give a step by step account of the events. She was consistent and she stood up very well against cross-examination.

The evidence of the State as a whole appears to be in line with all the undisputed and proven facts of the case.'

[35]. In his Heads of Argument, Mr Musekwa, Counsel for the appellant, subjected the Regional Magistrate to criticism for finding that the complainant was a truthful witness and for not taking into account the contradictions in her evidence. Criticism was also levelled at the fact that the lack of scientific evidence relating to the DNA analysis of the 'semen' which were reportedly found on the pants of the complainant was not regarded by the Regional Court as detracting from the reliability of the case presented on behalf of the State. However, a careful reading of the evidence of the complainant portrays a coherent, detailed and consistent narration of events. There is not a single part of her version which warrants outright rejection. Importantly, her evidence appears to have been given in a spontaneous manner. In that regard, her reference to the nickname of the appellant, that being Absa, is particularly telling. There certainly were a few contradictions and discrepancies in her evidence. Most of these do not however, in our view, impact so adversely on the quality of her evidence that it renders her testimony as a whole unreliable or untruthful.

[36]. In my view, the Regional Magistrate's approach in her analysis of the evidence cannot be faulted. She rejected the appellant's version as false beyond reasonable doubt. I agree with that assessment. If all of the evidence is viewed as a whole, the court *a quo* was right in its finding that the version of the appellant does not make sense.

[37]. As stated, the complainant gave a detailed, coherent account of the events. And most of it, but for the crucial fact relating to the rape, accorded anyway with that of the appellant. It is, as I have indicated above, highly improbable that the complainant would fabricate false evidence against the appellant, who had been nothing but decent and concerned about her well-being. The probabilities and the inherent strengths and weaknesses of the two conflicting versions had to be considered in weighing up the elements which point towards the appellant's guilt as against those indicative of his innocence. (*S v Chabalala* 2003 (1) SACR 134 (SCA) para 15). I am not persuaded that the trial court was wrong in accepting the complainant's version and rejecting that of the appellant as false beyond reasonable doubt. I can find no material misdirection or clearly erroneous finding on fact in his judgment. The medical evidence in my view puts the matter beyond reasonable doubt.

[38]. This conclusion accords with the picture in the matter as a whole. It is essential that one must never lose sight of the complete, overall picture. In *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426E–H Marais JA cited the following passage in *Moshepi & Others v R* (1980 – 1984) LAC 57 at 59F–H:

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step

back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'

[39]. The Regional Magistrate therefore correctly rejected the appellant's version as false beyond reasonable doubt. In my view, she was also correct in concluding, on the version of the complainant, that she was raped by the appellant. The appellant's appeal is devoid of merit.

[40]. I am accordingly of the view that the appellant's appeal against his conviction should be dismissed.

Order

Accordingly, I make the following order:-

(1) The appellant's appeal against his conviction is dismissed.

(2) The appellant's conviction by the Protea Regional Court and his sentence be and are hereby confirmed.

L R ADAMS
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree,

B CEYLON
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

HEARD ON:	21st October 2019
DATE OF JUDGMENT:	3rd December 2019
FOR THE APPELLANT:	Advocate L Musekwa
INSTRUCTED BY:	Legal Aid South Africa
FOR THE RESPONDENT:	Adv W Vos
INSTRUCTED BY:	The Office of the Director of Public Prosecutions, Gauteng Local Division, Johannesburg