REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A137/2019

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

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SIGNATURE **DATE**

In the matter between:

T, F Appellant

and

THE STATE Respondent

JUDGMENT

WEINER J

Introduction

[1] The appellant was charged with the contravention of s 3 read with s 1, 56(1), 57, 58, 59, 60, 61 and 68 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with s 256, 257 and 281 of the Criminal Procedure Act 51 of 1977 (the 'CPA') – rape – read with the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007.

[2] There is no dispute that the charge sheet referred to the provisions of s 51(1)(*a*) in Part I of Schedule II of Act 105 of 1997 in respect of the minimum sentence applicable, being life imprisonment. The charge sheet also indicated that such provisions were applicable because the complainant was a minor child, six years old at the time.

[3] The appellant pleaded not guilty, but was convicted on 18 October 2018. On 8 January 2019 he was sentenced to life imprisonment. An appeal is automatic since he was convicted and sentenced to life imprisonment by the Regional Magistrates' Court. He appeals against both conviction and sentence.

CONVICTION

[4] It is trite that the onus which rests on the state in criminal cases is to prove the guilt of an accused beyond reasonable doubt, but not beyond all shadow of a doubt. A court does not have to rely upon absolute certainty, but merely upon justifiable and reasonable certainty.[1]

[1] *S v Ntsele* 1998 (2) SACR 178 (SCA), see headnote at 180D.

[5] The conviction of the accused was based on the factual findings of the trial court. In *Mkhize v S*,[2] Mocumie AJA held:

'The approach to be adopted by a court of appeal when it deals with the factual findings of a trial court is trite. A court of appeal will not disturb the factual findings of a trial court unless the latter had committed a material misdirection. Where there has been no misdirection on 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. This court in *S v Naidoo & others*[3] reiterated this principle as follows:

"In the final analysis, a Court of appeal does not overturn a trial Court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong."'

[6] The evidence against the appellant was provided by the mother of the complainant, M (Ms M) and the complainant. In addition, the defence made a formal admission and admitted the contents of the J88 medical report compiled by Dr Nkondo, who found that the complainant's vaginal injuries were consistent with blunt force injury. The appellant thus admitted that sexual penetration had taken place. What was in issue was the identity of the perpetrator.

[7] Warrant Officer Mnisi compiled a DNA report and statement in terms of s 212(4)(*a*) of the CPA. This was also admitted by the appellant. The appellant's DNA was found on the panties of the complainant. In this regard, the appellant stated that he was surprised at this finding. His explanation was that the DNA was positive because the complainant was his child and they accordingly share the same DNA. This explanation is scientifically unsustainable and rejected as false.

[8] Ms M testified that the complainant was six years old at the time of this incident. She and the appellant had been in a relationship. The appellant was the father of the complainant. They had broken up when the complainant was two years old. They all stay in Munsieville. The appellant stays across the road from the complainant and Ms M. She and the appellant had an arrangement that the

[2] *Mkhize v S* (16/2013) [2014] ZASCA 52 (14 April 2014) at para 14 (Maya, Shongwe, Willis and Saldulker JJA concurring).
[3] *S v Naidoo & others* 2003 (1) SACR 347 (SCA) para 26.

complainant would stay with the appellant over the weekends. On 14 October 2017, the complainant came back from visiting the appellant. She had been there from Friday, 12 October 2017. When the complainant returned she complained that she was in pain. Ms M testified that the complainant was crying and shivering. The complainant reported that the appellant had ‘done naughty things to her’. On further enquiry, she pointed to her private parts and stated that the appellant had put something in there. Ms M went to confront the appellant, who denied the allegations. Ms M immediately went to report the matter to the police together with the complainant. She thereafter took the child to the doctor who completed the J88 report.

[9] The complainant testified through an intermediary. She stated that the incident took place at the house of the appellant; although she was unable to remember the date. She was eating in the kitchen when the appellant called her to his bedroom. In court, the complainant made use of two dolls, a male figure and a female figure, to demonstrate how the rape took place. She undressed the dolls and pointed the court to the vagina (‘koekoenasie’) and penis (‘bird’). She demonstrated how the appellant had put his ‘bird’ into her ‘koekoenasie’.

[10] The appellant denied that he had raped his daughter. He admitted that he was with the complainant on the day in question. His version was that the complainant was coached by Ms M to lie to the court about him. Ms M, according to the appellant, wanted him in jail so that he would not receive money that was due to him from the Road Accident Fund, in relation to an accident in which he was injured. He stated that she wanted the money for her and the complainant.

[11] He also testified that he had become impotent as a result of the accident, but provided no medical evidence in this regard. In addition, this version was not put to Ms M. He admitted the DNA results and stated that perhaps Ms M had stored his semen when they were together so that she could plant it on his daughter's panties in order to trap him.

[12] The learned magistrate treated the testimony of the complainant as that of a single witness and that of a child witness. He approached it with the necessary caution and considered the provisions of s 208 of the CPA.[4]

[13] It is settled in our law that in evaluating evidence, all that the trial court has to ask itself is whether the evidence presented to it by a young witness is trustworthy. For the evidence of such witness to be trustworthy would depend on a number of factors, such the child's power of observation, recollection, and the power of narration of the specific events at hand.[5]

[14] It is trite that a court is entitled to treat single and/or child witnesses with a certain amount of caution. This does not elevate the position to that of applying the cautionary rule.[6] The court need only find that the evidence was trustworthy and that the truth has been told. See *S v Sauls*[7] where it was held that:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the 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 has been told. The cautionary rule…may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded"…. It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'

[15] In *S v Artman*,[8] Holmes JA held as follows:

'She was, however, a single witness in the implication of the appellants. That fact, however, does not require the existence of implicatory corroboration: indeed, in that event she would not be a single witness. What was required was that her testimony should be clear and satisfactory in all material respects….'

[16] In *S v Mahlangu*,[9] the SCA said the following:

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[4] Section 208 of the CPA provides as follows: 'An accused may be convicted of any offence on the single evidence of any competent witness.'
[5] See *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A).
[6] See *S v M* 1999 (2) SACR 548 (SCA).
[7] *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G.
[8] *S v Artman and Another* 1968 (3) SA 339 (A) at 341A-B.

'The court can base its finding on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration. The said corroboration need not necessarily link the accused to *the crime*.' (Emphasis added)

[17] The learned magistrate accepted the evidence of Ms M. He found that she was a reliable and credible witness and had told the truth. In regard to the complainant, the magistrate stated as follows:

'…There were some discrepancies in her evidence. The court is going to put this to her tender age. But in general this child gave evidence of a clear and concise nature explaining in great detail what transpired…when she was raped by her father, the accused…She is further clear of the identity of the perpetrator being the accused. The accused is known to her being her father. The last incident took place in broad daylight. There is no reason that this child would have made a mistake in the identity of her perpetrator.'[10]

[18] There is no issue in this case of mistaken identity. The evidence of the complainant is corroborated by the medical evidence presented by Dr Nkondo and, more particularly, by the DNA evidence which directly implicates the appellant.

[19] In regard to the evidence of the appellant, the learned magistrate remarked that he gave poor quality evidence. His evidence was comprised of 'improbabilities and inconsistencies'.[11] The court thus rejected the version of the appellant that the complainant was coached by her mother to implicate him in a crime. The state witnesses and the corroborating evidence referred to above demonstrate that the appellant was correctly convicted of the offence.

SENTENCE

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[9] *S v Mahlangu* 2011 (2) SACR 164 (SCA) at 171B.
[10] See p188 of the record.
[11] See p119 of the record.

[20] The imposition of sentence is in the discretion of the trial court and a court of appeal does not interfere with this discretion for frivolous reasons. In *S v Nkosi*,[12] Maya JA held as follows:

'…it should be reiterated that sentencing is pre-eminently a matter for the discretion of the trial court and that this court does not have an overriding discretion to interfere unless the sentences imposed by the court below are vitiated by an irregularity or misdirection or are disturbingly inappropriate.'

[21] The charge sheet explicitly stated that the state would be relying on the provisions of s 51(1)(*a*) of the Criminal Law Amendment Act 105 of 1997, which provides for a prescribed sentence of life imprisonment to be imposed in relation to the rape of a minor.

[22] The trial court considered the pre-sentence report, as well as a victim impact report. The victim impact report contains a detailed assessment of the impact of trauma suffered by the complainant as a result of the rape. This was her father, the person that she trusted, who violated her. The damage may well be irreparable.

[23] The personal circumstances of the appellant provided no substantial and compelling reasons why the sentence of life imprisonment should not be imposed.

[24] The aggravating circumstances outweigh any personal circumstances in favour of the appellant. These include the following factors:

1. Rape is a serious and prevalent offence.

2. The complainant was a minor child at the time of the rape, age 6 years old. She was defenceless and could offer no resistance to the appellant.

3. The appellant was her father; a trusted person in her life.

4. She was deprived of her innocence.

[12] *S v Nkosi* 2011 (2) SACR 482 (SCA) para 34.

5. The appellant did not use any form of protection when raping the complainant; this exposed her to the possibility of contracting a sexually transmitted disease.

6. The appellant was not a first-time offender. He had two previous convictions for assault which contain an element of violence.

[25] Rape is a humiliating and degrading, and a brutal invasion of the privacy, dignity, and person of the victim – more particularly in a case such as this where a young child of six is raped by her father. Nothing less than a life sentence is warranted in this case.

ORDER:

[26] Accordingly the appeal against conviction and sentence is refused.

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S E WEINER

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

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T P MUDAU

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	28 January 2020
Date of judgment:	25 February 2020

Appearances:

Counsel for the Appellant:	Adv. AH Lerm
Instructing Attorneys:	Legal Aid
Counsel for the Respondent:	Adv. MM Mbaqa