REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: SS14/2019

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: /NO
REVISED: YES

In the matter between :

THE STATE

- v -

SUNNYBOY ANTHONY Accused

JUDGMENT

STRYDOM J :

[1] The accused, Mr Sunnyboy Anthony, hereinafter referred to as the accused was arraigned on one count of rape in contravention of the provisions of section 3 read with various sections of the Criminal Law Amendment Act. He was also arraigned on a count of sexual exploitation of a child in contravention of section 17 of the same Act.

[2] Pertaining to count 1, it is alleged that on or about 31 August 2020, and at or near Plot [....] Elandsdrift Road, Muldersdrift, in the District of Mogale City, the accused did unlawfully and intentionally rape N[....] Z[....], a six year old boy, by committing an act of sexual penetration by penetrating the anus of the boy. As far as count 2 is concerned, it is alleged that on the same date mentioned in count 1, the accused unlawfully and intentionally engaged the services of N[....] Z[....] with or without his consent and for financial or other reward, favour or compensation to the child for the purpose of committing a sexual act with him.

[3] The accused who was represented by Mr Mavatha from Legal Aid, pleaded not guilty to the counts and elected to give no plea explanation and exercise his right to remain silent.

[4] The accused was informed by the court about the applicability of minimum sentences as per the General Law Amendment Act, 107 of 1997.

[5] Before the State called the complainant, the State applied for the evidence of N[....] Z[....] (hereinafter referred to as "N[....]") to be received through an intermediary as contemplated in section 170A of the Criminal Procedure Act 51 of 1977 ("CPA"). There was no objection to this and the application was granted.

[6] N[....] was then called as a witness. The court established from N[....] whether he could distinguish between truth and lies and was satisfied that he knew what it meant to speak the truth. The court further established whether N[....] was aware of what it means to take the oath. Again the court was satisfied that N[....] understood the nature and import of the oath and he was sworn in as a witness. The court proceeded to receive his evidence in camera.

[7] N[....] testified that he was now 8 years old and 7 years old when the incident took place. He could not provide the date. He said he was playing with Penene (later referred to as Piekanien) and Daisy when Madala called him. He identified Madala as the accused. He knew him as they were neighbours. He went to the accused who sent him to a shop to go and buy an energy drink called "Dragon" and meat. He went to the shop and returned to the house of the accused.

[8] He said it was then when the accused did some “funny things” to him. He said that the accused took his private part and then put it into his buttocks.

[9] He said that his friends could see what happened inside the house of Madala. He said they looked through the keyhole. They told him afterwards that they saw what happened. He said that it was painful. He said he was lying on the bed on his tummy. He said the accused took off his pants and underwear. He never saw the private part of the accused. He said this took about 2 minutes. He was given R5 by the accused which he used to buy sweets.

[10] He said when he left the house of the accused he saw Piekanien and Daisy. He told them what happened and that Madala did funny things to him. They suggested to him that he must go and tell his mother. This he did when he arrived home and he told her that the accused took off his clothes and underpants and “*raped me*”.

[11] His mother then called the police. The police came and they went to the police station. He was thereafter examined by a doctor.

[12] During cross examination, he confirmed that the accused was using a walking stick at the time of the incident.

[13] It was put to N[....] that the accused never sent him to the shops. He said it was not the first time that he was sent. He confirmed that his two friends were 9 years old.

[14] When asked why he did not run away, he said he was locked in.

[15] It was put to him that the accused never saw him on 31 August 2020. N[....] was adamant that the accused did funny things to him. He denied that the accused was too sick to do these funny things. He then said that the accused was not using a walking stick.

[16] He said that his mother and the accused were not on speaking terms with each other. He confirmed that he told his mother on the same day what happened.

When his mother's version according to her statement was put to him that she only saw the following day that he had trouble walking and saw blood on his underwear he agreed that she only became aware what happened to him on the day after the incident. He then said he was too afraid to tell his mother what happened to him on the same day. He said the accused told him that if he tells his mother he will kill him. It was pointed out to him that this was now new evidence and was not alluded to in his testimony.

[17] The State then called Junior Tabang Mokoena. He is a friend of N[....]. He said his other name was Piekanien.

[18] He confirmed that the accused, who he also referred to as Madala, told him to go and call N[....]. He did so and Madala then called N[....] and said he must come to his home.

[19] He then went to his house to go and eat. He did not know what happened to N[....]. He said that he spoke to N[....] afterwards and he then told him that Madala did silly things to him. He then told him that he must tell his mother. He said this happened long after the day when N[....] went to the home of the accused. He denied that he peeped through the keyhole of the accused's home when N[....] was in the house with Madala.

[20] He said the accused never directly called N[....]. When it was put to him that the accused will say that he never called him, he said it was a lie. He insisted that the accused knows him.

[21] The State then called N[....]'s mother, Ms J[....] Z[....]. She testified that on 1 September 2020 she saw N[....] limping and she followed him to the toilet. She saw blood or something like mucus in his faeces in the toilet. She asked him what happened and he said it is Madala and that this was going on for a long time. She did not inspect him.

[22] The police as called. They came and took them to Muldersdrift Police Station and later to Merafong Hospital where N[....] was examined. N[....]'s underpants and tracksuit pants were put into a plastic forensic evidence bag.

[23] She testified that there was no problem between her and the accused who was her neighbour. She used to do washing for him. She said he used to walk normal without a walking stick.

[24] She said that N[....] told her that the accused is "sleeping with him" more than once. He did not tell her of other incidents. She confirmed that she did not touch his buttocks as N[....] testified.

[25] The State did not call the other friend of N[....] as previously indicated but called Dr. Everson Mzobe who examined N[....]. He compiled a J88 form and testified accordingly.

[26] He testified that the history the child gave to him was that a known male has been penetrating him with his penis in his anus on a number of times. He stated that the last time was not known. His mother noticed that the child was crying and passing a stool and his trousers having blood on it that morning. He noted that there was some blood on the tracksuit pants. He observed no physical injuries.

[27] In terms of the medico-legal examination report which was marked X, which he read into the record, he observed a tag on the anus of N[....] at 6 o'clock and concluded that there was a painful digital examination and blood streak on his finger. He further concluded a reflex dilatation consistent with abuse of anal penetration and blood streaks consistent with trauma in the anal canal.

[28] According to the J88 evidence samples were taken from N[....] and sealed in a plastic bag.

[29] The doctor admitted that although a reflex dilation is consistent with abusive anal penetration that this is not conclusive and that there can be other causes for this.

[30] The investigating officer Funi Mapena then testified that the samples were handed in for examination at the forensic science laboratory to ascertain whether there is DNA found which matches that of the accused. Mucus samples were taken from the accused on more than one occasion which was also sent to the laboratory for comparison. He testified he never got the results back.

[31] This concluded the State's case.

[32] The accused then testified denying all the allegations against him. He said that although he knows N[....] he did not send him to the shop on 31 August 2020. He said that during the time he was not sexually active as a result of his back problems. He denied that he had sexual intercourse with N[....] and testified that he was 61 years old. This concluded the evidence in this matter.

[33] On behalf of the State, Ms Marasela asked for a conviction on count 1. She argued that the evidence of N[....] should be accepted as it was corroborated by the evidence of Junior or Piekanien as well as the evidence of N[....]'s mother and the medical evidence.

[34] On behalf of the accused, it was argued that the failure of the State to lead evidence on the result of possible DNA evidence was fatal for the State. The Court was referred to the cases of *S v Carolus* 2008 (2) SACR 207 (SCA). In paragraph 32 of this judgment the court found as follows:

> *"[32] There are disturbing features of this case that we are constrained to address. In addition to the flagrant disregard of the rules relating to the identification of suspects, no crime kits were available at the hospital to enable Dr Theron to take a sample for DNA analysis. It is imperative in sexual assault cases, especially those involving children, that DNA tests be conducted. Such tests cannot be performed if crime kits are not provided. The failure to provide such kits will no doubt impact negatively on our criminal justice system."*

[35] Mr Mavatha further argued that there exists no corroboration for the version of N[....] through the evidence of other State witnesses. He said that N[....] and Piekanien contradicted each other, the main discrepancy being as to whether Piekanien looked through the keyhole what the accused did to N[....] and what he told them immediately thereafter. He also said that the evidence of Mrs Z[....] contradicted the evidence of N[....].

[36] N[....] said that he told her on the same day of the incident what happened to him while she testified that on the next day only she saw him limping, saw blood on his underwear and blood and mucus in his stool. It was only then when he told her what happened to him.

Evaluation of the evidence of N[....]

[37] Before he testified, being an 8 year old boy, the court asked him questions to establish whether he could distinguish between the truth and lies. At first he got the answers from court wrong about him attending school but in answer to subsequent questions he understood the questions and provided cogent and correct answers. The court was satisfied that he could draw this distinction between right and wrong.

[38] Initially he said that the accused took his private part and then put it into his buttocks. He gave a detailed description of what transpired, his position and that of the accused. Later in his evidence he said that he told his mother that the accused did “funny things” to him. But when asked what he described to her, he said “he took off my clothes and underpants and raped me”.

[39] The reference to “rape” appeared to be out of line with the other evidence as up to that stage he did not refer to the word “rape”. He was not asked by the State or defence counsel what he meant by using the word “rape”. This made the court suspicious why he would use this term whilst previously he spoke about “silly” or “funny” things.

[40] The question remains if the court can accept the evidence of a single child witness in the case of this nature. In terms of section 208 of the CPA, a court can

convict an accused on any offence on the single evidence of a competent witness. The court already found N[....] to be a competent witness.

[41] As was found in *R v Mokoena* 1932 OPD 79 at p 80, this section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Although it is not a requirement that the evidence of a single witness should be corroborated, a court will always look for evidence which corroborates such evidence. This is part and parcel of adopting a cautious approach. The court will consider all the evidence in the matter together with that of the accused. See *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449 – 450 which was approved by the Supreme Court of Appeal in *Naude and Ano v S* [2011] 2 All SA 517 (SCA) at [29].

[42] Standing on its own, the evidence of N[....] was clear and satisfactory in material aspects, although he only later in his evidence referred to the fact that he was “raped” whilst previously he said that the accused did “funny” or “silly” things to him.

[43] Applying the cautious approach the court then considered the other evidence to see if there was any corroboration for the version of the N[....]. The evidence of Junior (also known as Piekanien) also provided limited support to the evidence of N[....]. There were also discrepancies. The differences in their evidence pertains to whether Piekanien and Daisy peeped through the keyhole of the door of the accused and saw what happened to him. According to Piekanien, he told N[....] sometime afterwards that he must report the incident to his mother. This is in contradiction with the evidence of Piekanien who said that after N[....] went to the house of the accused, he left and did not see him again that day. This raises question marks as to why N[....] would say that his friends saw what happened to him and informed him to report it to his mother. The only limited support for the evidence of N[....] provided by Piekanien is that the accused called for him but doubt arises when this occurred.

[44] The evidence of the mother of N[....], Ms Z[....], cannot be criticised and was credible. Her evidence differs to some extent to the evidence of N[....]. N[....] testified

he told his mother what happened to him on the same day of the incident. She testified that she was told on the next day after she saw N[....] limping.

[45] It is an objective fact that after Mrs Z[....] made her observations she accompanied N[....] to the hospital for examination. At that stage according to the evidence of N[....], the accused had sexual intercourse with him on the previous day. If the court then considers the history provided to Dr. Mzobe, it becomes strange why it was noted that the last time of the abuse was not known.

[46] Dr Mzobe under cross examination confirmed that his findings were not conclusive but that it was consistent with anal penetration. He stated that there could have been other causes for the presence of blood but, on the probabilities, was caused as a result of anal intercourse. He agreed it was not the only inference to be drawn.

[47] After the arguments on behalf of the accused and the State, the court decided that it was essential to the just decision of the case and also in the interest of justice to obtain the results from the forensic science laboratory that was still outstanding at that stage. The State decided not to call this witness as all its attempts to timeously obtain the results failed. The court then decided to subpoena the relevant witness. The matter was postponed for this reason.

[48] On the resumption of the matter on 14 January 2022, the witness, Regina Cecilia Jansen Van Rensburg came to court and was called by the court as a witness. She testified that she is a Captain in the South African Police attached to the biology section of the forensic science laboratory and she was a senior forensic analyst and reporting officer in the service of the State. She prepared an affidavit in terms of section 220 of the CPA which was received by the court as evidence.

[49] She testified that she obtained the samples pertaining to the accused. There were two clothing items and also mucus samples of the accused which she could compare. She concluded in her report that no DNA was obtained from the exhibits with reference to semen. She further testified that a female DNA result was obtained from a pair of tracksuit pants in the form of blood.

[50] She testified that if a semen deposit would get on to clothing it would remain there for a long time if the clothing item is properly preserved.

[51] She would not have been able to give any explanation for the female DNA in the form of blood found on the clothing.

[52] The evidence of this witness did not advance the case for the State but to some extent it assisted the version of the accused that he never had sexual penetration with N[....]. If that happened there always existed the possibility of semen remains on his underpants which was not found. But more importantly the DNA of a female person was found to be present on the track suit pants worn by N[....]. One of the reasons for suspecting forced intercourse proved to be non-related.

[53] The court is of the view that a reasonable possibility exists that the accused's version is true that he did not have intercourse with N[....] and that N[....], being a child, evidence cannot be accepted. The court already indicated that there were contradictions between his evidence and that of Piekanien and also of his mother. What specifically concerns the court is the evidence of N[....] that Piekanien and Daisy looked through the keyhole when he was sexually assaulted while this was denied by Piekanien. This is an indication that N[....]'s imagination could have run away from him. The further discrepancy related to when N[....] informed his mother about the incident, the fact that the time of the incident could not have been determined by the doctor who examined him. If it happened the day before one would have accepted that even a child would have been in a position to tell that to a doctor. Then there is the issue about the blood stains on his tracksuit pants being that of a female. This evidence adds to the uncertainty as what happened to N[....].

[54] The onus was on the State to prove beyond reasonable doubt the guilt of the accused. The court cannot convict an accused on a suspicion as to what happened in this case. The accused must get the benefit of doubt. The court is of the view that the State failed to prove the guilt of the accused beyond reasonable doubt.

[55] Accordingly the accused will be entitled to his acquittal.

[56] The accused is found not guilty and acquitted on count 1 and count 2.

RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of hearing: 04 October 2021

Date of judgment: 23 February 2022

Appearances:

On behalf of the State: Adv. P Marasela

On behalf of the accused: Adv. A. Mavatha