IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO. A815/13

DATE: 7 November 2014

In the matter between:

REUBEN VUSUMUZI SIBEKO Appellant

and

THE STATE Respondent

JUDGMENT

TEFFO, J:

[1] The appellant was convicted in the Regional Court sitting at Benoni on 24 July 2012 of rape. It was alleged that around June 2011 and at or near Lindelani, he unlawfully and intentionally committed an act of sexual penetration with a female person, P[...] F[...] M[...], who was 13 years old at the time, by inserting his penis into her vagina, having sexual intercourse with her without her consent. He was then sentenced to life imprisonment.

[2] He appeals against his conviction and sentence with leave of the court *a quo* having been granted on 27 May 2013.

[3] Ms P[...] F[...] M[...] (the victim) who testified through an intermediary, Ms Abigail Kyakazi Fupe stated that around June 2011 as she was on her way to school, she met the appellant. The appellant threatened her with a knife, took her from the street and locked her inside his shack. He then took out his penis and inserted it in her vagina. After he had done what he did, she told him that he hurt her. The appellant threatened to kill her if she told anybody about what happened to her. He then spilt the white things on her face which came

out of his penis and ordered her to eat them. She ate them and vomited. He then told her to eat the vomit. After all this he locked her inside his shack, tied her hands and feet, covered her mouth with a piece of cloth and left her for the whole day without food. She stayed at the appellant's shack for four days (from Monday to Thursday). In the four days the appellant forced to insert his penis into her vagina. She refused but the appellant opened her legs by force. She could not run away from his shack because she could not move as her vagina was sore.

[4] He had sexual intercourse with her many times. She could not recall how many times. On Thursday the appellant forgot to lock the door when he went to work. As only her hands were tied and her feet were not, she managed to reach the door. A certain lady, who was sweeping outside next to the appellant's shack, rescued her by untying her hands and removing the cloth that covered her mouth. She told her to leave before the appellant could arrive. She then left.

[5] When she arrived at home she reported to her grandmother what happened.

[6] Ms M[...] M[...], the victim's grandmother, testified that she last saw the victim on Monday 6 June 2011 when she was going to school and she was on her way to work. When she returned from work the victim was not at home. She went around looking for her in the streets and everywhere but did not find her. On Thursday, 9 June 2011, when she was home from work, T[...], the victim's friend, came to her homestead looking for her jersey that she once lent the victim. She told T[...] that she had been looking for the victim for days and she was nowhere to be found. T[...] told her that she saw her at a corner where they sell chicken feet.

[7] She then left with T[...] to look for the victim. She found her and came home with her. When she asked the victim about her whereabouts in the days she was missing, she said she was at the appellant's shack. The victim also told her that the appellant called her, put her inside his shack and refused her to leave the shack. When she asked her where were her school clothes and books, she said they were at the appellant's shack. The victim further told her that the appellant had sexual intercourse with her. She then phoned the police to come to her homestead. They came and the incident was reported to them.

[8] Under cross-examination she testified that when she left with T[...] to look for the victim, they found her around 18:30 where they sell chicken feet. She was just standing there next to the person who was selling chicken feet. When she asked the victim where did she get the clothes she was wearing, she said she got them on the fence where they were hung to dry. She also testified that the police went to fetch the victim's school clothes and books at the appellant's shack, the same Thursday after she returned home. Her further evidence was that if she did not go out with Thembelihle to look for the victim, she would not have returned home.

[9] She disputed the victim's evidence that after she managed to escape from the appellant's shack, she came straight home. She testified that the victim did not tell her how she managed to leave the appellant's shack. The appellant's shack was at the back of her shack.

[10] The J88 was handed in by agreement and read into the record. According to what was recorded on the J88 the clothes of the victim were dirty and her panty was taken for DNA analysis. No injuries were noted. The victim was crying and very traumatised. A condom was not used in the rape. The victim was not sexually active. She was at development stage: Tanner stage 3, pubic hair; Tanner stage 3, breast. Her mons pubis was swollen, her urethral office was swollen and bruised and her labia majora was also swollen. The number of fingers admitted in the vagina were zero. No bleeding, no discharge and no tears. The nurse who completed the J88 concluded that there was clinical evidence conclusive of penetration.

[11] According to the appellant's evidence, the victim came to him on Sunday in the day. She found him sitting under a tree drinking a cold drink. She asked for it. She poured herself a glass of cold drink. She did not drink it, she put it on the ground and ran into his shack. While inside the shack, she called him. He went into the shack where he found her naked. She then asked him to have sex with her. He put on a condom. After realising that she did not have any pubic hair, he took off the condom, tore it off, wore his pants and went outside where he was sitting. The victim suddenly came out of his shack and left. Around 17:00 she came back to his shack, sat and then left. She came back around 23:00 and knocked at the door. She told him that she had come to sleep at his shack. He opened the door for her and let her sleep on the ground as he realised that she was too young.

[12] She slept at his shack until in the next morning. He asked her whether she was going to school on that day. She informed him that she was not writing on that day. She left his shack after 09:00 and said she was going home but she came back at night again at 23:00. She knocked at the door and told him that she was afraid to go home as it was late. She stayed at his shack until on Wednesday. She would only come to his shack to sleep at night and during the day she would be gone. She also told him that at her homestead they refused to give her enough blankets.

[13] On Tuesday he asked her why did she want to sleep at his shack. She went and took her school clothes which he tried to return to her home and hid them behind the toilet of a neighbour. The school clothes were found by her grandfather at his shack on Thursday when he came with the police.

[14] He did not keep her in his shack under duress. He did not force her to stay in his shack. A neighbour found her school clothes behind the toilet and took it to her homestead.

[15] He denied ever having sexual intercourse with her during her stay at his shack.

[16] When told under cross-examination that the victim was at the time 12 years old, he said she told him that she was 13 years old. He conceded that he could see that she was still young. He testified that when he told the victim that he was going to tell her father about her coming to his shack, she said if he tells her father all that, she would also tell him what they were doing. He never told her father and or grandparents that she was coming to his shack but only told the neighbour who found the uniform behind the toilet. He testified that he was scared to tell her father after she said she would tell him what they have been doing.

[17] He started to know the victim from the year 2000 when they moved from Apex to Lindelani. He conceded that the victim grew up in his eyes as a neighbour.

[18] Ms Nurse Mamaile was referred to a statement that she made to the police on 11 June 2011 which she confirmed as her statement which she signed after it was read back to her. The statement was read into the record and she confirmed all its contents. In the statement she mentioned that she was renting a place in the yard of the appellant at the time of the incident. She used to see the victim at the appellant's shack and when the victim saw her, she ran into the shack and started peeping at her through the window and the door. When the victim wanted to go to her homestead, she would first look outside, open the door halfway and check the surroundings. She would look at the victim and make sure that she does not see her. When the victim does not see anybody watching her, she would run to her homestead. One day the appellant told her that the victim did not want to go to school and he chased her away but she did not want to go.

[19] She disputed that the victim was locked up at the appellant's shack and that her feet and hands were tied when the appellant went out during the day. She also testified that she has never heard the victim crying for help, that she was raped or kept in the shack against her will. The victim also never came to her for help. She testified that she is not related to the appellant. She did not even know him well at the time but was just a tenant at the premises.

[20] Under cross examination she explained that she was only at that place for a month and at that time it was about two to three weeks that she had been seeing the victim frequenting the appellant's shack. She first saw her in the morning as she was leaving for work and in the afternoons when she came back from work. The victim's homestead and the appellant's shack are separated by a fence. The victim would jump over the fence and go into her homestead, come out again and walk out through the gate. At some stage she asked the appellant as to what was happening between him and the victim as she could see that the victim was very young and the appellant told her that they were lovers. She told the appellant that the victim was very young to be his lover and that police could arrest him for being in love with a minor.

[21] She denied that the victim was kept at the appellant's shack against her will and maintained that she could go in and out of the appellant's shack as she pleased. She also mentioned that the doors of the

appellant's shack remained open at all times when the victim came there. She maintained that she was never locked inside the shack. She stated that she arrived at that place in the first week of June 2011. She did not understand what was happening when she saw the victim at the appellant's shack until she asked him. After he had told her that they were lovers she decided to stay away. She also mentioned that the appellant told her that the victim was forcing to come and sleep at his place.

[22] The appellant raises the following grounds in this appeal:

22.1 The magistrate erred in finding that the State had proved its case beyond a reasonable doubt and that the State witnesses gave evidence in a satisfactory manner as he did not take into account the material contradictions in their evidence.

22.2 The complainant in her evidence in chief contradicted herself in every material respect when comparing the statement she made to the police. She had the audacity in cross examination to say that the police in fact added facts to her statement. She also said in cross-examination that her grandmother was not telling the truth when she said she found her roaming around the shopping area after being away from home for days. She testified that she went straight home after escaping from the appellant's shack.

22.3 The Court *a quo* erred in rejecting the appellant's evidence and accepting the State's evidence. The appellant's evidence was corroborated by Ms Nurse Mamaila who testified that the complainant did not stay at the appellant's shack under duress but on her own free will.

22.4 In convicting the appellant the Court *a quo* erred in failing to properly analyse and evaluate the evidence of the State witnesses and did not properly consider the improbabilities inherent in the State's version. The Court also erred in rejecting the evidence of the appellant as not being reasonably possibly true and accepting the evidence of the State witnesses.

[23] Section 208 of Act 51 of 1977 ('the Criminal Procedure Act") provides that an accused person may be convicted of any offence on the single evidence of a competent witness. It is, however, a well-established judicial principle that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (Stevens v S 2005 (1) All SA (1) (SCA)).

[24] The correct approach to the application of the so-called 'cautionary rule' was set out by Diemont JA in S v Sauls and others 1981(3) SA 172 (A) at 180 E-G where he said the following:

" *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 referred to by DE VILLIERS JP in 1932 OPD 79 at 80, 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. "

[25] Nugent J in S v Van der Meyden 1999 (1) SACR 447 (W) at 449C - 450B said the following:

"*Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent but what is required to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which incriminates the accused, and evidence which exculpates him cannot both be true there is not even a possibility that both might be true, the one is possibly true only if there is an equivalent possibility that the other is untrue.....*

... The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond a reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether to convict or acquit) must account for all the evidence. Some of the evidence might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored. "

[26] In S v Hammond 2004(2) SACR 303 SCA the Court held as follows:

" *Evidence of a complaint in a sexual misconduct case at the earliest reasonable opportunity is exceptionally admitted only as evidence of consistency in the account given by the complainant claiming to have been assaulted: That is to say, it is admitted as a matter going to the complainant's credit. It is not corroborative. Evidence of the complaint does not amount to evidence of lack of consent, nor its absence to evidence of consent. The complainant's testimony is lack of consent, and the complaint does no more than support the credibility of the complainant in so testifying. "*

[27] It is correct that there were some discrepancies in the evidence of the victim and that of her grandmother. According to the grandmother the victim told her that the appellant called her, put her inside

his shack and refused her to leave. The victim testified that as she was on her way to school, she met the appellant who threatened her with a knife as a result of which he forced her into his shack where he locked her up for some days. She also testified that her hands and feet were tied and her mouth was covered with a cloth. Further to the above the victim did not tell her grandmother how she managed to leave the appellant's shack unlike what she testified in court that on Thursday the appellant forgot to lock the shack and a certain lady who did not testify to corroborate her evidence, assisted her to escape. There was also evidence with regard to where did the victim get the clothes that she was wearing on Thursday when she was found. Her evidence was so confusing where she initially stated that because her homestead was not far away from the appellant's shack, the appellant removed her clothes from her homestead's washing line while they were hanging there. Her grandmother's evidence was that the victim told her that she herself took the clothes from the fence where they hung them to dry.

[28] If one takes the totality of the evidence I am of the view that the above contradictions in the victim and her grandmother's evidence and the victim's statement to the police are not material to affect the evidence tendered in its entirety for the following reasons: It is common cause between the parties that the victim was missing at her homestead for four days. I say this because while the victim's grandmother's evidence to the effect that since she went to school in the morning of Monday, 6 June 2011, she never returned home, she was only found on Thursday, 9 June 2011, was not contested, the appellant concedes in his evidence although he said from Sunday to Wednesday, that the victim slept at his shack for four nights although she would leave in the morning. What he only disputes is the allegation that he had sexual intercourse with her. It is also common cause that the victim was at the time of the incident a child 12 years or older but under the age of 16 years as defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("The Sexual Offences Act").

[29] It is clear even from the appellant's own version that he accommodated the victim at his shack for four consecutive nights without informing her grandparents about it who were his neighbours. According to the nursing sister who examined the victim after the incident and completed the J88 there was clinical evidence of conclusive penetration. The victim's date of birth was recorded as 20 March 1998 on the J88 and the incident happened in June 2011. A condom was not used during the sexual intercourse and the victim was not sexually active at the time. She was at developmental tanner stage 3 pubic hair and breast. Her mons pubis was swollen, her urethral office was swollen and bruised and her labia majora was swollen. No fingers could be admitted in the vagina.

[30] Ms Nurse Mamaile testified that the appellant told her at some stage that he and the victim were lovers. Why would the appellant be afraid to approach the victim's father and tell him about the conduct or tendency of the victim coming to his shack very late at night if something between him and the victim was not

happening? The appellant was cross-examined at length as to why he did not report the conduct of the victim to her grandparents with whom she stayed and who were his neighbours but he was evasive when he responded. He kept on saying that he was afraid to do so because when he told the victim that he would do so, the victim said she would tell her father what they were doing. He further stated that he only told a neighbour about it.

[31] This goes to the question of how would he be comfortable to accommodate the victim in his shack for so many nights without informing her family if something was not happening. The J88 corroborates the victim's evidence that the appellant sexually penetrated her by putting his penis into her vagina during the nights she was at his shack. It is my view that the magistrate correctly rejected the appellant's version that he never had sexual intercourse with the victim while she was at his shack.

[32] The fact that the appellant once told Ms Mamaile that he and the victim were lovers strengthens the reason why he accommodated the victim for four consecutive nights in his shack without telling her grandparents.

[33] The evidence as to how the victim managed to leave the appellant's shack is not clear. All what she said was that a certain lady who was not called to testify assisted her to leave the shack after she noticed that the door was not locked on Thursday. According to her evidence she managed to go to the door because her feet were not tied but her hands were still tied and her mouth was still covered with a cloth. She did not say as to how the lady who was sweeping next to the appellant's shack noticed her at the door, what did she do to alert her that she was in trouble. This aspect does not also augur well if one takes into account that the victim never told her grandmother how she left the appellant's shack.

[34] It is also strange that the victim after she was assisted to leave the appellant's shack, she still did not go straight home but was roaming the streets where she met friends like T[...] and had the time to chart with them without reporting the alleged incident to them and pretended that nothing happened after she was missing at her homestead for four days. Her evidence does not show that she was worried about herself and her family. She also did not seem worried that the appellant would find her again on the streets and force her again to his shack. According to her grandmother had it not been for T[...], she would not have returned home. This is supported by the fact that her evidence was that she managed to escape from the appellant's shack in the morning but her grandmother said she found her roaming the streets around 18:30. This conduct of the victim coupled with Ms Mamaile's evidence that the appellant told her that he had a relationship with the victim, the fact that she always saw her entering the shack of the appellant as she pleased, the fact that she was able to go to her homestead and remove her clothes from the fence after ensuring that no one was there to see her, indicates that she stayed at the appellant's shack willingly.

[35] The victim is indeed a single witness with regard to what happened to her while she was at the appellant's shack. I agree with the magistrate's finding that the victim was sexually penetrated by the appellant which version is corroborated by the J88 but it is my view looking at the totality of the evidence and the reasons highlighted *supra* regarding the victim's conduct after the incident that the Court *a quo* misdirected itself by rejecting the evidence of Ms Mamaile whose version tallied exactly with the victim's conduct during her period of absence from her homestead. The fact that she was able to get herself clothes from her homestead's fence while she testified that her feet and hands were tied and that she was locked in the appellant's shack for the whole day is strange. It is also strange that while her homestead was next to the appellant's shack and in the yard where the appellant's shack was situated there were other people like Ms Mamaile renting the place, there was no evidence that she screamed for help if she was really in danger and did not like what was happening to her while she was at the appellant's shack. I also find it strange that she was able to change the school clothes she was wearing the day she left her homestead. If she did not like what was happening to her at the appellant's shack, she would have screamed for help and she would have been found wearing the same clothes she was wearing when she left her homestead on Monday. Ms Mamaile testified that she did not know the appellant that much. She did not have any reason to fabricate her story. She even went to the extent of telling the Court that she asked the appellant as to what was happening between him and the victim as she saw her frequenting the appellant's shack. She even said she warned the appellant after he told her that he and the victim were lovers that police could arrest him for having a love relationship with a minor.

[36] I am satisfied from the evidence tendered that the appellant was guilty of committing an act of consensual sexual penetration with a child. The Court *a quo* should therefore have not convicted the appellant of rape but of statutory rape as defined in Section 15(1) of the Sexual Offences Act.

[37] As regards sentence it was submitted that an effective term of life imprisonment is strikingly inappropriate in that it is out of proportion to the totality of the accepted facts in mitigation and disregarded the time which the appellant spent in custody awaiting trial. It was further submitted that the Court *a quo* also erred in not imposing a shorter term of imprisonment taking into account the age and personal circumstances of the appellant, the rehabilitation element and the mitigating factors proven. It was also argued that the Court *a quoe*rred in overemphasising the seriousness of the offence, the interest of society, the prevalence of the offence, the deterrent effect of the sentence and the retributive element of sentencing.

[38] It is trite as, inter alia, held in S v Rabie 1975(4) SA 855 (A) at 857 D-F that in every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

> "*(a) should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court', and (b) should be careful not to erode such discretion: hence the further principle*

that the sentence should only be altered if the discretion has not been judicially and property exercised'."

[39] However, where it appears to the appeal Court that the trial Court failed to have regard to certain factors, or ought to have assessed those factors differently from what it did, then such actions by the trial Court will be regarded as a misdirection entitling the appeal Court to consider the sentence afresh. (S v Fazzie and Others 1964(4) SA 673(A))

[40] I have already found that the evidence proves that the appellant had consensual sexual penetration with the victim, a child as defined in the Sexual Offences Act. This finding entitles this Court to consider the sentence afresh. The incident happened in June 2011 while the victim who was born on 20 March 1998 was 13 years old. Medical evidence revealed some injuries, namely, her mons pubis was swollen, her urethral office was swollen and bruised and her labia majora was swollen. The appellant was 43 years old at the time, unmarried, but had a child of 20 years who resided with his mother. He was unemployed and a first offender. He was released on bail after being in custody for two and a half weeks. He was sentenced on 24 July 2012. He has already served two years and three months in prison.

[41] As against the appellant's personal circumstances the seriousness of sexual offences and their prevalence in our society must also be weighed. The legislature reflecting the social mores of society has enacted legislation in an attempt to curb sexual intercourse between adults and children and for good reason. The exploitation of emotionally immature children and vulnerable members of our society and the risks of pregnancy and sexually transmitted diseases is a cause for serious concern.

[42] Having considered the triad consisting of the crime, the offender and the interests of society, the fact that punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to circumstances and the totality of the evidence, I am of the view that under the circumstances the appropriate sentence to impose is for the appellant to serve a period of five years imprisonment.

[43] I therefore propose the following order:

43.1 The appeal against the conviction and sentence of the appellant is upheld.

43.2 The conviction of the appellant on a charge of rape is set aside and replaced with the following:

"The appellant is convicted of Statutory Rape."

43.3 The sentence of the appellant by the Court *a quo* is hereby set aside and replaced with the

following sentence:

> "The appellant is sentenced to five years imprisonment which sentence is antedated to 24 July 2012."

43.4 The order of the Court a quo declaring the appellant unfit to possess a firearm is hereby confirmed.

M.J.TEFFO

JUDGE OF THE HIGH COURT

I agree,

F.G. PRELLER

JUDGE OF THE HIGH COURT

Appearances:

For the appellant: NL Hartwell

Instructed by: Pretoria Justice Centre

For the respondent: A Roos

Instructed by: The Director of Public Prosecutions

Date Heard: 20 October 2014

Date of Judgment: 7 No vember 2014