HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPORTABLE

CASE NO: **A17/2013**

DATE: 11 JULY 2014

In the matter between:

VUSIMUZI SAMSON MTHETHWA Appellant

and

THE STATE Respondent

JUDGMENT

MAKGOKA, J

[1] This is an appeal against the conviction and sentence of the regional magistrate, Springs. The appellant was initially charged with one count of kidnapping (count 1), and two counts of rape (counts 2 and 3). He was acquitted of count 3, but convicted of counts 1 and 2 (kidnapping and rape, respectively). He was sentenced to 20 years' imprisonment, both counts being taken as one for purpose of sentence. He appeals against the conviction and the sentence, with leave of the trial court.

[2] The complainant in respect of both counts was an 11 years old girl. The state alleged that on an unspecified day in 2010, in the afternoon, the appellant raped the complainant at his place of residence. The child's evidence is difficult to follow, as it is neither coherent nor lucid. She testified that on the day of the incident (which was established during the course of the trial as being 14 April 2011), the appellant found her playing in the street. He grabbed her, picked her up and took her to his place of residence. She was alone and as a result, no one witnessed the incident. He covered her mouth so that she could not scream.

[3] Once they had reached the appellants' house, the appellant undressed her. She was lying on her back. He inserted his penis into her anus, and covered her mouth with his underwear to prevent her from screaming. After he had raped her, he allowed her to leave, but threatened to kill her were she to tell anybody about the incident. At that moment, her sister pushed the door open and found the appellant clad only in his underwear and a T-shirt. The sister told the appellant that she was going to report to their mother that the appellant had raped the complainant. The complainant did not tell her sister what the appellant had done to her. Instead, she ran to her uncle's place, where she took a blanket from a washing line and slept on it in the passage.

14] The following morning she left without speaking to anyone, but did not go to school. Instead, she went to 'the street', and later went back to her uncle's place. Her uncle told her he was going to enquire at the complainant's house as to why she was not at school. Later that day her mother came to fetch her and took her to a police station. She had not told her mother about her ordeal. Her mother never enquired from her as to the reason she had not come home the previous day. She further testified that she made her first report of the rape to her seven year old friend, identified only as S[...]. After she reported to S[...], she was taken to a doctor for examination.

15] The child's sister testified that on 14 April 2011 at approximately 19h00 she went to the appellant's parental home to recharge her cellphone battery. The appellant occupies a shack on the premises. On her arrival she found the child standing at the door of the appellant's room. She was crying. When she enquired from her as to what she was doing there, the complainant did not answer her. She kept on crying. The appellant was inside his shack, and peeped from inside. He was fully dressed. She asked the appellant as to why the complainant was crying. The appellant did not answer her, but instead, he slammed the door shut on her. She told the appellant that she was going to report to her mother to have found the complainant crying outside his shack.

[6] She went into the main house where she had a brief encounter with the appellant's mother, and left without charging the cellphone battery. When she left, the complainant had already left, but she was not home when she arrived. She told her mother that she had earlier found the complainant crying next to the appellant's room. The complainant did not return home that night. Her mother went to the appellant's mother to enquire about the whereabouts of the complainant, as she had been informed that she was last seen next to the appellant's shack. The following day her uncle, Mr B[...] M[...], reported to them that the complainant was found sleeping outside his house, and had apparently spent the night there. She and her mother went to fetch her.

[71 When she was asked to explain what happened to her, the complainant was reluctant to explain in the presence of her (the sister) and her mother. She offered to explain only to the uncle and his mother-in-law, which she did. Thereafter the uncle made a report to her and her mother, on the basis of which they took the

complainant to the police, where she made a statement. She was later taken to a hospital for examination, as the complainant had mentioned in her statement that the appellant had raped her.

[8] In cross-examination it was put to the witness that on the day of the incident, 14 April 2011, there was no encounter between her and the appellant, and that the witness had a motive in falsely implicating the appellant. The motive is said to be that early in 2011 the appellant and the witness had a brief love relationship which ended when he resisted her monetary demands. The witness rejected all these suppositions. Further in cross-examination, the witness also contradicted the complainant's version with regard to the supposed encounter between the witness and the appellant. She denied that she pushed the door open, and that the appellant was half-naked. She further denied that she told the appellant that she was going to tell her mother that the appellant had raped the complainant - only that she was going to tell the mother that she found the complainant crying next to the appellant's shack.

[9] Mr B[...] L[...] M[...], the complainant's uncle, lives in the same neighbourhood as the complainant and the appellant. On the evening of 14 April 2011, he went to the washing line of his home to remove a blanket which had hung there during the day. He did not find it. Later he noticed that the blanket was in the passage, inside the house. When he investigated, he found the complainant sleeping underneath the blanket. It was about midnight. He left the complainant there and went to sleep. Early the following morning he went to the complainant's mother to report the incident. The complainant was still sleeping in the passage. After reporting to the mother, the latter instructed him to go tell the complainant to come home, which he did. Whilst walking back with the complainant to her mother's house, the complainant told him that she was scared. He did not enquire further about that statement. When they arrived, the mother asked the complainant to explain as to what had happened to her. The complainant explained to her mother that she had been raped by the appellant. He left and was later informed that the complainant had been taken to hospital.

[10] The appellant took the stand in his own defence. He testified that the child is well-known to him as one of the children in his neighborhood. On several occasions he would invite the complainant, together with other children, to his shack, where he would give them food. He testified that on 14 April 2011 he was in his shack fixing his television set. When he craved a smoke, he went out of his shack and stood at the door, looking for someone he could send to buy him cigarettes, when the complainant was passing by. He called her, gave her money and sent her to buy cigarettes for him. It was approximately 17h00. The complainant obliged and returned with the cigarettes. She left immediately without entering his shack. He never saw the complainant again. He denied the version of the complainant's sister that she came to his shack that evening and confronted him about the complainant crying outside his shack. According to him he never had any encounter with the complainant's sister that day. He further testified that the complainant's sister was bitter towards him because when he proposed love to her, she demanded money from him, instead of responding to

his proposal. He refused to give her money, and that, according to the appellant, was the source of the sister falsely implicating him.

[11] In his notice of appeal, the appellant attacks the conviction on several grounds, mostly concerning the internal contradictions in the evidence of the complainant, and the external contradictions in the evidence of the complainant and of other state witness, namely the complainant's sister and her uncle. Those contradictions are glaring from the summary of the evidence above, and it is not necessary to regurgitate them. In addition, the appellant contends that the complaint's evidence is not supported by the evidence of the medical doctor. The state supports the conviction.

[12] When considering the arguments on behalf of the parties, it is useful to bear in mind the proper approach when it comes to the factual findings of the trial court. The approach is found in the collective principles laid down in *R* v *Dhlumayo* 1948 (2) SA 677 (A) which are as a follows. A court of appeal will not disturb the factual finding of a trial court unless the latter had committed misdirection. Where there has been no misdirection on fact, the presumption is that trial court's 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. See also S' *v Hadebe & Others* 1997(2) SACR 641 (SCA); *DPP* v *S* 2000 (2) SA 711 (T); 5 v *Leve* 2011 (1) SACR 87 (ECG); and *Minister of Safety and Security*' *and Others* v *Graig and Another NNO* 2011 (1) SACR 469 (SCA).

[13J In considering cases of alleged sexual assault, the starting point is the jurisprudential framework stated by the Supreme Court of Appeal in S v *Stevens v S* [2005] 1 All SA 1 (SCA) para 1:

> 'Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behaviour are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such behaviour, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural safe-guards are properly applied and adhered to.'

In S v *Vilakazi* 2009 (1) SACR 552 (SCA) pars 21 and 22 the following apt remarks w'ere made:

> 'The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all evidence. For it is in the nature of such cases the available evidence is often scant and

many prosecutions fail for that reason alone...'

[14] In my view, the doctor's evidence, more than the cumulative effect of the contradictions in the state's case, is crucial, and is, on its own, dispositive of the appeal. I therefore turn to consider that aspect. It is to be borne in mind that the child's version was that she was raped by the appellant on 14 April 2011.

Dr Masheledi, examined the child on 15 April 2011 and completed a pro-forma medical report, the so-called J88 form. He testified that there were no signs of genital penetration. However, the anal examination revealed signs of repeated penetration (estimated to be five times) by a hard blunt object such as an erect penis. His conclusions in this regard were based on the fact that the tone (sphincter grip) of the anus was poor, and the presence of twitchiness (the 'winking' of the anus). The doctor explained that when the anus has been repeated penetrated, it opens and closes on its own when the inner thigh is stroked towards it.

[15] He could not tell whether there were signs of fresh penetration. The clinical findings from the anal examination show that there were no fissures/cracks, scars, abrasions, swelling, or bruising, of the skin surrounding the orifice. There was redness, however, around this area, which he attributed to an infection, and not to penetration. On the orifice itself, similarly, there were no tears/fissures or swelling. His clinical findings were stated as 'normal (and) no injury noted.' Under conclusions, he noted that 'no sign of penetration (was) seen but this does not exclude rape.'

[16] It should be kept in mind that the penetration of the child, on the date alleged by the state, 14 April 2011, was crucial. The State relied on the evidence of a single witness, whose evidence had to be clear and satisfactory in all material respects. See *R* v *Mokoena* 1932 OPD 79; *R* v *Mokoena* 1956 (3) SA 81 (A) and S' v *Webber* 1971 (3) SA 754 (A). The single witness was also a child of 11 years. When dealing with the evidence of children, our courts have developed certain guidelines like the cautionary rule which is to be applied to their evidence. The court must therefore have a proper regard to the danger of an uncritical acceptance of the evidence of a child witness see *R* v *Manda* 1951

(3) SA 158 (A) at 163E-F where rationale is found at 163E-F where Schreiner JA stated:

> '(T)he danger inherent in reliance upon the uncorroborated evidence of a young child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps, to suspicion. It seems to me that the proper approach to a consideration of their evidence is to follow the lines adopted in the case of accomplices. The trial court must fully appreciate the dangers inherent in the acceptance of such evidence and where there is reason to suppose that such appreciation was absent a court of appeal may hold that the conviction should not be sustained. The best indication that there was proper

appreciation of the risks is naturally to be found in the reasons furnished by the trial Court.'

[17] In his judgment, the learned regional magistrate adopted a view that, since the complainant's evidence that she had been annually penetrated was supported by the doctor's evidence, therefore the state had proved its case against the appellant. But, with respect to the learned regional magistrate, this was a wrong premise. The issue before him was not whether the complainant had been penetrated before, but whether on 14 April 2011, she was penetrated, and if so, whether it was by the appellant, as alleged by the state. Had he approached the enquiry in this manner, he would have had the presence of mind to consider the pertinent findings of Dr Masheledi as summarised above. The upshot of those is that there was no indication that the complainant was penetrated on 14 April 2011, as there were no fresh bruises, lacerations, tears, or some form of injury. Generally, the child's evidence was extremely poor, lacked coherence, and is not supported by the objective medical evidence.

[18] The appellant's version is not beyond criticism, either. His denial of having encountered the child's sister during the evening of the alleged incident, cannot be reasonably possibly true, in the light of the very objective and coherent evidence of the child's sister. In my view she was a very good witness who never sought to exaggerate what she witnessed in order to falsely implicate the appellant. If she had such intentions, it would have been easy for her to say that she found the appellant and the child in a compromising position. She did not, and that demonstrated her candour and reliability. The appellant's version that she had a grudge against him to falsely implicate him should therefore be rejected as false and non-sensical. Having said that, him having lied in his evidence does not mean the whole of his version should be rejected *(S* v *Mtsweni* 1985 (1) SA 590 (A). It does not relieve the state from discharging its onus to prove the guilt of the appellant beyond a reasonable doubt.

[19] The conclusion therefore is inescapable that the state had failed to prove that there was penetration of the child, either vaginally or annally, on 14 April 2011. Given this conclusion, it is not necessary to consider the impact of the contradictions in the evidence of the state in any detail. Suffice it to say that the contradictions are manifold and material. On a conspectus of the evidence, we are unable to confirm the conviction based on the events of 14 April 2011. The appeal has to succeed.

[20] Something needs to be made very clear, though. This finding is not an exoneration of the appellant in respect of possibly other incidents of rape of the child on other occasions. Should the further investigations reveal sufficient evidence against the appellant, the state certainly has in its power to prosecute the appellant in respect of those. In this regard I encourage the Director of Public Prosecutions to assign a senior state advocate to carefully study the relevant docket/s in the matter with a view of identifying and prosecuting the person/s who had repeatedly abused the child.

[21] Before concluding, there are two disturbing aspects I need to comment on. The first is the welfare of the child complainant in this matter. The second concerns the conduct of the learned regional magistrate, Mr J.R.Nkosi. With regard to the first aspect, it is clear, from the evidence of the doctor, that the child has been a victim of sexual abuse over an extended period. It does not appear that she has received any form of counseling. What is particularly perturbing is the attitude of the child's mother. She did not seem overly bothered by her overnight absence from home on 14 April 2014. From the evidence before us, it appears that her only endeavour to find the child was a half-hearted enquiry with the appellant's mother. There is no indication that she reported the child missing, either that night or early the following morning.

[22] Even after being informed that the child had been found at the uncle's house, she did not rush there to see if the child was fine, is disturbing. She did not even enquire from her brother as to the circumstances around her spending the night at his house. All she did was to 'instruct' the uncle to 'bring her here.' From the little information before us, it seems that the child's relationship with the mother might be less than ideal. The very fact of the child running away to the uncle's house, instead of going home, must say something about the mother-child relationship. In this regard I note the evidence of the uncle that when she took the child to her mother the following morning, the child told him that she was 'scared'. During her admonition at the beginning of the trial, when asked what her parents do at home, she replied that they 'shout and scold.'

[23] The conduct of the uncle, at whose house she spent the night, is also most startling. It should be remembered that he testified that he found the child sleeping in the passage of his house, wrapped up only in a blanket. He left her there and went to sleep. It did not occur to him to make the child comfortable, nor to call the child's mother to enquire why the child was at his house. He only did that in the morning.

[24] Children who are obviously at risk should be provided with the care and protection of appropriate social services. Enquiries ought to have been conducted immediately the rape was reported whether the child was in need of care *(S v Mojaki* 2006 (2) SACR 590 (T); 5 v *Mbokhani* 2009 (1) SACR 533 (T)). Neither the police, nor the prosecutor, nor the judicial officer who presided over the trial, took any steps in this regard. In *M v S; Centre for Child Law as Amicus Curiae* 2007 (2) SACR 539 (CC) (2008 (3) BCLR 1312, the majority of Constitutional Court, albeit dealing with the interests of dependent children when their primary care-giver is sentenced, stated the following at para 19:

> 'Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds, and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and av

oidable trauma.'

[25] The upshot of the concerns mentioned above is that the child might be a child in need. Obviously the repeated rapes have caused her trauma, the extent of which is not clear at this stage. Her mother's attitude towards her is worrisome, as is the conduct of the uncle, as set out above. As the upper guardian of the minor child, this court should initiate an enquiry into the welfare of the child.

[26] Now to the conduct of the learned trial regional magistrate. There are a number of instances on record which indicate that the learned regional magistrate treated the child complainant, other witnesses and counsel for the appellant, discourteously. I mention a few. When the child was admonished to tell the truth, this is what transpired:

'Court: Do you know the importance of taking an oath, what it means to take an oath?

Are we to sleep now? Where is the answer please? No, no. do you know or you do not know please? If you do know' you say, "I do not know" if you know you say. "I know"'

Child: No 1 do not know .

Court: What causes you to take so long to answer?

Child: Because I was still thinking.

Court: You must think fast now because you are going to have many questions...'

Court: If you happen to tell lies I will be forced to punish you.

Child: Yes.

[27] During the examination-in-chief of the child complainant, it seemed that the child hesitated in answering a question. The learned magistrate clearly barked at the child to 'Talk!' Later during cross-examination of the child, the following appears on record:

'Court: Playing alone? — Yes.

What game is that which is played by a single person? Do not die please, talk?

[28] In his judgment, the learned regional magistrate said the following of the child and her evidence:

'The State in this case relied on the evidence of a single witness who is 11 years of age. Her evidence

relates to a matter involving a sexual element. The court is alive of the degree of caution to be applied in evaluating the evidence of a child in these matters. The child...is 11 years of age and doing grade 4. She gave an impression she is someone who is very forgetful. She could not remember even her date of birth. She could not even differentiate between dates and months. She only remembered how accused had sex with her. She explained how she came to the conclusion that accused had raped her. Her friends told her what is rape (sic). She later remembered when she testified it was on 9 December. To (the) court her mind is unstable.'

(my emphasis)

[29] All of the above, in my view, show that the learned regional magistrate lacked the necessary sensitivity and empathy for the child complainant. He also demonstrated complete lack of appreciation for the constitutional dictate of s 28(2),[1] which decrees the paramountcy of the children's interests under all circumstances. He was brash, abrasive and over-bearing towards the child. To inform a child complainant that the court would 'punish' her (whatever that means), was intimidating, and might well have contributed to the incoherence and inconsistency of the child's evidence. Appearing in court as a witness can be a daunting task for most people, even more so, when such a witness is a child complainant, especially in a rape case.

[30] It is therefore imperative that judicial officers who preside in matters where sexual violation is alleged, be it in the lower or superior courts, should exhibit the necessary patience, empathy and sensitivity when dealing with victims of alleged sexual violations. This imperative translates into a duty, on the authority of s 28(2) of the Constitution, where the alleged victim is a minor child.

[31] As indicated earlier, the learned regional magistrate's unseemly conduct was not limited to the child complainant. Counsel for the appellant, and other witnesses, were not spared. At the commencement of the trial, during the swearing-in of the intermediary, counsel put questions to the intermediary as to her experience which qualified her as an intermediary. Apparently the court viewed that as a delaying tactic by counsel for the trial not to proceed. At a later stage the court had to adjourn because the child complainant was apparently tired. The learned regional magistrate found an opportunity to pass sarcastic remarks about counsel's earlier conduct:

'It is a relief to all the people who did not want to start this matter trying by all means to have it postponed by asking, "Are you registered social worker" when we work with them everyday. Any way you have got your postponement. We want to finish this child (sic) next week Friday. There would be no delays now. no consultation, no what (sic) we start at 09:00 with the child.'

[32] Later, there was a debate between the court and the appellant's counsel about whether counsel was entitled to cross-examine the child on a statement made by a police officer who had taken down the child's statement. The court, clearly disagreeing with counsel's submission, made the following remark to, and about counsel:

[33] During the re-examination of the child's uncle, the witness was rather long-winded for the court's liking. The learned regional magistrate sarcastically remarked:

> 'Here, we are going to talk until tomorrow."

[34] After the child's uncle had finished testifying, and before he was excused, the court said the following to him:

> Court: You have now completed giving evidence but before releasing you I want to communicate what you told in your own language. I want to communicate that. This is off the record. I want you to think about what you told us when you leave going home. African words). — (African words).
>
> Right you may go. After explaining Mr. Van Niekerk he said, 'i want to apologise for that" it tells me it is only now he understands the question. Anyway it was off the record.'

[35] The lower courts are the coalface of the judiciary. For the majority of the citizens of our land, their first experience of the judicial system is in those courts. It is absolutely vital therefore that those who are charged with the responsibility to preside in those courts, should show the necessary respect to those who appear before them, either as witnesses or legal representatives. There is no room for impatience, abrasiveness or sarcasm, such as demonstrated by the presiding officer in this case. Such conduct does not redound to the dignity and decorum of the court. It distracts from the diligence and courage with which the lower courts have, in the main, discharged their responsibilities, despite their tremendous workload, often coupled with less than ideal working conditions.

[36] I find the part of the record, quoted in para [34] above, most disturbing. It is not clear what the purpose of the conversation the court had with the witness. However, two aspects are clear. First, it concerned the evidence of that witness.

Second, the appellant's legal representative, Mr *Van Niekerk,* did not follow the conversation as it was conducted in an indigenous language, hence the need later for the court to explain to him what had been discussed.

[37] It is undesirable that a judicial officer should say anything to a witness concerning the case 'off the

record', whatever that might mean. Everything mentioned in court concerning the case should be on record for all concerned to understand and follow. If anything is said in the language not understood by all concerned, as was apparently the case here, it should be translated for the benefit of those who do not understand that language.

[38] To sum up, the appellant's appeal should succeed. The interests and welfare of the child complainant in this matter should be enquired into as soon as possible. The relevant authorities should be requested to assist in this regard. The Magistrate Commission should receive a copy of this judgment, not as a complaint, but merely for its interest in the pertinent issues discussed in the judgment.

[39] In the result the following order is made:

1. The appeal against the conviction is upheld.

2. The sentence imposed on the appellant is set aside.

3. The Member of the Executive Council (MEC) of Social Development in Mpumalanga Province, is directed to cause an inquiry to be conducted into the welfare of the complainant child in this matter and to report to the Registrar of this court within three (3) months of this order, as to the findings following such an inquiry, having regard to paragraphs [20] to [24] of this judgment;

4. The state advocate who appeared in this matter is directed to bring a copy of this judgment to the attention of a senior state advocate, having regard to paragraphs [19] and [20] of this judgment.

5. The Registrar of this court is directed to bring a copy of this judgment to the Chairperson of the Magistrates Commission.

T.M. MAKGOKA

JUDGE OF THE HIGH COURT

I agree

R. TOLMAY

JUDGE OF THE HIGH COURT

DATE HEARD : 3 APRIL 2014

JUDGMENT DELIVERED: 10 JULY 2014

FOR THE APPELLANT : MR. S. MATLAPENG

INSTRUCTED BY : PRETORIA JUSTICE CENTRE

FOR THE STATE : ADV. M. J. NETHONONDA

INSTRUCTED BY: DIRECTOR OF PUBLIC

PROSECUTIONS, PRETORIA

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1 Constitution of the Republic of South Africa Act. 108 of 1996.