IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A910/2013

DATE: 15 MAY 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

JOHN WILLIAM MSIMANGO Appellant

and

THE STATE Respondent

JUDGMENT

Tuchten J:

1 The appellant appeals against his conviction on a charge of raping the complainant during 2007. No more particulars of the date of the alleged offence were given in the charge sheet. The complainant was born on 6 December 2000.

2 The complainant lived with her aunt in a house in Leslie. Other persons who lived in the house were the complainant's slightly older brother and the appellant, whom the complainant described as her uncle. Another woman, Ms S[...], had stayed in the house but had left the household before the date of the alleged offence. Ms S[...] had had an intimate relationship with the appellant but this relationship had apparently been terminated and Ms S[...] had left the house before the date of the offence.

3 The complainant gave evidence through an intermediary. She said that the rape took place during an evening when her aunt was away from the house at a braai. She said that she and her brother were sleeping

on the floor of the same room in which the appellant habitually slept. The appellant slept on a bed. the appellant had woken her, undressed her and himself, threw her on the bed and raped her. Thereafter, she said, she did not tell anybody although she said that the appellant had not threatened her to gain her silence.

4 The evidence of the complainant's aunt was that the braai in question had taken place on 16 December 2006. Ms S[...], who was called as a witness by the court a *quo*, also went to the braai. This date is a public holiday and falls, every year, after the public schools have broken up for the Christmas holidays.

5 The complainant suffered from urinary incontinence. The evidence was that this condition preceded the alleged rape. On 30 July 2009, ie some 19 months after the alleged offence, the complainant's aunt took her to the clinic in a nearby town for treatment for her incontinence. The clinic nursing assistant, Ms Giyani, testified. Nurse Giyani asked the complainant in the presence of her aunt whether there was somebody who was having sexual intercourse with her. The complainant ignored the question. At Nurse Giyani's request, the complainant's aunt left the room and the complainant then, on further questioning, told Ms Giyani that her uncle had undressed her and had had sexual intercourse with her. On questioning from Ms Giyani, the complainant told her that the incident of rape which she had described had taken place about three to four day after the school she attended had reopened and that the appellant had raped her several times.

6 Ms Giyani sent the complainant for a medical examination. It was found that the complainant's hymenial membrane was broken and that the vaginal orifice could be seen simply by opening the labia majora. The conclusions of the medical practitioner were embodied in a form J88. The form J88 was admitted and the medial practitioner did not testify. He found that there was "sexual abuse - ongoing". But the medical practitioner also found, and recorded on the form J88, that there was no evidence of "recent" vaginal penetration. As he did not testify, this apparent contradiction was not explained.

7 The complainant's aunt testified. The complainant told her aunt that she had been raped only once by the appellant and that this act of rape had taken place on 16 December 2006. Whether this date was specifically mentioned or whether the complainant identified the date by reference to the braai I have mentioned is unclear.

8 The appellant himself gave evidence. He denied the allegations of rape. The regional magistrate held in regard to the appellant's evidence that he could not

> ... say outright that the accused was a lying witness. If his evidence is viewed together with the totality of the evidence... weighs so heavily against the accused that the court has no difficulty in rejecting his denial.

9 In my view the regional magistrate was clearly wrong in coming to this conclusion. I think that the

evidence before the court a *quo* was unsatisfactory. I say this because broadly the complainant did not spontaneously report the alleged rape of 16 December, her reports of the abuse she had suffered were made for the first time long after the

alleged incident and were contradictory in several important respects.

I point to the following:

9.1 There is a discrepancy between what the complainant told her aunt and what she told Nurse Giyani about the number of times the appellant had allegedly raped her. I do not think that this discrepancy can simply be brushed aside on the basis that young children can be expected to be confused about details. If the complainant had been abused more than once by the appellant, or by anyone for that matter, I should have expected that she would disclose this to her aunt. She had no reason to minimise the guilt of the man or men who had abused her.

9.2 There is a problem with the date 16 December 2006. Firstly, the charge alleged that the rape had taken place in 2007. If the evidence before the prosecutor had been that she had been raped on the night of the braai, one would have expected the charge to be much more specific; indeed to have identified that very date. But secondly, and more importantly, 16 December is in the holidays, not in the school term. That date was, on the evidence, the only day on which the complainant had been left alone with the appellant and on which the appellant would thus have had the opportunity to commit the crime with which he was charged. Added to this is the admitted conclusion of the medical practitioner who examined the complainant that the complainant was when he saw her enduring *ongoing* sexual abuse. This indicates that this little girl had possibly been regularly raped by someone other than the appellant.

9.3 The complainant did not report the rape to her closest female relative, her aunt, or anyone else until she was directly asked for this information by Nurse Giyani. Had Ms Giyani not probed the question, it is likely that the complainant would not have disclosed the fact of the abuse at all.

9.4 The complainant gave evidence on 14 February 2010. That was over three years, on the complainant's aunt's evidence, after the alleged rape. She was a single, juvenile witness. The complainant, as I have said, gave evidence through an intermediary. These circumstances reduced the ability of the trial court to evaluate the complainant as a witness. Indeed, the regional magistrate did not evaluate the complainant as a witness at all but concluded, as I have pointed out, that the conviction was founded on what the regional magistrate found, in effect, were overwhelming probabilities againstthe appellant. In this context I think that for the reasons I have given, the regional

magistrate ought to have found that the complainant was a less than satisfactory witness. The factual underpinning of the finding on probabilities was absent and the finding can thus not stand.

10 In my view, therefore, the conviction itself cannot stand. It is a tragedy that justice cannot be done for this little girl but as I see it the quality of the evidence leaves us no choice. The court a *quo* ought to have found that there was a reasonable doubt whether the appellant raped the complainant. The appellant must be given the benefit of that doubt. I would set aside the conviction and sentence imposed upon the appellant and substitute the following:

The accused is found not guilty and discharged.

NB Tuchten

Judge of the High Court

13 May 2014

I agree. It is so ordered.

C Pretorius

Judge of the High Court

13 May 2014