IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG. PRETORIA

CASE NO: A192/14

DATE: 29 AUGUST 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

JACOB MKHANUKWA MGOMA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

RAULINGA J,

1. The appellant appeals against conviction only, with leave of the court a quo.

2. The Appellant was charged and convicted on two counts of rape and one count of indecent assault in the Regional Court of Mpumalanga sitting at Secunda. He was sentenced to 14 years imprisonment on each count of rape and 1 year imprisonment on count 3. The sentences were ordered to run concurrently making it an effective term of 14 years imprisonment. The appellant was legally represented during the trial proceedings and the application for leave tolappeal in the court a quo.

3. The chronicle events ojf the incidents are that in or about 2005 and 2006 and at or near Delmas the Appellant unlawfully and intentionally had sexual intercourse with N[...] E[...] S[...] without her consent.Also that upon or about November 2006 and at or near Delmas the Appellant did unlawfully and intentionally

commit an act of indecent nature upon F[...] S[...] by touching her buttocks.

4. The first incident or rape occurred when the first complainant, E[...] was sleeping in the company of F[...] and S[...]. The Appellant allegedly entered the room wjien they were sleeping and dragged E[...] to an outside room where he used to sleep. The appellant raped the complainant once and thereafter she went to the original place where she was sleeping, after he had given her some money. She did not scream when she was dragged because the appellant told her that he would tell her grandfather that she stole his mofiey. She felt some pain when he raped her.

5. The second incident pf rape occurred in 2006 when the appellant threatened her that if she refused to have sexual intercourse with him he would tell the first complainant's grandfather that she stole his money. She was in the company of F[...] and S[...]. She voluntarily walked to the outside room where the appellant raped her once and told her not to tell anyone about the incident She did not make a report to F[...] and S[...]. However, she made a late report to her grandmother, M[...]. She was not attended to by a Doctor - she was not hospitalised.

6. The incident of the third count of indecent assault allegedly happened in November 2006 at njght when the appellant evaded the second complainant's privacy and touched her buttocks while she was lying on her bed. He also exposed some pornographic material to her.

7. I must mention right at the outset that there appears to be some discrepancies in the version of the state case and some missing link in the chain of events. The charge sheet indicates that the offences in counts l and 2 were committed in 2005 and 2006 respectively, whilst the offence in count 3 was committed in 2006. This can be discerned from E[...]'s evidence when she testified that the offences where committed when L[...] was still alive. L[...] died in 2002, before the offences were committed. Further to that, the medical report, J88 in respect of rapes in counts 1 and 2 was not placed on record. As a consequence, the evidence of the first complainant is not corroborated by medical evidence. E[...] was in the company of S[...] and F[...] when she made a statement to the police. They heard what she told the police when she was making a statement. It is not clear who the first report The alleged first report, one M[...], was not called to testify. E[...] contradicts her version by stating that she was raped when L[...] was still alive

8. The version of the appellant is a bare denial on ail the three counts.

9. It is trite that the state bears the onus to prove the guilt of the accused beyond reasonable doubt. There is no obligation on an accused where the State bears the onus, to convince the court of the truthfulness of any explanation which he or she may tender. If his version is reasonably possibly true he is entitled to be acquitted even if his explanation might be improbable - *S v V2000(1)SACR 453 (SCA) at 455a-b.*

10. The State's version must be evaluated against this salutary test. The legal question in this appeal is whether the state has proved the guilt beyond reasonable doubt.

11.There are a number of contradictions which emerged from the first complainant herself. Furthermore, there are other material contradictions in the evidence of her withesses on crucial aspects of the case.

12. The first complainant was 11 years old In 2002 when L[...] died. She was about 13-14 years when the offences were committed in 2005 and 2006 and 17 years old when she testified in 2008. The same would apply to the second complainant in count 3 . Moreover, the appellant denies the commission of the offences. In the premises one is left with the say so of the complainants against bare denial of the appellant. It is well settled that caution should be exercised when consic ering the evidence of children, See *R v Manda 1951(3) SA 158 (A) at 163 C~E.* In this case the trial court failed to properly evaluate the evidence of the children.

13. Further to that, there jis no medical report to corroborate the evidence of the first complainant. What is also critical is that there are some contradictions in the evidence of the first complainant. What complicates matters further is that the incidents were reported after a long time had elapsed. The first report witness, M[...] was not called to testify.

14. The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the acqused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party was decisive but that can only be an ex post facto determination and a trial court should avoid the temptation to latch jon to one obvious aspect without assessing it in the context of the full picture presented in evidence -*S v Chabalala 2003 (1) SACR134 (SCA) atp$ra 15.*

15. One must also be mindful of the fact that the first complainant was a single witness in regard to the two counts of rape. The circumstances are such that the evidence of the first complainant requires to be examined very carefully before it can be accepts so as to form a foundation by which the state could discharge the onus of proving the guilt of the appellant beyond a reasonable doubt - Mclaggen v The State (084/13) [2013] ZACSA92 (June 2013).

16. It is my considered view that the state could not offer an acceptable explanation for the discrepancies and might have difficulty in discharging the required onus. In the premises the appeal must be upheld. This dispenses with the necessity to ditode all other aspects in this case.

17. I propose the followingorder:

(a) The appeal on convection is upheld.

T J RAULINGA

JUDGE OF THE NORTH GAUTENG HIGH COURT

S STRAUSS

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT