REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A607/2014

DATE: 1 DECEMBER 2014

In the matter between:

M[...] S[...] S[...] **APPELLANT**

N[...] N[...] M[...]

and

THE STATE **RESPONDENT**

JUDGMENT

Date of Hearings: 20 NOVEMBER 2014

Date of judgment: 01 DECEMBER 2014

KUBUSHI, J

[1] The complainant in this matter is a 15 year old girl. She laid a charge of rape against the appellants. The first appellant was consequently charged with rape whilst the second appellant was charged as an accomplice to the rape. Although both pleaded not guilty, they were found guilty as charged.

[2] At the time of the commission of the offence the complainant was eleven years old. As a result the charge

against the first appellant attracted the prescribed minimum sentence of imprisonment for life unless there were substantial and compelling circumstances justifying deviation from the prescribed sentence. On conviction, the trial court did not find any substantial and compelling circumstances to exist and sentenced the first appellant to imprisonment for life. The second appellant was on conviction sentenced to 20 years imprisonment. The trial court granted them leave to appeal both their respective convictions and sentences. Both appellants are out on warning.

[3] The allegations against the two appellants were that the second appellant allowed the first appellant to repeatedly have sexual intercourse with the complainant or caused the first appellant to have sexual intercourse with the complainant during the period between 2008 until 2009.

[4] The factual background is that at the time in question, the complainant stayed with the second appellant who is the wife to the complainant's maternal grandfather. She is not the biological grandmother. The first appellant is a neighbour who stays five houses from the second appellant's house.

[5] It is alleged by the complainant that between the periods of 2008 until 2009, in the early hours of the morning, after her grandfather has left for work, the first appellant would come to the house and after talking to the second appellant would go to the complainant's bedroom and have sexual intercourse with her. The first time it happened, the complainant informed the second appellant. The second appellant told her that if she does not have sex with the first appellant she (the complainant) will not have money to go to school.

[6] In May 2009 the complainant visited her maternal aunt (the second state witness) for a weekend but then refused to go back. On enquiry she informed her aunt that there is a secret between her and the second appellant. She never went back. She later went on her own to report the rape to the police.

[7] She was examined by a private nurse practitioner, Sister Rollen, who from the injuries she observed, confirmed previous forceful vaginal penetration, though not acute. The complainant's aunt also testified and corroborated the complainant's evidence in as far as she (the aunt) was involved.

[8] The appellants vehemently denied the allegations. Their defence is a bare denial as they both testified that they knew nothing about the rape. Most importantly, the first appellant's testimony is that he could not have been able to commit the offences at the time and days it is alleged the offences happened because he was employed at jack's Paint. He left his home every day in the morning to be able to catch the 6:00 transport to work because he started work at 7:00.

[9] The first appellant's erstwhile employer, Mr Sternberg, testified on his behalf and confirmed his employment at Jack's Paint at the time in question. He also confirmed that the first appellant started work at 7:00. However, because of the lapse of time, it was 4 years since the first appellant left the employment, he

could not remember whether there were days when the first appellant would arrive late at work or not report for work due to sick leave or otherwise.

[10] The appellants' counsel raised a point *in limine* in respect of the conviction of the second appellant. According to counsel, the second appellant should not have been charged and convicted of a count of rape in terms of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). According to counsel the Act repealed the common law offence of rape and as such the appellant ought to have been charged in terms of s 55 of the Act.

[11] The assertion by the respondent's counsel in counter argument is that the second appellant was charged as an accomplice to rape and not as a perpetrator. Although conceding that the Act has repealed the common law offence of rape, counsel, however, submitted that there is nothing in the Act that purports to exclude the common law definition of an accomplice to be applicable in the Act.

[12] The purpose of the Act is to comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute by, amongst other things, repealing the common law offence of rape and replacing it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender. Section 68(1 *)(b)* of the Act, repeals the common law crime of rape, among other offences, with the result that rape committed after the commencement of the Act is punishable under the Act and not under the common law. It can now be said that the crime of rape has been codified.[1]

[13] It is correct that in this instance, the second appellant was charged for acting as an accomplice to the offence in that as the grandmother of the complainant, she allowed the first appellant to repeatedly have sexual intercourse with the complainant and/or caused the complainant to have intercourse with the first appellant without her consent. And this is the verdict returned by the trial court.

[14] An *accomplice* in a legal context has been defined as a person who does not satisfy the requirements for liability in respect of a crime, but unlawfully and intentionally furthers the commission of the crime by somebody else. [2] The person that does satisfy the requirements for liability in respect of the crime is described by *Snyman op cit*258 as the *perpetrator.* [3]

[15] The following was stated in *S v Motha:* [4]

> '[13] What becomes clear from the relevant parts of the Act is the following. First, it is not the crime of rape which was abolished, it is the common law relating to the crime which was repealed. This means that the crime of rape remains a crime, but has a different content. This content, which was

previously provided by the common law, is now provided by s 3 of the Act. The content provided by s 3 includes that content previously provided by the common law, namely the penetration of the genital organ of the complainant by the genital organ of the accused. The balance of s 3 includes actions, now construed as rape, which, under the common law, did not constitute rape.'

[16] The contention by the respondent's counsel that the Act does not specifically exclude the common law offence of acting as an accomplice to rape is to me, not sustainable. Firstly, it is evident from the aforementioned that in order for a person to be considered an accomplice, he or she must have assisted in the furtherance of the commission of a crime. In this instance, the crime which was furthered is rape. And as already stated, rape committed after the commencement of the Act is punishable only under the Act and not under the common law. Secondly, the preamble to the Act is also very clear, it states that the Act deals in a single statute with 'all aspects of the laws and the implementation of the laws relating to sexual offences and all legal aspects of or relating to sexual offences'. Consequently, the offence of assisting in the furtherance of the commission of the crime of rape, is covered by the preamble, and is punishable under the Act as well. The appellants' counsel is therefore correct, the second appellant should have been charged in terms of s 55 of the Act. Her conviction can as a result not stand and should be set aside.

[17] On the merits of the appeal, the appellants raised a couple of grounds why their respective convictions should be set aside. According to the appellants:

a. The complainant was a single witness and the trial court failed to treat her evidence with caution.

b. The state failed to prove beyond reasonable doubt that the appellants raped the complainant.

c. The versions of the appellants were reasonably possibly true.

[18] It is a trite principle of our law that in criminal proceedings, for the prosecution to succeed, the state must prove its case against an accused beyond reasonable doubt. In the corollary, a court does not have to be convinced that every detail of an accused's version is true, as long as such version is reasonably possibly true in substance. It is also improper for a court to reject an accused's version merely because it is improbable unless such version can be said to be so improbable that it cannot be reasonably possibly true.[5]

[19] The trial court found that the complainant's evidence, approached with the required caution, was reliable. It went on to hold that the complainant's version was also corroborated by Sister Rollen's findings of previous forceful penetration. As against that, it found that the appellants' respective versions were in the main improbable based on the fact that there was no reason for the complainant to implicate them falsely. In its finding it heavily relied on the failure of the first appellant to call his wife and his neighbour who provided

him with transport to work, to come and give evidence. It also relied on a speculative hypothesis that there was an opportunity on the part of the first appellant to commit the crime between 4:00 and 6:00 when he had to get his transport or leave to go to work.

[20] From the record it is evident that the trial court was aware that it should approach the evidence of the complainant with caution. The trial court appreciated the fact that the complainant was a single witness as to the commission of the offence, and a child witness as well. The trial court was also alive to the fact that it had to find guarantees for reliability of the complainant's evidence and found such safeguards in the findings of Sister Rollen, who examined the complainant on 25 November 2009 and found injuries which according to her confirmed that there was clinical evidence of previous forceful penetration.

[21] It is not a rule of law or practice that requires a court to find corroboration implicating the accused, but what is required is that the court should warn itself of the peculiar danger of convicting on the evidence of a single witness and seek some safeguard reducing the risk of the wrong person being convicted, but such safeguard need not necessarily be corroboration. Once, however, the court decides that in order to be so satisfied it requires corroboration, it would be pointless to look for corroboration other than corroboration implicating the accused. [6]

[22] The evidence of Sister Rollen does not in my view corroborate the evidence of the complainant that she was raped by the first appellant. It is trite that for corroboration of children's evidence, some other material evidence from an independent source is required but such evidence must implicate the accused in the commission of the crime. Although Sister Rollen's evidence is from an independent source it does not connect the first appellant to the rape.

[23] As to the trial court's credibility findings, they are not, in my view, borne out by the evidence. Accordingly this court is at large to interfere despite the advantages that the trial court had of seeing and hearing the complainant. The trial court was in my view clouded in its judgment by the fact that the complainant was a child witness and that she was testifying after the lapse of a period of four years. That is not how such evidence should be approached. What was expected of the trial court was to understand the evidence and carefully analyse it, which it failed to do.

[24] To my mind the evidence of the complainant was riddled with material inconsistencies and was unsatisfactory in several material respects and resulted in critical shortcomings in the state's case.

[25] Whilst it is true that the alleged rape occurred when the complainant was still very young, and had happened sometime back, her evidence is not clear. According to the complainant's testimony the rape took place on five different occasions. It is however, not clear from the record when exactly were the rapes

committed. According to the charge sheet the alleged rapes occurred ‘during the year 2008 until 2009’. In her evidence in chief when asked how many times it happened, the complainant’s answer was ‘maybe it could be like five days that it happened’. Under cross examination she confirmed that it happened on five different days and that it happened between January until May 2008. The impression created is that the five days stretched from January until May 2008. It is also not clear from the evidence when the complainant left her grandfather’s place. According to her, she left in May 2009, her aunt’s evidence is that she left in May 2008, whilst the second appellant testified that she left in 2007. These are material discrepancies which cannot simply be ignored.

[26] Another matter that raises concern is the improbabilities of the complainant’s version. Her testimony is that some days the appellant would stay with her the whole day and only leave when the second appellant was about to come bad? from work. On these days she would sit on the bed and do nothing, she would not even go to the bathroom. Her failure to report the rape when she left her grandfather’s house to stay with her aunt is also not satisfactorily explained. She left of her own free will to stay with her aunt yet she does not inform the aunt the reason why she left. She only tells the aunt that it is because of a secret between her and the second appellant. It took her more than a year before she eventually reported the matter to the police and no proper explanation is proffered why she could not do it earlier than that time.

[27] There is no obligation upon an accused person, where the state bears the *onus*, to convince the court. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused痴 version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this court and other courts the test is whether there is a reasonable possibility that the accused痴 evidence may be true. [7]

[28] The versions of the appellants are to me reasonably possibly true. The first appellant’s version is that he could not have committed the offences at the time it is alleged by the complainant because he left early in the morning to catch the 6:00 transport to work. The uncontested evidence of his witness, Mr Sternberg, confirmed that the first appellant was employed at J[...]’s P[...] during the period in question; he started work at 7:00 on week days and at 8:00 during weekends; and that he worked six days a week. According to this witness it is possible that the first appellant was never late for work. The version of the second appellant that this whole matter revolved around the dispute of the social grant payment was never contested by the state nor cleared up during the trial.

[29] In any event, it appears that the appellants are entitled to an order that their convictions and sentences

are set aside because the state failed to discharge the *onus* resting on it. The evidence of the child witness was not carefully scrutinised. The contradictions and inconsistencies were not properly considered.

[30] I would in the circumstances propose that the appeal on the convictions and sentences be upheld and the convictions and sentences imposed be set aside.

E.M.KUBUSHI

JUDGE OF THE HIOH COURT

I concur and it is so ordered

A. A.LOUW

JUDGE OF THE HIGH COURT

Appearances:

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footnote1