IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A650/2015

Date: ~~31 October 2016~~
9/11/16

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

9/11/16 .....
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In the matter between:

DAVID PAPO Appellant

and

THE STATE Respondent

JUDGEMENT

DU PLESSIS, AJ

1.

The appellant was convicted in the Regional Court of Gauteng, held at Pretoria

on one count of contravening Section 3 of Act 32 of 2007 - rape. He was subsequently sentenced to 20 years imprisonment.

2.

The appellant applied for leave to appeal his conviction and sentence, which leave was subsequently refused on 26 June 2014. The appellant directed a petition to the Judge President of the Gauteng High Court, Pretoria, for leave to be granted to appeal his conviction and sentence. His petition was successful and he was granted leave to appeal against his conviction and sentence.

3.

It is alleged that the appellant raped a six-year-old girl to whom I shall refer as "G". On 5 December 2010, the appellant a 38-year old male attended a cleansing ceremony at his house in Mamelodi, Pretoria. The child "G" also attended the ceremony with her grandmother.

4.

It is common cause that the appellant's sister at some stage saw the appellant and "G" together in the backyard of the house. I shall refer to her as "L".

5.

Her evidence was that when she saw the appellant and "G", the appellant was pushing "G" into a passage behind the house. She did not see, nor did she

allege that the appellant raped "G" at any stage. The high-water mark of her evidence was that she saw the appellant push "G" into the passage with his penis hanging out of his trousers. The child was not crying or screaming. The witness however called out to the appellant and asked him what he was doing. When she approached him and got hold of his arm, his penis was no longer hanging out. She called her sister to come and assist. The two older sisters then took the appellant and "G" into the house where the older woman were.

6.

Once inside the house, the grandmother alleges that "L" screamed at the appellant and told the grandmother that the appellant raped "G". The grandmother's evidence was *"she said my brother is a rapist, and I said who is he raping, and she said he is raping a child."*

7.

"L" denied that she ever said anything of the sort. The best she was willing to say: *"... I caught him, I found him with a kid at the back of the house"*. "L" admitted that she never saw the appellant rape the child.

8.

In cross-examination, "L" conceded that the appellant was also standing next to the toilet. The appellant himself alleged that he went to the toilet to urinate and that he had just finished urinating when "L" saw him.

9.

"L" also admitted that there is a peach tree next to the toilet where the appellant was standing and that the children including "G" were playing there.

10.

When confronted with the appellant`s version that he had just finished urinating in the outside toilet, "L" admitted that the appellant was standing at the toilet with his penis out and her answer was: *"I cannot comment, because I did not see him urinating".*

11.

The child was not particularly upset but only started crying when "L", according to the grandmother started screaming in the house.

12.

When confronted with the grandmother's allegation that she told everybody that the appellant is a rapist, "L" vehemently denied this and her reason been: *"I said I found my brother with a kid at the back of the house. I cannot say he is a rapist because I did not see him raping the kid."*

13.

"L'" s sister also gave evidence and alleged that when she was called to the back of the house by "L", she found "L" and the appellant and the child at the back of the house. She said that she saw the appellant with his pants unzipped and with an erect penis. "L" however said that when her sister came to the scene, the appellant`s penis was no longer outside his pants.

14.

Both sisters alleged that "G" had no panties on when they arrived at the scene. "G" only had her dress on. "G's" own evidence was that the appellant took her panties and had put it in his pocket. "G" however did not tell anybody that the appellant took her panties. This only came out when she gave evidence. This was denied by the appellant and he alleged that when the police came, they did look for the panties but nobody could find it. This evidence remains unchallenged.

15.

"G's" evidence was presented through an intermediary. She said that she came to Court to tell the Court what her mother told her to say. She said that the appellant put his penis in her vagina while she was standing. The prosecutor, realizing the difficulty with this version, suggested to the child that the appellant might have been sitting down when he put his penis in her vagina. She however said, he was also standing and that they were facing one another. She said that they were caught by "L", and that she screamed when the appellant put his penis in her vagina.

16.

This evidence is however not corroborated by either "L" or the sister.

17.

"G" was taken to the doctor for an examination. The doctor gave evidence and handed in a J88 form evidencing the results of her assessment of the child. There were no signs at all of any penetration nor of any injuries. She did find some redness on the outside but attributed this to *"fiddling".*

18.

The appellant denied that he ever raped or sexually assaulted the child. He referred to the fact that the grandmother herself *"checked"* the child before the police came to determine whether she was raped or not. This evidence similarly remains unchallenged.

19.

Although the grandmother's allegation that "L" alleged rape this was denied by "L" and the sister. The appellant's evidence that: *"...because the panty was nowhere to be found"* similarly remains unchallenged.

20.

"G" told the Court that the appellant was having intercourse with her when they

were caught by "L". "L" however saw nothing of the sort, and the doctor confirmed that no penetration took place. Apart from the child's evidence, there is no circumstantial evidence corroborating that of the child. The child herself never told any of the elders, including the grandmother, that she was raped.

21.

The court a quo submitted in the judgement that the evidence was that: *"she (G) indicated as and when she was been sexually assaulted by the appellant, "L", whom she called, saw this and raised alarm."* This was indeed the evidence of "G" , but was denied by the state witness "L".

22.

In cross-examination "G" indicated that she told the Court that the appellant raped her, *"because her mother told her to say so".* This should be considered with caution. The complainant was only six years old. The Magistrate however did ask questions to clarify this but the child's answer was simply in *"it happened."*

23.

The court a quo incorrectly summarized the evidence of "L" and of the sister on important aspects. He accepted that "L" saw the appellant with an erect penis while this was not her evidence. He said when she got to the child, she was crying, *"and her eyes welling with tears"*, which was not her evidence or that of

the child or of the sister. The contradiction between the sister alleging that the appellant`s penis was outside his pants and erect when she arrived on the scene and "L" submitting that his penis was inside his pants " no longer hanging outside " and no erection was not considered by the court a quo.

24.

The Magistrate accepted incorrectly so, that the doctor found *"according to the nature of her injuries, or whatever examination she, the result of her examination, this child was indeed sexually assaulted."* The doctors' observation however, was *that "the hymen was intact but that did not exclude penetration".* When asked to explain this apparent contradiction in cross-examination, the doctor answered *"fiddling around genitalia, i.e. redness suggest fiddling".* This is no confirmation of sexual assault or of penetration.

25.

There is no evidence as to what caused the redness. The court a quo referred to a suggestion of the doctor *"that this was only indecent assault..."* but then makes a conclusion that is entirely unsupported by the evidence when the court a quo submits that *"... because the rape as defined now, is wide. If you put anything into the child's vagina, you are committing an act of penetration".* The Magistrate then incorrectly concludes that "L" saw the appellant with an erect penis protruding from his trousers and pushing the child into the passage. This in turn leads to the court a quo concluding that some form of penetration must have occurred.

26.

Rejecting the evidence of the appellant, the court a quo finds the appellant guilty of rape.

27.

It serves little purpose that the Court a quo approached the evidence of the child with caution and warned himself to apply the principles of a single witness and corroboration if this is based on the wrong factual conclusions. The incorrect facts no doubt convinced the court a quo that the appellant is guilty.

28.

Most telling is the court a quo's approach to the appellant's evidence. When asked by his Attorney to respond to the evidence that he *"attempted to rape "G""* the court a quo remarked: *"he must lead evidence to rebut, to rebut charges, not what the people are saying here."* This is of course an incorrect approach and could have influenced the Court's approach to evaluating the evidence of the appellant.

29.

I am mindful that the court a quo was in a far better position than this Court to take account of not only the child's evidence, but also her appearance, demeanor and personality. The same applies to the witnesses that gave evidence. I am similarly mindful that the Court of Appeal would not likely upset

the trial Magistrate's findings of a fact.

30.

I am however satisfied that the examples referred to above, demonstrates a material misdirection by the trial Court in its findings of fact as these findings of fact were presumed to be correct despite the actual evidence as recorded showed them to be clearly wrong.

31.

This Court is mindful of the approach to findings of fact by a trial Court in **S v Hadebe and Others 1997 (2) SACR 64 (SCA) 645 (E – F) and 426 (A – B)** where the Court emphasized that the Court of Appeal should, in assessing whether a trial Court's findings of fact were wrong, be careful not to focus too intently on the separate parts, losing sight of the fact that the whole body of evidence might shred valuable light on the evidential value of its component parts.

32.

Although I am mindful that the trial Magistrate is in a position to judge what is probable and what is improbable in regard to particular persons whom he observed at the trial, he would also be in a better position to draw inferences than the Court of Appeal. However, the inferences that were drawn by the trial Magistrate as demonstrated above are patently wrong and no reason exist why

this Court is not in an equally favorable position as the trial Magistrate to consider the evidence presented.

33.

"G" was not only a single witness regarding the rape but also a child witness. In this regard **S v Dyira 2010 (1) SACR 78 (ECG)** reiterated the approach to a single child witness. Although the Magistrate did articulate the warning in the judgement, an examination of the evidence of the child in order to satisfy himself that the evidence given by the witness is clear and substantially satisfactory in all material respects fell short of the standard to entitle the Court a quo to accept her evidence. The child's evidence regarding penetration as described by herself is simply incorrect. The doctor's assessment and the results thereof dismissed this evidence as incorrect. For the Court a quo to then make the assumption that she could have been penetrated by anything else because of the doctors' reference to *"fiddling"* is simply not supported by any corroborating evidence. Corroboration is not a pre-requisite for a conviction, but in this matter some form of corroboration that implicates the appellant had to be present before the appellant could have been convicted beyond reasonable doubt. Not only was there no corroboration of any penetration and/or any indication of rape but was there the evidence of the sisters that on close scrutiny, did not actually see anything other than the appellant standing next to the toilet with his penis hanging out and the child in close proximity. The child was not crying, nor screaming as she alleged in her own evidence. The child's evidence as to how the rape took place with her standing and the appellant standing could have been a mistake by the child but even when assisted by the prosecutor, the whole act of the rape became even more improbable.

34.

Even when applying the alternative approach as suggested in **S v Artman, 1968 (3) SA 339 (A) at 340 (H)** that failing corroboration, a Court will look for some feature in the evidence which gives the implication by a single child witness enough of a hallmark of trustworthiness to reduce substantially the risk of a wrong reliance upon her evidence, none could be found. On the contrary, the evidence of the appellant that the grandmother *"checked"* the child for any evidence of rape when the police came to arrest him, and that everybody was looking for the child's panty but could not find it, remained unchallenged. The appellant's attorney's suggestion that the fiddling that might have caused redness as suggested by the doctor, could have been the grandmother's fiddling or checking, is not improbable.

35.

"G" is a very young child and she remains the only witness implicating the appellant. Even accepting that she as a young child had been subjected to a traumatic experience and would not necessarily come to Court to lie, she remains the only witness that implicates the appellant and her evidence must be treated with caution. A degree of corroboration is required and this Court reminds itself of the danger of relying solely on her evidence to convict the appellant. In the absence of any form of corroboration and the improbabilities as is evidenced by not only her version but also the contradictions between the State witnesses, and the absence of any medical evidence taken immediately after the incident, suggesting either penetration or injuries , it cannot be said

that the State proved its case beyond reasonable doubt. Although the evidence as a whole may be considered and judged and although the Court does not have to be convinced that every detail of the appellant version is true, there can be no doubt that the appellant's version is reasonably possibly true. Even when tested against the inherent probabilities, the appellant version cannot be rejected given the improbabilities of the evidence of the child and as considered with the differences between the State witnesses. It cannot be said that the appellant`s version is so improbable that it cannot be reasonably possibly true.

36.

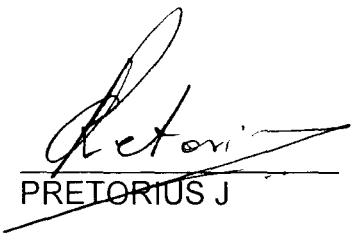
Under these circumstances we find that it has not been proven that the appellant is guilty of rape as charged or of any of the competent verdicts. As a result the following order is made:

36.1 The appeal against the conviction is upheld;

36.2 The conviction and sentence is set aside;

36.3 The accused is found not guilty.

DU PLESSIS AJ



PRETORIUS J

I agree

For the Appellant:

H Steynberg

Instructed by Legal Aid SA

For the Respondent:

Adv BE Mahoke

Instructed by the Office of the Director of Public Prosecutions, Pretoria

9/11/16

Date of Judgement