IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA
Case Number: A808/15
In the matter between:
D J D P APPELLANT
And
THE STATE RESPONDENT
Coram: **HUGHES J**
JUDGMENT
HUGHES J

[1] In this appeal the appellant, D J W Du P, was convicted of rape in terms of section 3 of the Sexual Offences Act 32 of 2007. He was sentenced to 15 years' imprisonment. Leave to appeal against both conviction and sentence was granted by the trial court.

[2] The complainant was 6 years of age when the appellant, her uncle, raped her in her bedroom. The complainant's mother, C N (C), and the appellant are siblings.

[3] On 11 May 2011, C had a braai at her home in honour of her husband, B N (B) and the appellant, as it was their birthdays. An invitation was also extended to the appellant to sleep over after the braai.

[4] That night, whilst the complainant was asleep in her bedroom, at some stage, her parents testified that they heard her cry. The appellant offered to check on her. C stated that the appellant was with the complainant for about 15 minutes when she told B to check on them.

[5] B testified that when he entered the bedroom he noted that the complainant was seated on the appellant's lap. He enquired if all was in order and the appellant replied in the affirmative, saying it was only a nightmare. The next morning they discovered that the appellant had left without saying goodbye and the door had been left open.

[6] The following day, whilst on their way to drop off C at work, they noticed that the complainant was not her usual self as she was extremely quiet. After some enquiries as to what was the matter she answered that she was afraid to tell because she thought they would give her a hiding. Eventually she told them that whilst the appellant was in her bedroom with her the previous night, he put his figure in her private parts and told her not to tell. B took her to hospital immediately whereafter

where she was examined.

[7] When the complainant testified, she stated that the appellant inserted his finger and penis into her private parts, and even though it was painful, she did not cry or scream. She further said that he also licked her private parts.

[8] The appellant takes issue that the complainant was a single witness, and that there are contradictions in her evidence. He also argues that no weight should be attached to the medical evidence of Dr Khoele who examined the complainant and completed the J88.

[9] From the record the magistrate acknowledged that the complainant was a single witness and that her evidence was to be dealt with caution. Further, the magistrate also conceded that she was not a perfect witness but concluded that she gave satisfactory evidence; she stood her ground and remained unshaken during cross-examination.

[10] I am mindful of the *dictum* **of** *Fletcher v S (171/09) [2009] ZASCA 169 (1 December 2009)* **where it was pointed out that the application of caution was envisaged to ensure that a wrongful conviction will not emerge and should not be confused with corroboration that a sexual offence had taken place:**

"[8] Bianca was a single witness to the rape. It is trite that her evidence should be approached with caution. The objective of this approach is mainly to reduce the risk of wrong convictions. It is not to be confused with the erstwhile requirement of corroboration in sexual offences". This appears from the following statement by Olivier JA in S *v Jackson: S v Jackson 1998 (1) SACR 470 (SCA) at 476e-f.*

'In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt — no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.'

[11] In the current case I cannot find fault with the magistrate's analysis of the child's evidence as a single witness, this is also so with the contradiction, relied upon by the appellant. These contradictions, to my mind, are not material, as the evidence of the child is corroborated in material respects by her parent's evidence and the medical evidence.

[12] The magistrate pointed out that the incident took place when the child just woke up from sleep. Further, she was a very young child, the incident took place quite a while ago and her evidence was intercepted by a long delay. These factors attributed to the not so perfect picture painted by the child's evidence. Even in the face of these adversities the magistrate concluded that '... contradictions *per se* **do not lead to the rejection of the witnesses' evidence'.**

[13] I am not convinced that the magistrate came to the wrong conclusion in accepting the evidence of the witnesses' of the state in light of what is pointed out above and reference is had to S *v Francis 1991 (1) SACR 198 (A) at 204c-e***:**

"This Court's powers to interfere on appeal with the findings of fact of the trial Court are limited (*R v Dhfumayo and Another 1948 (2) SA 677 (A)).* **... In the absence of any misdirection the trial Court's conclusion... is presumed to be correct. ...In order to succeed on appeal... a reasonable doubt will not suffice to justify interference with its findings... Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with the trial Court's evaluation of oral testimony (S** *v Robinson and Others 1968 (1) SA 666 (A) at 675G-H)"*

[14] Turning to the medical evidence. Dr Khoele, qualified herself as a medical doctor practising for 11 years having obtained her MBCHB and MMED in Psychiatry. Whilst she is stationed at the Military Hospital she renders assistance at the Crisis Centre where the child was brought for an examination. What cannot be taken away from Dr Khoele's evidence is that she conducted an examination of the child within 24 hours of the incident taking place. The result of her examination was that the hymen was swollen with a fresh tear at nine o'clock. She concluded 'that the child had multiple soft tissue injuries to the genitalia'. Further, the injuries were in keeping with that caused by a blunt object such as an erect male penis or an adult finger.

[15] On the other hand the appellant called his own expert Dr Lekozi a medical practitioner with a MBCHB, Diploma in Clinical Forensic Medicine and a lecturer at Medunsa in field of Clinical Forensic where he trains nurses and doctors practising in the field of Clinical Forensic Medicine. He was requested to interpret the J88 completed by Dr Khoele and comment on her findings. He expressed his opinion stating that, where Dr Khoele describes what she saw as injuries was in fact inflammation, and several sources could be responsible for this, like chemical irritants, poor hygiene and possibly a blunt force. However, he was adamant that a blunt force was more improbable as a source of this inflammation.

[16] I am persuaded that the magistrate commenced her analysis of the expert evidence from the correct premise, and in doing so came to the correct conclusion, that the role of an expert does not take over the function of the court. Further, that the court still has a duty to evaluate and decide a case on the facts and evidence before it.

[17] The bottom line is that the magistrate accepted that the inflammation could have been caused by a number of sources but that one of these was a blunt force, which could not be excluded as sought by Dr Lekozi. Importantly, the examination and observations by Dr Khoele within 24 hours of the incident could not be

discounted and these clinical findings corroborate the evidence of the child. In the circumstances the magistrate was correct in accepting Dr Khoele evidence.

[18] The approach to be adopted when dealing with expert evidence ultimately lies with the presiding officer. This decision-making duty should not be abdicated when dealing with expert evidence. The examination of all the evidence cumulatively with the expert's reports is undertaken to determine if the opinions advanced by the experts are founded on logical reasoning. See *Bolitho v City and Hackney Authority [1998] AC 232(HL (E)); Michael and Another v Linksfield Park Clinic (pty) ltd and Another 2001 (3) SA 1188 (SCA) at 1200 para [34]* **-** *[36].*

[19] The appellant's version is that he did not sleep over on the night in question and had no knowledge of what happened to the child. He also testified that he and his sister were not on good terms and thus she had invented these accusations. The magistrate noted in her judgment that this was not put to Chantelle when she was being cross-examined. In my view, had this been done, it would have allowed Chantelle an opportunity to deny the challenge or even qualify the evidence of the appellant, which he places reliance upon.

[20] It is trite that the failure to put one's version to a witness amounts to the witness's testimony being regarded as correct and unchallenged. See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) at 36J-37E para [61] to [63].* **In the circumstances I find no misdirection by the magistrate when the appellant's evidence was rejected.**

[21] In light of the above I find no misdirection on the part of the magistrate in the analysis of the evidence in *toto* **and the conviction must stand.**

[22] Not much was advanced by both the appellant and the state regarding sentence. It cannot be said that the magistrate imposed a sentence that was disturbingly inappropriate or that a material misdirection occurred when dealing with sentencing. The magistrate appreciated that the minimum sentence was to be imposed, namely that of life imprisonment and found that there were substantial and compelling factors to deviate therefrom and impose a lesser sentence. In the circumstances I do not find it appropriate to interfere with the magistrate's decision on sentence as it was well considered.

[23] Consequently the following order is made:

The appeal against both conviction and sentences are dismissed.

W HUGHES

Judge of the High Court Gauteng,

Pretoria

I concur AC BASSON

Judge of the High Court Gauteng,
Pretoria