IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)
Case number: A 568/2011

MATJATJA PATRICK RAKGOALE **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT
TOLMAY, J:
INTRODUCTION

[1] The appellant was charged with one count of rape of a girl of 13 years old. He was found guilty on 13 January 2011 and sentenced to life imprisonment.

[2] The appellant was granted leave on petition to appeal against the conviction and sentence.

THE EVIDENCE

[3] Three witnesses testified for the state, namely, the mother of the complainant, the complainant and the doctor who examined the complainant.

[4] The mother of the complainant, Ms S, testified that the complainant was born on 11 August 1996. On 26 May 2008, (later it would seem that the correct date was actually 25 May 2008) a Sunday morning at about 10:00 she noticed blood in the chamber pot. Ms S was not menstruating at the time and apparently did not understand the presence of the blood and asked the complainant whether she was experiencing any pain. Complainant then told her that she was indeed experiencing some stomach pain and told her mother that the appellant, who was her mother's boyfriend and the father of her mother's son D had raped her.

[5] She said the complainant told her the incident occurred on a Tuesday when she came from school. The evidence of this witness indicates that the complainant told the witness that the rape took place some 5 days before it was reported to the witness. The complainant told her that the appellant grabbed her by the legs, pushed paper into her mouth to prevent her from screaming and then raped her. She stopped the complainant from telling her the rest of the story and said she must rather tell the police. After this report she waited for the appellant to arrive, which he did at 15:00. She confronted

him with the complainant's allegation that he raped her. The appellant got very angry and they started fighting. The complainant got scared and went to fetch the police. When the complainant came back with the police, the appellant had already left. Ms S then told the police that she and the appellant fought because of the allegation that he raped complainant. She and the complainant were then taken to the police station. The police told them that the complainant had to go to the hospital for an examination by a doctor, but because her younger child D was at home, she had to go home. She told the police that they would come back the following day to lay charges and to take the complainant to the hospital. She asked the police to accompany them home so that she could talk to the appellant in the presence of the police. She said she told the police that she wanted to ask the appellant for forgiveness. She wanted to do this so that they could sleep at home.

[6] I find this evidence improbable for various reasons. One would not expect the witness to ask for forgiveness if appellant did indeed rape her child nor would one expect of her to want to stay in the same house as the appellant. It is also interesting to note that the appellant did not live with her and he left before the police arrived there. Under these circumstances there existed no reason for her to try to appease the appellant so that she could sleep at home.

[7] When they did not find the appellant at her home she and the complainant went with the police to the appellant's parents' home where he lived. He was not arrested despite the fact that appellant allegedly told the police that he was accused of rape. Ms S did go to the police the following day, 26 May 2008, and did lay charges against the appellant and he was arrested on the same day. The complainant was also taken to the hospital for the necessary medical examination. She said she terminated the

relationship with appellant on that day because of the alleged rape.

[8] The complainant initially testified that on 20 May 2008 when she returned home she saw appellant at their neighbours' home and was about to wash the dishes when appellant entered the room. He grabbed her by her feet and dragged her to the room where he pushed paper into her mouth to prevent her from screaming and proceeded to rape her. He told her he would kill her and her family if she told anyone. After the incident he left.

[9] Contrary to her initial evidence that the incident occurred on 20 May 2008, she later testified that she told her mother about the rape approximately a month after the incident occurred. She testified that the rape occurred on a Monday. This contradicts her mother's evidence that she told her it took place on a Tuesday. They also contradicted each other pertaining to how long ago the incident occurred.

[10] The complainant said she was not yet menstruating when this incident occurred. She testified that she started bleeding after the incident and continued to bleed up to the date that the incident was reported. This evidence must be seen in the light of the fact that she said the incident

occurred a month before she reported it to her mother. If that is true she must have been bleeding for a month, which I find improbable in the light of the medical evidence with which I deal later on. She confirmed that she went to the police because of the fight between the appellant and her mother and not to report the rape. She confirmed her mother's evidence pertaining to the laying of the charge and the visit to the hospital.

[11] Dr Chiane Mbuyi, the doctor who examined the complainant, found that the hymen was torn. He however did not find any fresh injuries. The tears in the hymen, according to him, occurred a long time ago. He noted no bleeding nor was he told of any bleeding pursuant to the visit. The consultation with him took place on 26 May 2008. The evidence of the doctor did not support the evidence of Ms S. If the complainant was still bleeding the day prior to the examination by the doctor one would have expected some explanation for the bleeding. The doctor also testified that he was not informed about any bleeding. The J 88 refers to the date of the rape as 20 May 2008 and suggests that the doctor was told that this was not the first time that the complainant had been raped by the appellant. The complainant did not suggest any prior incident in her evidence, and she had two different versions pertaining to when the rape occurred.

[12] The appellant testified that he started dating the complainant's mother in 2005 and the relationship was terminated by him on 26 May 2008. They quarrelled on that day about a cell phone call she had from another man, whom she had arranged to meet. The appellant said he was angry as he

suspected she was cheating on him and he assaulted her. She then sent the complainant to the police. He left and at 13:00 the complainant and her mother came with the police to his home. The police told him that Ms S said he assaulted her. He admitted that he assaulted her and told the police about the phone call and that he thought she was cheating on him.

[13] The police then left. He testified as to his whereabouts on 20 May 2008, but we know that according to the complainant she waited a month before she told her mother about the incident, consequently 20 May 2008 became irrelevant. According to appellant the complainant was influenced by her mother to lay charges because of the fight they had. He said he ended the relationship because he suspected that Ms S was cheating on him.

[14] The appellant's mother Mr R testified for the defence about his whereabouts on 8 May 2008 she said he returned 23:00 and was at home until the following morning. Her evidence did not assist at all as the date of 8 May 2008 was never put to any of the state witnesses. Accordingly, the whereabouts of the appellant on that day are irrelevant for purposes of this case.

CONCLUSION

[15] It is trite that the state carries the *onus* to prove the appellant's guilt beyond a reasonable doubt. In this instance the version of the complainant's mother that she saw blood in the chamber pot and that this led to the report of the rape is improbable for the reasons already alluded to. The medical evidence

did not reveal any indication of a recent injury which could have caused the bleeding nor were there any signs of fresh injuries. I have already alluded to the improbability of Ms S's evidence pertaining to the report to the police. The contradiction in the evidence also creates a problem for the state as it reflects on the credibility of the version of the complainant. The police who might have confirmed Ms S's version were not called to testify.

[16] It is trite that one should approach the evidence of a single witness with caution. In this instance, where the evidence pertaining to the rape raises so many questions one cannot, in my view, find that it was proven beyond a reasonable doubt. The improbability of the complainant's version of events is illustrated by the contradictions as well as the lack of medical evidence.

[17] In my view the appellant's version is reasonably possibly true. In **S v Schackwell 2001(2) SACR 185 (SCA)** the following was said:

"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally there is the observation that, in my view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. It cannot be rejected merely it can be said to be so improbable that it cannot reasonably possibly be true".

[18] I am of the view that appellant's version that he and the complainant's mother got into a fight because of her suspected cheating on him and that complainant was prompted by her mother to make these allegations is reasonably possibly true. I am of the view that the state did not succeed in proving the appellant's guilt beyond a reasonable doubt. The learned magistrate clearly misdirected herself when she found to the contrary.

[19] I am of the view that the appeal must consequently be upheld.

[20] I make the following order:

20.1 The appeal is upheld; and

20.2 The conviction and sentence is set aside.

R G TOLMAY
JUDGE OF THE HIGH COURT
I agree:
N TUCHTEN
JUDGE OF THE HIGH COURT
I agree:
TAN MAKHUBELA
ACTING JUDGE OF THE HIGH COURT