IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

APPEAL CASE NO: A117/2021

COURT *A QUO*: SH294/2011

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: NO

21 January 2022
DATE

[redacted]
SIGNATURE

In the matter between:

Phillip Nkabinde — Appellant

and

The State — Respondent

This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Case lines by the Judges or their secretary. The date of this judgment is deemed to be 21 JANUARY 2022.

JUDGMENT

Munzhelele J (van der Westhuizen J concurring)

Introduction

[1] The appellant in this matter was convicted of rape of a nine (9) years old complainant in the Regional Magistrates' Court of Benoni and sentenced to life imprisonment in terms of section 51(1) and Schedule 2, Part I of the Criminal Law Amendment Act 105 of 1997. Because of the sentence of life imprisonment imposed on the appellant, an automatic right to appeal conviction and sentence in terms of section 309(1) of the Criminal Procedure Act 51 of 1977 is applicable. The appellant brought an appeal only on conviction. The attack on the appellant's conviction in this Appeal Court was premised substantially on how the trial court assessed the identity evidence to find the appellant guilty. It had been complicated for us to understand the submissions found on the heads of argument by the appellant. The appellant did not put up a clear argument, except quoting cases in which he failed dismally to state the relevancy of those cases to his appeal.

Background of the case

[2] The appellant was a resident of the Wattville section. This is the same place where the child victim stays. The victim used to play on the street and in her yard with her siblings. The appellant was well-known to the community and the victim. He interacted with the victim on the date of the rape and some other dates prior to the rape. Both the appellant and the victim know each other very well, and the victim also knows the appellant as Uncle Lazi.

[3] On 31 March 2011 at Wattville, the complainant, a nine (9) years old child, was busy playing in the yard with her siblings when the appellant called her to come and take a cell phone from him and money, but she refused. It was during the night before eight o'clock. The child testified that it was before generations soapie could play. Seeing that the child had refused, the appellant grabbed her and pulled her to Mngani's place, where there was a shelter. She was ordered to remove her clothes, but she refused. The appellant removed the child's pants and panty. The child remained naked, and the

appellant undressed himself and penetrated her with his male genital into her female genital. The child was threatened that the appellant would kill her if she would tell anyone about the sexual intercourse which occurred. The appellant was in possession of a knife when the rape occurred. After finishing, he told her to go home. The child did not tell anyone about the ordeal, but she was severely injured, as described on the J88. Pinky Mpongwase and Lebohang Khumalo witnessed the child unable to walk properly due to injuries.

[4] Pinky Mpongwase, when she saw that the child could not walk properly, inspected her private part and found that the child had some discharges. She then called the child's mother, Morungwe Rivonia Makweba. Pinky could not testify because she had passed away before the case could be heard. Lebohang Khumalo confirmed that she saw the child on the date when they were walking together with the child to the tuck-shop; the child was not walking correctly.

[5] The child's mother, Ms. Morongwe, came home and took the child to the hospital. The child never told the mother who raped her while at home. A nurse, Jackleen Schouten, attended to the child in the mother's presence at the hospital. She asked the child for the name of a person who raped her, but the child did not divulge the information. Later the nurse told the child that if she could tell her who the person was, then such a person would be taken to prison where they would dig a hole and put that person inside such hole and will never be seen outside again. The child then said okay- 'the person's name is Malume Lazi'. The child mentioned the name without any hesitation in the presence of her mother.

[6] The registered nurse, Jackleen Schouten at Themba Rape and Trauma Centre, examined the child on 2 April 2011 and found that her para-urethral folds were bruised on both sides, labia minora bruised at 3 o'clock and 9 o'clock, fossa navicularis bruised at 6 o'clock, bruised at 8-9 o'clock, her private part was also swollen. The clinical evidence was that the child was vaginally penetrated.

[7] The appellant denied the allegations of rape. He confirmed that the child knows him and knows the child and the child's mother. The appellant also confirmed that he is known as Lazi in the township. He testified that he stays on the same street with the child. He lives only four houses away from the child' house.

Discussion

[8] It is trite law that a court of appeal should refrain from lightly interfering with the credibility findings of a trial court which is presumed to be correct. This is so because the trial court had the benefit of being steeped in the atmosphere of the trial, observing and hearing the evidence first-hand. Therefore, the trial court is "in the best position to determine where the truth lies". See *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e. In considering the judgment of the court *a quo*, this court has been mindful that a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong. See *S v Francis* 1991 (1) SACR 198 (A) at 198J – 199A.

[9] It is the evidence of the child in this case, which ultimately forms the crux of the case and determines the guilt of the accused. It has long been accepted that the evidence of a child is potentially unreliable because of the child's inexperience, imaginations, and susceptibility to influence, and for that reason, her evidence should be approached with caution by the trial court. See *Viveiros v S* (75/98) 2000 ZASCA 95; 2000 2 All SA 86(A) para 2. The trial court must fully appreciate the dangers inherent in accepting such evidence. Where it is apparent that such appreciation was absent, a court of appeal may hold that the conviction should not be sustained. *R v Manda* 1951 (3) SA 158 (A) at 163C-F. The trial court has extensively assessed the evidence of the child in appreciation of such dangers inherent in the child's evidence from pages 75 to 86 of the judgment to the satisfaction of this appeal court. Further, the cautionary rule that the trial court applied to the evidence of this child when assessing the credibility and reliability of her evidence

was apparent in the judgment from pages 75 to 84. From the judgment of the court *a quo*, it was evident that the evidence of the child was well analysed.

[10] The main issue in dispute is the identity of the perpetrator. Put differently; the case turned on the reliability of the complainant's identification of the appellant. We agree with the court *a quo* that the child could not have wrongly identified the appellant as the perpetrator. It was common cause that the child knew the appellant, and the appellant knew the child and the mother. It was further common cause that the community of Wattville knew Malume Lazi. The possibility of the child identifying the wrong perpetrator does not exist. We had no reason to doubt that the State proved beyond reasonable doubt that the appellant raped the child. Again, we agree that the court *a quo* did not misdirect itself when it found that the appellant was the culprit in the rape of the nine (9) years old child. We again agree with the court *a quo's* findings that the child's evidence as a single witness was clear in all material aspects and had satisfied the cautionary rule applicable to a single witness.

[11] On page 84 of the judgment, the court *a quo* had dealt with the discrepancies regarding whom she first informed about the rape, whether it was Pinky, Lebo, or the mother. The trial court attributed this confusion to the child's age and even the period elapsed between the incident and when the child had to testify. Secondly, the appellant made it an issue that the child did not want to tell anybody who the perpetrator was. The appellant argued that it was because of the fact that she did not know who the perpetrator was. The court *a quo* found that it was not because she did not know but because of fear. There is evidence that the child was intimidated and threatened to be killed if she would tell anybody. However, the nurse Jacleen put her at ease. When she heard the nurse saying that such a person who raped her would be placed in a hole and never be seen again, she felt protected and then divulged the information. That is typically the behaviour of a child. She felt that he would no longer harm her because he would be in a hole and never come out again. We found that the discrepancies regarding the

evidence of the child were sufficiently dealt with by the court *a quo*. Further the court *a quo* found correctly that the State had proved beyond reasonable doubt the identification of the appellant. We have found that the court *a quo* did not misdirect itself on this point, even on this issue.

[12] It is a common cause that the child was penetrated or raped. An act of rape is a dehumanizing, invasive, and humiliating experience for a child victim. She has been intimidated by the appellant having a knife. She might have felt helpless in the circumstances. Rape has a psychologically shattering effect on the victim, including the loss of ability to trust other people that they could help. This could be seen when the child could not trust her immediate family, including her mother, for protection against the perpetrator until she had an assurance that this person would be put into the hole and never be seen again. She was relieved and started to divulge the information of the culprit's identity.

[13] The argument by the appellant that the nurse was the first report and not the mother is flawed. We agree with the trial court that the mother could testify as a first report because when the child was narrating to the nurse who the perpetrator was, she was present in the nursing room. She also heard the information about the perpetrator's identity, and she could testify as a first report. The first report issue should not be allowed to inhibit the State's ability to prevent and combat gender-based violence and violence against children, in accordance with the State's constitutional and international obligations in the protection of children as the vulnerable group of our society. If this argument by the appellant to say, the mother cannot testify as a first report whereas she was present when the child was narrating the rape information to the nurse, this would be arbitrary to the interest of the child as protected by the constitution in terms of section 28 of the Constitution of South Africa. It will also defy logic and common sense.

[14] We have found that the evidence of the child had been consistent with the evidence found on the J88 where the nurse examined the child and found that she was penetrated. The evidence of the child not walking properly while going to the tuck shop with Lebohang

Khumalo corroborated that the child was penetrated; however, this issue was not in dispute it was essential for the State to adduce it in order to be seen to have proved all the elements of the offence of rape.

[15] In conclusion, we find that the State has proved beyond reasonable doubt that the appellant is the person who sexually penetrated the victim. We find that the trial court did not misdirect itself in assessing the totality of the evidence. Further, the trial court adequately assessed the cautionary rule applicable to the child evidence and single evidence of a single witness. We agree with the findings that the victim's evidence was satisfactory in all material aspects. There is no misdirection by the trial court in convicting the appellant based on the totality of the evidence adduced.

Order

[16] In the results, the following order is made

1. The appeal against the conviction is dismissed.

M Munzhelele
Judge of the High Court Pretoria

Heard on: 26 October 2021
Electronically Delivered: 21 January 2022

Appearances
Appellant: Adv. L Vorster
Instructed By: Luando Voster Attorneys

Respondent: Adv. C.P Harmzen
National Prosecuting Authority