IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

JUDGMENT

NOT REPORTABLE
CASE NO: AR773/2014

In the matter between:

DUMISANI MTHETHWA APPELLANT

And

THE STATE RESPONDENT

Coram : Koen et Seegobin JJ
Heard : 18 February 2016
Delivered : 23 February 2016

ORDER

On appeal from the Regional Court, Stanger (sitting as a court of first instance):

The appeal is upheld and the conviction and sentence are set aside.

JUDGMENT

SEEGOBIN J (Koen J concurring):

[1] This is one of those appeal records that fills one with a sense of disquiet on a reading of it. It is an appeal which emanates from the Regional Court, Stanger. The appellant, a 42 year old male, was arraigned in that court on a charge of rape. The allegation was that the appellant had unlawfully and intentionally committed an act of sexual penetration with the 22 year old complainant by inserting his penis into her vagina without her consent. The offence was alleged to have been committed on 16 April 2009 at [N…..] [G…….], in the regional division of KwaZulu-Natal. The offence was to be read subject to the relevant provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 as well as with the provisions of s51 and/or 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended.

[2] The appellant, who was legally represented, pleaded not guilty and elected to remain silent. The State's case rested on the evidence of the complainant who was 22 years old by the time the trial commenced on 23 April 2013, Mrs [*C…….] [N…….]* who is the complainant's aunt and with whom the complainant resided, and Constable *Gladys Ndlozi* who recorded a statement from the complainant and thereafter referred the matter to a special unit which attends to all investigations concerning child and family abuse and other sexual

offences. Apart from this evidence, the medical report (J88) was admitted by agreement. The doctor who completed the report was never called as a witness. I will return to the medical report and to the doctor's findings later.

[3] The appellant testified in his defence and called his wife, Miss [*D……]*, to testify on his behalf. At the conclusion of all the evidence the appellant was convicted. Having found no substantial and compelling circumstances present, the trial court sentenced the appellant to 15 years imprisonment. The present appeal against conviction and sentence comes before this court pursuant to a petition which was granted by this court on 6 February 2015.

[4] The following facts were common cause:

(a) The complainant is the biological daughter of the appellant;

(b) for some time prior to the incident in question the complainant and her sister [*Z…….]* resided with their aunt, Mrs [N……], at [M……..] while their father, the appellant, resided at [N…..] [G……] with his second wife, Miss [D…….];

(c) a few months prior to the date in question, the complainant and her sister left their aunt's place and went to live with their father;

(d) [Z….] stayed there for a short while and then left while the complainant continued to live with the appellant;

(e) The offence in question was alleged to have been committed by the appellant on 16 April 2009 but was only reported by the complainant about a month later in May 2009;

(f) The complainant was examined by Dr MA *Deysel* at Kwa-Dukuza on 22 May 2009; and

(g) Dr Deysel's clinical findings as recorded in the J88 medical report (Exhibit 'A') suggested that the "appearance of the complainant's hymen was consistent with having had sexual intercourse in the past".

[5] The complainant was a single witness to the alleged offence and therefore her evidence was required to be approached with caution. In terms of s208 of the Criminal Procedure Act 51 of 1977 an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility[1]. The correct approach to the application of the cautionary rule was set out by Diemont JA in *S v Sauls and Others*[2], as follows:

> "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* 1971(1) 3 SA 754 (A)). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean
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> > 'that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded'
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> (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[6] In *S v Stevens*[3], the SCA cautioned:

> "Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behaviour are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such behaviour, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural safeguards are properly applied and adhered to."

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[1] See, for example, S v Webber 1971(3) SA 754 (A) at 758 G-H.
[2] 1981(3) SA 172 (A) at 180 E-G.
[3] [2005] 1 All SA 1 (SCA).

[7] In light of the principles set out above, it becomes necessary to examine the judgment of the trial court in order to see whether it was justified in concluding that the guilt of the appellant had been proved beyond reasonable doubt. The *first* observation is that the judgment is fairly short being only four pages. This is indeed remarkable considering that the record is 174 pages long with the evidence itself taking up about 119 pages. *Secondly*, a reading of the judgment reveals that the learned magistrate simply failed to conduct a proper and thorough analysis of the evidence presented on both sides before rejecting the appellant's version as being false beyond a reasonable doubt. Additionally, she failed to provide cogent reasons for concluding that the evidence had established the guilt of the appellant beyond a reasonable doubt. Bearing in mind that the complainant was a single witness to the rape, the learned magistrate failed to demonstrate in her judgment that she exercised the requisite caution when examining such evidence. In fact, the learned magistrate did not even pay lip service to the cautionary rule and its application to the matter before her. She made no credibility findings, she did not consider the merits and demerits of both the State and defence witnesses and simply rejected the appellants version out of hand without providing any reasons therefor. As I will endeavor to show hereunder the judgment of the learned magistrate is thoroughly unsatisfactory and raises serious doubts concerning the complainant's version of what transpired.

[8] It is perhaps convenient at this stage to summarise briefly certain established principles which govern how evidence in a criminal trial is to be evaluated. The following cases illustrate the point. The list is by no means exhaustive.

[8.1] Navsa JA in *S v Trainor*[4] referred (with approval) to the following passage by Nugent J (as he then was) in the matter of *S v Van der Meyden*[5]:

> "It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is "completely acceptable and unshaken". The passage seems to suggest that the evidence is to be separated into compartments, and the "defence case" examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence. . . . The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

[8.2] In para [9] of *S v Trainor*, Navsa JA went on to say the following:

> "[9] A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the *onus* on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong."

[8.3] Heher JA in *S v Chabalala*[6] said the following:

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[4] 2003(1) SACR 35 SCA at page 40, para [8]; see also: S v Mathonsi 2012(1) SACR 335 (KZP).
[5] 1999(1) SACR 447 (W) at 449h-450b.
[6] 2003(1) SACR 134 (SCA) at p.139, para [15].

> "[15] The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: *S v Van Aswegen* 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear."

[8.4] In *S v Bhengu*[7], Broome DJP quoted with approval the following passage from the judgment of Leon J in *S v Singh*[8] in which it was said that:

> "The proper approach in a case such as this is for the Court to apply its mind not only to the merits and the demerits of the State and defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses."

[8.5] On the importance of judicial officers to give reasons for their decisions, the SCA in *S v Mokela*[9] had regard to what was stated by the Right Honourable Sir Harry Gibbs, GCMG, AC, KBE, the former Chief Justice of the High Court of Australia, in the 1993 (67A) Australian Law Journal 494 where at 494 he said:

> "The citizens of a modern democracy — at any rate in Australia — are not prepared to accept a decision simply because it has been pronounced, but rather are inclined to question and criticise any exercise of authority, judicial

[7] 1998(2) SACR 231 N
[8] 1975(1) SA 227 (N) at 228 G-H.
[9] 2012(1) SACR.

> or otherwise. In such a society it is of particular importance that the parties to litigation — and the public — should be convinced that justice has been done, or at least that an honest, careful and conscientious effort has been made to do justice, in any particular case, and that the delivery of reasons is part of the process which has that end in view … "

[9] In light of all of the above, I consider that had the learned magistrate applied her mind properly to the evidence and conducted a thorough evaluation thereof, she would have concluded that there were serious discrepancies and shortcomings in the State case. I proceed to highlight some of these hereunder.

[9.1] the first relates to the date when the complainant made a report of the alleged incident. She averred that the incident occurred on 16 April 2009 yet she only saw it fit to make a report to her aunt sometime in May 2009, almost a month after the incident. As explanation for this delay, she averred that she felt brave to tell her aunt because she was now away from her father (the appellant) who had earlier threatened her. She was no longer afraid of him. However, under cross-examination she admitted that she never told the police that her father had threatened to kill her if she told anyone about the incident.

[9.2] In her evidence-in-chief- she averred that she told her stepmother, Miss [D……], that very evening about the rape but Miss [D…..] did not believe her. Under cross-examination she maintained that she never informed her stepmother because she did not think that her stepmother would believe her.

[9.3] She initially testified that her father had threatened her with a firearm, however, according to the J88 medical report (Exhibit 'A'), she told the doctor that she was threatened with a knife. When she was asked

to explain this discrepancy, she said that she was confused. She further admitted that she never mentioned in her statement to the police that her father had threatened her with a firearm. She maintained that she was confused when she made the statement.

[9.4] While she initially maintained in her evidence that she only made one statement to the police, it transpired that she had in fact made three statements in 2009. It was for this very reason that she was recalled by the defence to explain the numerous discrepancies which appeared in these statements and her evidence in court. She was simply unable to provide a plausible explanation for any of them. She continued to maintain that she was confused.

[9.5] The complainant's medical examination was done five weeks after the alleged incident. The medical report was neutral in providing any corroboration for the rape. The doctor merely concluded "that the appearance of the hymen was consistent with having had sexual intercourse in the past". If one has regard to Miss D…..'s evidence, the complainant had informed her that she had a boyfriend in [D…….]. According to Miss [D……] the complainant often came home late from school and when questioned about this, she would say that she needed to see her boyfriend in [D……]. In these circumstances it would have been reasonable for the court to conclude that the complainant was sexually active and that the doctor's findings were consistent with this.

[9.6] As far as the first report is concerned, it is not clear on the evidence whether the report was first made to the police (according to Constable *Ndlozi*) and thereafter to the social workers or whether it was first made to her aunt who thereafter reported it to the police and the social workers.

> The complainant seemed to suggest that she had already been to the police station prior to making a report to her aunt. This evidence was never clarified. The complainant was attending school at that stage and she had every opportunity of making a report at the earliest opportunity either to her class teacher or to her friend/s but she simply failed to do so.

[10] These discrepancies aside, there are certain findings made by the learned magistrate which are not borne out by the evidence. For instance, she found as a fact that the appellant persisted with his conduct "until he was satisfied". However, according to the complainant's evidence, when she cried out and told him that it was painful, he released her immediately and told her to have a bath. The learned magistrate also found that the complainant went the very next day and reported the incident to her aunt, Mrs [N……], whereas according to the complainant (and as I pointed out earlier) she made a report to her aunt only in May 2009. These findings once again demonstrate that the learned magistrate simply failed to carefully consider the evidence before her.

[11] In my view, had the learned magistrate analysed all the evidence carefully, she would have found that the complainant was a most unsatisfactory witness whose evidence did not have the ring of truth about it. She would have been justified in concluding that the evidence could not be relied upon for a safe conviction. Her failure to conduct a proper evaluation of the evidence amounts, in my view, to a serious misdirection on her part.

[12] The appellant denied raping the complainant on the day in question. He also denied owning a firearm. A close reading of his evidence and that of Miss [D….] suggests that the complainant and her sister [Z……] were not happy about their father leaving their mother and marrying Miss [D…..]. According to Miss [D……] the complainant often remarked that she wanted her father to

resume his relationship with their mother. Both the complainant and [Z……] seemed to dislike Miss [D…..] intensely. All this would have found reason on the part of the complainant to falsely implicate her father as a way of getting back at him for marrying Miss [D…….]. In my view, neither the appellant nor Mis [D…..] were bad witnesses. If anything, they seemed to be far more consistent in their evidence compared to the complainant. All in all, I am not persuaded that the guilt of the appellant was proved beyond a reasonable doubt. It follows that the conviction cannot stand.

ORDER

[13] The order I make is the following:

The appeal is upheld and the conviction and sentence are set aside.

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_____ I agree

KOEN J

Date of Hearing	:	18 February 2016
Date of Judgment	:	23 February 2016
Counsel for Appellant	:	TP Pillay
Instructed by	:	Justice Centre, Pietermaritzburg
Counsel for Respondent	:	Z Dyasi
Instructed by	:	The Director of Public Prosecutions, Pietermaritzburg