IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

AR No: 362/19

In the matter between:

SBONGISENI MHLONGO **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from: The Regional Court, Pietermaritzburg (Mr C.F. Masikane sitting as court of first instance)

1. The appeal against conviction is upheld, and the conviction and sentence of the appellant is set aside.

2. The order of the trial court is substituted thereof with: 'Not guilty and discharged'.

JUDGMENT

Delivered on:

Mngadi J:

[1] The appellant, by virtue of an automatic right of appeal, having been convicted and sentenced to life imprisonment by the Regional Court, Pietermaritzburg, appeals against both conviction and sentence. The appellant

was charged before the regional court with and convicted of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act), and sentenced to life imprisonment.

[2] The charge of rape was read with the provisions of section 51 and/or 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA). It alleged that in that upon or about 1 December 2014, and at or near Greytown, in the regional division of KwaZulu-Natal, the accused did unlawfully and intentionally commit an act of sexual penetration with the complainant, A.Z., by inserting his genital organ into her genital organ without the consent of the said complainant. Section 51(1) and Schedule 2 of the CLAA was applicable, in that the complainant is a child under the age of 16 years, to wit, 4 years old. The appellant, who was legally represented, pleaded not guilty to the charge. The learned regional magistrate, after hearing evidence, convicted the appellant as charged. Having found no substantial and compelling circumstances to impose a sentence less than the prescribed minimum sentence of life imprisonment, sentenced the appellant to
life imprisonment.

[3] The incident, which gave rise to the charge, took place on 1 December 2014. The mother of the complainant at about 19h00, and accompanied by the complainant and her son, visited her father who was recuperating in hospital. The children were not allowed to enter the hospital wards. She left the complainant seated on a bench near the ward. She, after the visit, came out of the ward. She found that the complainant was missing. The hospital security guards and others assisted her to look for the complainant. The security guards found the complainant with the appellant. They suspected that the appellant had sexually assaulted the complainant. The matter was reported to the police.

[4] The appellant, when the charge was put to him, pleaded not guilty to the charge. He disclosed the basis of his defence as a bare denial. He then, in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the CPA), through his legal representative, made the following admissions:

(a) He admitted the chain evidence relating to the proper taking and

safeguarding, without any tampering, of swabs for DNA analysis from the complainant on the same night. The swabs were taken from the genital area of the complainant, from the panty that the complainant was wearing, and also from the front of the tracksuit pants that the complainant was wearing.

(b) He admitted that the specimens were properly sealed, packed and sent to the forensic laboratory.

(c) He admitted that the specimens were received untampered by the forensic laboratory, which safeguarded them until they were examined.

(d) He admitted that his blood was drawn from him, sealed, packed, and forwarded to the forensic laboratory and it was received intact.

[5] The State lead evidence from eight (8) witnesses. The appellant testified as the only witness in his defence. The State witnesses were the complainant, the complainant's mother, two security guards, a police officer, and two medical doctors and the DNA expert . Documentary evidence consisted of the appellant's affidavit in support of the bail application, the abridged birth certificate of the complainant, the s 212 of the CPA affidavit regarding the DNA analysis results. Further documentary evidence consisted of the medical report (the J88) in respect of the complainant, the paediatric sexual assault evidence collection kit, the affidavit by Dr Twayigira which related to collection of specimens, the medical report (the J88) relating to the appellant's medical examination on 2 December 2014 by Dr. Thusi, and also the complainant's mother's police statement.

[6] Semakaleng Suzaan Mpyana testified as follows. She was a warrant officer in the South African Police Service attached to the Biology Section of the Forensic Laboratory in Pretoria. She works as a forensic analyst and reporting officer. She qualified with B Tech degree in biotechnology. She has fifteen (15) years' experience. In this case she carried out the duties of analysis and interpretation of data. Ms Mpyana explained what DNA is and the procedure followed before the stage which was carried out by her. (The witness was neither involved in the said procedure nor did she ensure that the procedure she testified about was followed in this case. In my view, that evidence need not be

summarised and need not be considered.) Ms Mpyana testified that the data to be analysed and interpreted by her was on her computer. There were two samples. The first DNA result profile was obtained from the stains in the tracksuit pants. The second DNA result profile was obtained from the reference blood sample obtained from the appellant. She compared the two DNA profiles. The results showed that they are from the same source. The results were in the report which was handed in as an exhibit.

[7] A.Z. (the complainant) was nine (9) years old when she testified. She testified through an intermediary in terms of s 170A of the CPA. Before she testified, the regional magistrate conducted a competency enquiry after which he admonished her. During the enquiry the Regional Magistrate asked; her names, her age, whether she was schooling, and her grade at school. He asked her whether she understood the nature and import of taking a prescribed oath and she said she did not know. She said she knew the difference between telling a lie and telling the truth. She said the right thing to do is to tell the truth. He asked her if she tell lies, what do her teachers or parents do to her, she said they hit her. It is trite that the competency enquiry, before a child is admonished, must objectively show that the child knows the difference between telling lies and telling the truth. In my view, it does not help to ask the child whether she knows the difference and end the matter there. Either the child is asked what is the truth and what is a lie. Alternatively, properly framed questions, taking into account the age of the child, can be directed to the child and her response to those questions will show whether she knows the difference between the truth and the lies. See *S v Ragubar* (148/12)(2012] ZASCA 188; 2013(1) SACR 398 (SCA) paras 7-8..

[8] The complainant testified that something happened to her at the hospital. She sat on the benches outside the ward. Her mother and brother went into the ward. She waited for her mother. She sat alone and it was at night. A boy accosted her. He grabbed and held her by her hand. He took her into a dark structure. In the dark place, the boy lowered her pants. He lowered his zip of his pants. He then took his penis and he inserted it into her private part. It was dark. She did not see the penis. She felt pain. The complainant demonstrated what she said happened by the use of anatomically correct dolls. She testified that she

did not remember in what position she was, whether she was lying or. the ground or standing or sitting. She did not remember whether she was in a staircase standing on the steps or on the floor. She remembers what was put into her private part because it was painful. She said that when he was doing that she was crying. She said the security guard approached. They took her to her mother. She does not remember whether she spoke to the security guard or not. She also does not remember whether she told her mother what happened. She said she did not remember who is the person who took her.

[9] The complainant, under cross-examination, testified that she had no knowledge that the appellant came out of the toilets. She denied that the toilets are near the benches on which she sat. She denied that she approached the appellant crying asking for her mother. She denied that the security guard approached when the appellant was standing with her and calming her not to cry. She said the appellant was lying that two security guards approached and they assaulted him. She said the appellant is lying if he denies that he took her to a dark place, lowered her pants and his zip and inserted his penis into her private part.

[10] N[....] E[....] Z[....] (N[....]) testified that she is the mother of the complainant. She worked as a social worker. She was visiting her father who was sick in hospital. It was just before 20h00. She came out of the ward' and she found that the complainant had disappeared. She left the complainant outside the ward. Children were not allowed in the ward. The security guards and others assisted her in searching for the complainant. After a short period, the complainant approached with the security guard. The security guard was carrying the complainant having lifted her up. The complainant's pants were lowered. Another security guard approached with a suspect. The suspect was the appellant. He held the appellant by his hands. The appellant's pants were unbuttoned and they were wet at the front part. The complainant was crying nonstop. She took the complainant. She lifted her pants and she dressed her properly. She asked the complainant why she was crying. The complainant told her that there was a person who took her away. That person lowered her pants and he inserted his penis into her vagina. She pointed out the appellant as the

person in question. She pointed out the appellant in front of her and the security guards. The complainant was taken to a room to be examined by the doctor. She was present during the examination and the completion of the medical report by the doctor. The security guards told her that they found the appellant with the complainant and the complainant was crying.

[11] Alex Freeman Myaka (Myaka) testified as follows. He was employed at the hospital as a security guard and he was doing night shift on 1 December 2014. He was posted in the main gate. The complainant's mother approached them at the gate. She enquired about the complainant who had disappeared. They went to look for the complainant. They took different directions. They searched around the hospital. They proceeded towards the surgical wards. They went down by their rooms. His colleague Wiseman Sithole emerged with the complainant. He emerged by the maternity wards. The complainant was walking and he was pulling her by her hand. He was not sure whether she was fully clothed. The appellant was on the side of the complainant. He said he was Mchunu. The complainant was crying. Community members approached and they assaulted the appellant., They gave the complainant to her mother. He was not present when his colleague found the complainant. He noticed that the appellant's pants were wet on the zip near the groin. He asked the appellant why his pants were wet and whether he did anything to the child. The appellant said he was throwing away thrash. He emphasised that they did not assault the appellant and that the members of the community had assaulted the appellant.

[12] Jean Baptistein Twayigira (Twayigira) testified that she was a medical doctor. In 2014 she was a community service doctor. She completed her community service four months prior to her testifying. On 1 December 2014, her mother and other relatives brought the complainant to her. There was chaos as they were a lot of people. The complainant and her mother went into the consulting room. It was a case of alleged sexual assault. She started by playing with the complainant to calm her down before the examination. The complainant smiled at her. The complainant had no physical injuries. The central nervous system, the heart, chest and abdomen were normal. Her mental health and emotional status was playful. The gynaecological examination showed nothing of

significance. On the para-urethral folds there were serous fluids which looked more creamish. She could not determine what the fluids were. She found the presence of the fluids as abnormal. She took vaginal swabs for DNA examination. She also took the panty for DNA analysis for fluids that leaked to the panty. She has not been able to find the complainant's hospital file. On 29 October 2015, she deposed to a statement that a tracksuit pants was also taken for DNA analysis. She did not record, as it is required in the paediatric sexual assault evidence collection kit, the specimens or samples collected because it was chaotic at the time. She also did not record on the medical report the samples collected for further investigation. It was a very busy night.

[13] Nhlanhla Hamilton Thusi testified as follows. He was a medical doctor with ten (10) years' experience. On 2 December 2014 at 13h15, he examined the appellant. The appellant had a bruise on the right hand and a mild trauma on both shoulders. He had trauma on the eyes. He had no open wounds. The injuries on the appellant were consistent with an assault.

[14] Wiseman Thuthekani Sithole (Sithole) testified as follows. He was a security guard employed and working at the hospital on the day in question. On 1 December 2014, he was stationed at the hospital doing a night shift. At 21h30, he got into a ward to take out three visitors because the visiting time was over. N[....] told them that the complainant was missing. She described to them the complainant and how she was dressed. They started to look for the complainant. They took different directions. He proceeded towards the park homes. He took a passage with poor lighting, which leads to dark place. He heard a voice of a person talking with a big voice and a voice of a person that sounded like a minor or child who was crying. He came closer. He saw two figures, a tall one and a short one. He got closer, the shorter figure was wearing night colours and it was a child. Near that place, there was a container with steps. The shorter figure was on the steps and the other figure on the ground. He came closer. He saw the tall person but he was not clearly visible to him. He grabbed him. He sent a message to his colleagues that he has found the person they were looking for. His colleagues then approached. He held to the person by the container. His colleagues arrived whilst he was still holding him. He placed him in handcuffs. He took the complainant to her mother. He knew Myaka but he did not see whether

at any stage he was present or not. There were many people. The people came to see what was happening. He was carrying the complainant when he gave her to her mother. He was told to take the complainant to the ward but her mother was present. He thinks the person who was with the complainant is the appellant. He denied that he and Myaka at any stage found the appellant and the complainant by the benches at a male ward. He did not see the complainant and the appellant on the benches near the wards. He had no knowledge that the appellant was assaulted on that night. He and Myaka did not assault the appellant. He handed the appellant to his colleagues when he took the complainant to her mother. He did not know what happened outside because there was a lot of noise. He confirmed that he found the appellant and the complainant near the container at the back of the hospital near the park homes. He denied that the appellant was with the complainant by the benches near the wards.

[15] Thembelihle Priscilla Ngobese testified that she was a sergeant in the South African Police Service. She charged the appellant as Sibongiseni Mhlongo although the warning statement indicates that he is Sibongiseni Mchunu. She found out that the appellant's father's surname is Mhlongo, his mother's surname is Mchunu. She took the appellant to the doctor who drew blood from the appellant for the DNA investigation.

[16] The appellant, before the trial commenced, at the request of his attorney, was referred in terms of s 77 of the CPA for mental assessment, and·he was found fit to stand trial. He testified that he was in hospital to honour an appointment with his speech therapist. He arrived at about 12h00. There was a long queue. He was carrying a hospital card. He saw the doctor at about 17h30. The doctor was closing. He was rushing not to miss his transport home. The evidence that he was in hospital at around 21h00 confused him. He saw the complainant. She was sitting outside the ward on the benches. She was crying and she was saying 'mother, mother'. She said she wanted her mother. Two security guards approached. They asked him about the complainant who was continuously crying. They asked him where her mother was. They accused him of causing the complainant to cry. One security guard struck him. One grabbed

him. He was struck with a stick and a clenched fist. He was struck on the jaw. He sustained a laceration inside the mouth, which bled. He was hit on his eyes. He fought with the security guards. The police arrived and separated them. They said they will take him to the hospital but he was left in prison. He did not know why he was taken to jail.

[17] The learned regional magistrate stated that what was in dispute was whether the appellant took the complainant to a dark and secluded place where he raped her. The State was relying, as far as the alleged rape was concerned, on the evidence of a single witness, who is also a child. He stated that the complainant cannot identify the person that molested her, but the complainant pointed out that person to her mother as the appellant. He then referred to case law to the effect that allowance should be given where the court is dealing with the evidence of a young child. The regional magistrate stated that he had no reason whatsoever to disbelieve the evidence that the appellant and the complainant were found in a dark place by the security guards. The regional magistrate stated that semen was found in the genital organ of the complainant. The DNA evidence shows that semen in the complainant's trackpants was that of the appellant. The semen in the genital organ of the complainant together with the evidence of the complainant that it was painful established sexual penetration. The appellant found the regional magistrate was a pathetic witness. He rejected the appellant's version being not reasonably possible true.

[18] The hearing of an appeal against findings of fact is guided by the principle that in the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. See *S v Hadebe and others* 1998 (1) SACR 422 (SCA) at 426b. The conviction of the appellant, whether he had sexual intercourse with the complainant, and if so, whether it was without the consent of the complainant, is founded on the evidence of the complainant. It was the evidence of a single witness and a child. The evidence of the complainant as evidence of a child is required to be approached with great caution. See *R v Manda* 1951 (3) SA 158 (A) at 162H. The danger inherent in relying upon the uncorroborated evidence of a child must not be underrated. The

imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care, amounting perhaps to suspicion. The trial court must fully appreciate the danger inherent in the acceptance of such evidence, and where there is a reason to suppose that such appreciation was absent, a court of appeal may hold that the conviction should not be sustained. See *Manda* at 163E-F. The allowance given to evidence of young children, in my view, is that the child would not experience the incident like an adult and should not be expected to react to incidents like an adult. No other evidence directly corroborated the evidence of the complainant. The medical evidence was neutral on the issue of whether sexual intercourse took place. The regional magistrate appreciated that there was a risk in relying on the evidence of the complainant but found other evidence supporting the evidence of the complainant. In addition, the evidence of the complainant as a single witness evidence was required to be clear and satisfactory in all material respects to found a conviction, which appears to have escaped the attention of the regional magistrate. In my view, the discrepancies in the supporting evidence were not, with respect, accorded due consideration by the regional magistrate which amounts to a failure to approach the evidence with the required caution. In particular either the following discrepancies were not given any weight or they were overlooked:

(a) The complainant testified that a boy accosted and took her away and sexually molested her. The appellant was thirty (30) years old at the time of the incident. The complainant in her evidence did not say that the person found with her by the security guard Sithole was the boy who sexually molested her. Further, she did not testify that she pointed out to her mother on the night in question the boy who took her away and sexually molested her.

(b) The complainant testified that whilst the boy was sexually molesting her, the security guards approached whereas Sithole testified that he found the appellant and the complainant standing and fully clothed.

(c) The complainant testified that when the boy was sexually molesting her, she did not know whether she was lying on the ground or standing or in any other position. It appears, in my view, that she had no appreciation of what she was

testifying about.

(d) The evidence is that the complainant was crying but immediately after she was united with her mother and taken to the doctor, she was smiling and playful. The doctor found her to be in a healthy mental state. In my view, this was not a condition expected of a child recently sexually assaulted.

(e) Sithole who found the complainant did not see anything untoward in the clothing of the complainant and that of the appellant except that the appellant's pants had a wet area in front. In my view, a child whom had been found in the act of being raped, would have had some indication in her clothing that something had just happened to her.

(f) The doctor examined the complainant there at the hospital soon after the alleged rape. It is inexplicable that no evidence of recent sexual penetration was found on her.

[19] The regional magistrate found that the doctor who examined the complainant found semen on the genital organ of the complainant. However, in my view, the doctor testified that she found serous fluids. It cannot be assumed that a medical doctor could not identify semen. If it were semen, she would have said so. There was no other evidence from a person who examined the serous fluid and found that it was semen. The regional magistrate having assumed that the serous fluid was semen went on to conclude that, because the semen in the track pants of the complainant was that of the appellant, the serous fluid was the appellant's semen.

[20] The regional magistrate accepted the evidence that the appellant was found in a dark spot with the complainant, which was the evidence of Sithole and Myaka. However, the regional magistrate found that the appellant was assaulted which was denied by Sithole. Sithole testified that he found the appellant and the complainant. Nobody could have assaulted the appellant without Myaka and Sithole being aware of it. It is clear, in my view, that they, in particular Sithole, were mendacious in their evidence. The evidence of Sithole that he did not see Myaka is strange to say the least. These are indications that it was risky to take Sithole on his word. The appellant fought with them and they probably assaulted

him. They had a motive either to lie against him or to exaggerate their evidence against him at the trial.

[21] The complainant testified that the boy who sexually molested her removed or lowered her panty. However, she was found wearing her panty. It is inexplicable that no semen was found in her genital organ and no semen was found in her panty but semen is found in the track pants. It is not possible that semen would leak from the genital organ through the panty to the pants but it not be found on the panty. Both Sithole and Myaka who came across the appellant and the complainant, and they suspected that the appellant molested the complainant, did not see the semen stains on the track pants of the complainant. The wet part of the appellant's pants was not taken for DNA analysis. This in explicable if the police were summoned and the wet was associated with the sexual assault of the complainant.

[22] The regional magistrate accepted N[....]'s evidence that the complainant told her what happened and pointed out the appellant as the person who took her away and molested her. But both Sithole and Myaka who were present did not testify about that. Further, evidence of a first report is admitted for a limited purpose to show consistency on the part of the complainant. In this case, not only that the complainant did not testify that she pointed out any person to her mother but even in court she said she could not remember who is the person who took her away and sexually molested her. She testified that she did not remember whether she told her mother what happened. In such a case, the alleged first report and pointing out of the appellant cannot be accorded any evidential weight. See S *v Dyira* 2010 (1) SACR 78 (ECG) para 5.

[23] The evidence of the complainant, as demonstrated above was, in my view, particularly poor. In addition, the clothing condition she was in, her mental state, and of more importance, the gynaecological condition are inconsistent with her version. No doubt the DNA evidence is an objective credible evidence. However, the material examined were stains in the track pants of the complainant. Further, the state did not lead evidence from the person who determined the DNA profiles of the samples. DNA evidence is circumstantial evidence. DNA evidence standing alone in this case, it did not establish sexual

penetration.

[24] The State bore the onus to prove the guilt of the appellant beyond a reasonable doubt. In terms of section 208 of the CPA, 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. It is required to be clear and satisfactory in every material respect. It is not the labels that are given to the evidence by a judicial officer that count. Evidence, as it appears on record, must be clear and satisfactory in all material respects. The exercise of caution entails scrutiny of the evidence, noting discrepancies and attaching due weight to the discrepancies that are found. See *R v Mokoena* 1932 OPD 79 at 80; *R v Mokoena* 1956 (3) SA 81 (A) at 85-86; S *v Webber* 1971 (3) SA 754 (A) at 757-759; *Stevens v* S [2005] 1 All SA 1 (SCA) para 17; S *v Artman and another* 1968 (3) SA 339 (A) at 340H

[25] In my view, the evidence of the State, approached with the necessary caution, falls short of proving the guilt of the appellant beyond reasonable doubt.

[26] I am of the view that the conviction of the appellant falls to be set aside. I, accordingly, propose the following order:

1. The appeal against conviction is upheld, and the conviction and sentence of the appellant is set aside.

2. The order of the trial court is substituted thereof with:

   'Not guilty and discharged'.

Mngadi J

I agree and it is so ordered.

Madondo DJP

APPEARANCES

Case Number AR	:	362/19
For the Appellant	:	Z Fareed
Instructed by	:	Pietermaritzburg Justice Centre Pietermaritzburg
For the respondent	:	S Singh
Instructed by	:	Director of Public Prosecutions PITERMARITZBURG
Heard on	:	18 September 2020
Judgement delivered on	:	23 October 2020