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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR 589/18

In the matter between:

KUKI THEOPHELUS LUVUNO

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Regional Court, Pietermaritzburg (Ms V Jamuna sitting as a court of first instance)

1. The appeal against conviction on the charge of rape is upheld.
2. The conviction and sentence on the charge of rape is set aside.

JUDGMENT

Delivered on:

Mngadi J: (Gani AJ concurring)

[1] The appellant having been convicted and sentenced to life imprisonment by a court of a regional division, in the exercise of an automatic right of appeal, appeals against conviction and sentence.

[2] The appellant stood charged before the regional court on three (3) counts, namely, two counts of rape and one (1) count of sexual assault. The court acquitted him on one (1) count of rape. The court on the other count of rape convicted the appellant and having found no substantial and compelling circumstances for a court to impose a lesser sentence, sentenced the appellant to life imprisonment. The court on the charge of sexual assault convicted the appellant as charged and sentenced him to five (5) years imprisonment.

[3] The appeal is confined to the conviction and sentence on the charge of rape. The charge alleged rape in contravention of s3 of the Sexual Offences and Related Matter Act No. 38 of 2007 read with section 51(1) and schedule 2 of the Criminal Law Amendment Act No. 105 of 1997 (the CLAA). It alleged that on 7 January 2011 the appellant unlawfully and intentionally committed an act of sexual penetration with [L... M...] the complainant aged five (5) years by inserting his genital organ into her genital organ without her consent.

[4] A legal representative represented the appellant during the trial. The appellant pleaded not guilty to the charge. He through his legal representative elected to remain silent and to put the State to the proof of the charge against him.

[5] The State led evidence from the complainant, the complainant's mother T[...] M[...] and Thokozane Dube (the medical doctor). The documents handed in as exhibits were the birth certificate of the complainant and the medical examination report (J88) of the complainant. The appellant testified for the defence and he did not call any witnesses.

[6] The heads of argument addressed the question of the appropriateness of the sentence only without addressing the issue of conviction. After perusing the record of the proceedings, we requested counsel in the further heads of argument to address the issue of the conviction, which they did. The Criminal Law (Sentencing) Amendment Act 38 of 2007 commencing on 31 December 2007 amends the Criminal Procedure Act 51 of 1977 (the CPA) so as to provide for an automatic right of appeal if a person is sentenced to life imprisonment by a regional court. The automatic right to appeal relates to both conviction and sentence. Section 309 (1) (a)

of the CPA provides that a person sentenced to imprisonment for life by a regional court under section 51 (1) of the Criminal Law Amendment Act No 105 of 1997 may note an appeal against conviction and sentence without having to apply for leave to appeal in terms of s309B of the CPA. The essence of the automatic right of appeal is that an accused person tried in the regional court and sentenced to life imprisonment dissatisfied with the outcome of the trial may request the high court to relook at the matter. The automatic right of appeal relates to both issues involving an error of law or procedure. It is akin to an automatic review. The appeal court dealing with the matter in terms of an automatic right of appeal irrespective of the issues raised has a duty to satisfy itself that the conviction is in accordance with law in that it is supported by evidence and that the sentence of life imprisonment is appropriate.

[7] The court must be satisfied that in the trial before the regional magistrate there was sufficient body of evidence based on which a judicial officer could return the verdict of guilt beyond reasonable doubt. In *S v K* 2008(1) SACR 84 (C) at 86a-g, it was held that the judicial officer needs to be vigilant in the assessment and evaluation of evidence in order to eliminate the risk of conviction based on insufficient evidence, particularly, as the offence carries a heavy punishment. The fact that complainants in such matters are women and children, the most vulnerable members of society, is not to be allowed to be the substitute for proof beyond reasonable doubt. The failure to evaluate evidence properly and objectively is nothing other than an injustice.

[8] The appellant was charged with rape of a five (5) year old girl. The complainant was five (5) years old when the alleged rape took place and she was twelve (12) years old when she testified. It made it difficult to determine whether the complainant could correctly recall what happened to her when she was five (5) years old, at that age she was not in a possession to comprehend what was happening. If the complainant was not a competent witness at the time that the incident took place, the State could not show that she was at that age of sufficient understanding to distinguish between the truth and the lies and to understand the import of telling the truth. She could not recall something that she could not understand. In my view, her evidence is a reconstruction to which not much weight can be given. It follows that the evidence of the first report made by the complainant at the age of five (5) whilst

she was not a competent witness would also carry no weight. Further, relating to evidence of young children lapse of time may have a huge impact. See *S v T* 1973 (3) SA 794 (A). In *S v Mbokhani* 2009 (1) SACR 533 T the court held that the passage of time may distort the child's memory.

[9] The complainant testified that she was at home and she was playing outside with her two siblings. It was during the day and her mother who was sick was in the house. She testified that the appellant who was unknown to her approached. He asked her who was present at home. She told him that her mother was present. He proceeded into her house. After a while, the appellant came out. The appellant asked her to go with him to his house and that he would give her cakes and juice. She agreed and she walked with the appellant. The appellant held her by hand. They reached a spot where there was some tall grass. The appellant instructed her to sit down. He asked her to lean against his arm. When he said she must lean against his arm he was lying on top of her. She sat on the grass and she took off her panty. She was wearing a skirt and a shirt. The record when the Prosecutor lead evidence from the complainant indicates the following:

Prosecutor: Okay what did you do after he instructed you to sit down?.....I sat down . He then asked me to lean against his arm.

Court: Lean against his arm?.....Yes.

Prosecutor: Where did you sit down?..... Sat down on the grass.

When he said that you must lean on his arm how was he positioned?... He was lying on top of me.

L...M you have to tell the court what happened step by step. What did this man do until he slept on top of you?.....He instructed me to sit down and thereafter I took off my panties.

What were you wearing on that day?--- I was wearing a skirt and a T shirt.

Court: T Shirt or skipper?Skipper, T Skirt and shoes.

Prosecutor: So, would it be skirt, T shirt, panty and your shoes?..... Yes

This man told you to sit down and he took off your panty. What happened?

Prosecutor: Sorry, where did he place this panty after he took off this panty where did he place it?

Court: L...M... first listen to me. I want you to listen to me L...M... you need to

tell us step by step what happened to you that day he made you sit down on the grass?..... Yes

We were not there so you have to tell us?..... Yes.

I need you to cast your mind back to when this incident occurred and tell me. I want you to narrate to us what happened to you to us as if your you were telling a story..... Yes.

Prosecutor: Please tell us then after you were sitting down what did he do?..... He then took off my panty.

Yes, I was asking where he left the panty?..... Actually he pulled my panties down to my legs.

Where about on your legs?... Around my ankles.

Proceed. ...He then laid on top of me.

How were you position when he laid on top of you?.... I was lying facing upwards.

What was the position of his clothing when he lay on top of you?..... By then he had opened or unzipped the zip of his trousers.

He laid on top of you, what happened then? He thereafter inserted his penis into my vagina.

Interpreter: Your Worship, the witness using the kids words for penis is tololozi and the kids words vagina komozi, nkogozi nyalo,my vagina

Prosecutor: How did you feel when he inserted his penis into your vagina?..... It was painful although I did not cry.

Where was it painful?inside my vagina

Why did you not cry?

Interpreter: The witness is silence.

Prosecutor: Sorry ! Because there was nobody even if I had cried who could have heard me.

Court: Sorry even if she did cry nobody would have heard her?..... Yes.

Prosecutor: Yes, proceed, he inserted his penis into your vagina, what happened then?..... He started making some movements whilst he was on top of me.

What movements did he make?...Up and down movements

Proceed.... After he had finished making those movements, he then dressed me on my panty.

Court: He pulled up your panty?... Yes

Prosecutor : Proceed ?... He then told me to go

What did you do?... I got up and started to walk. I actually left together from that spot together with that dad. Whilst leaving together with that dad on our route or way what he remarked or said:

'Look, If you love something it means do you love love that person'.

Did you understand what he meant? ... No

Proceed what happened after he said those words?... He further then said to me that he is going to get hold of cakes and juice, he was going to see me. He then said to me that I must go along on a separate tarred way or route whereas he also going to walk along or a different route or pathway.

Proceed ?..... After, that I went home and on arriving at home I than found my grandmother. I found my grandmother, Sabelo, Sane, Ayathandwa and Sane's mother.'

[10] The complainant asked by the prosecutor where her skirt was when this man inserted the penis into her vagina, said he had pulled it up to the area of her stomach. She said the man after saying they must take separate ways, he greeted her goodbye and he started walking up that vicinity. She stated that her grandmother asked her when she arrived where she was coming from. She was in the dining room with her grandmother and her mother was in the bedroom. She said to her grandmother she left with the man who came over at her home. She said her grandmother asked her if there was a thing that he had done to her. She told the grandmother that he had raped her. She told the grandmother what happened. She stated that the grandmother and her sisters agreed to the effect that he had raped her. She stated that she was then taken to the police. Her grandmother told the police what happened. On the same day, she was taken to hospital. Two nurses examined her. She was checked but she was not asked to explain what happened.

[11] The complainant testified that when the man called her, she was playing with her siblings near the door of her house. Her mother sent her siblings to the shop and she remained behind. Her mother sent her siblings to the shop whilst she and the man were in the house. Soon after her siblings had left, the man came out of the house and he went away with her. She said she left with the man and she did not

think he would do anything bad to her because he was her mother's acquaintance. She said the appellant is the man who took her away. She said he was lying when he says he did not know her mother, that he did not come to her home and that he did not take her away and raped her.

[12] T[...] M[...]. She was the mother of the complainant. On 7 January 2011 (date of the incident) at approximately 14h00, the appellant came to her house. The children were playing outside. It was the first time for the appellant to come to her house. She used to see him in the bus whilst she worked. The appellant told her that he had come to bring the word of God. He said he saw her walking slowly and that she was sick. She told him that she had everything she needed and that she was not keen to join his church. The appellant then left.

[13] She testified that after the appellant had left the house, she sent the complainant and Noluthando her sister to the shop. Noluthando returned from the shop alone. Noluthando asked her where the complainant was. She told Noluthando that she must go and look for the complainant. She came back and she told her that she could not find the complainant. She told her to go back and look for her. Noluthando came back with the complainant. The complainant did not enter the house. She stood behind the house. She instructed Noluthando to go and call their grandmother for her to find out what was the problem with the complainant. The grandmother arrived. The grandmother attended to the complainant to find out what the problem was. The complainant was young and she did not understand what happened.

[14] Thokozani Dube (Dube) testified that she qualified as a medical doctor in 2006. On 7 January 2011, she examined the complainant and she completed the medical examination report. She noted hymen and posterior rim of hymen was not visualised. She found redness on urethral orifice, redness on the para-urethral folds. The redness may be as a result of infection. She concluded that because of the redness she found that sexual assault cannot be excluded, vaginal penetration was most likely. The doctor in her evidence stated that because of that redness and that the posterior rim being absent it meant that there was something that went in and it was recent. In my view, it is unfortunate that the doctor did not explain the significance of

the absence of hymeneal posterior rim in relation to the time of the examination and the time of the incident. Further, if redness in the areas in which it was found could be because of infection, what measures and tests she conducted to eliminate infection as the cause of the redness on the complainant. In my view, it is significant that the examination was conducted on the same date as the alleged incident but there were no injuries found on the complainant on the gynaecological examination. It is clear as testified to by the doctor that she relied heavily on the history given to her for the conclusion. She did not approach the examination with the view to independently verify the history given to her. She assumed that the history given to her was correct which may have influenced her opinion. In *S v ML* 2016(2) SACR 160 (SCA) at 162i-163a the court held that where the complainant is a very young child and the only witness implicating the appellant, her evidence must not only be treated with caution, but a degree of corroboration is required to reduce the danger of relying solely upon her evidence. To rely upon the cryptic findings and bald conclusion by the doctor to provide the requisite corroboration is unjustified.

[15] The appellant testified. He stated that he did not know the mother of the complainant. He denied ever visiting the home of the complainant. He denied that he took the complainant away and he had sexual intercourse with her. He testified that he did not know the complainant.

[16] The medical examination report (J88) indicates that DNA samples placed in the evidence collection kit 09A7AB9731XX were collected. There is no indication on the record whether any DNA examination was conducted and the results thereof. However, it took the State six (6) years to commence with the prosecution of the appellant. It is not on the record what caused the delay. However, the State had an ample opportunity to present the DNA evidence in support of the State case. The appellant to be fair to him was entitled to be informed of the result of the DNA examination. The learned regional magistrate readily concluded that the complainant testified in a clear, concise and satisfactory manner. She found that her evidence was consistent with first report and it was corroborated by the medical evidence which showed that she was recently sexually molested. In my view, the said conclusion was arrived at without a scrutiny of the evidence and without taking into consideration the shortcomings in the evidence.

[17] The complainant's mother stated that the complainant's grandmother attended to the complainant. She indicated that it is the grandmother who checked the complainant. The complainant testified that her grandmother questioned her as to where she had been and what happened. She said the grandmother agreed with the complainant that she had been raped. In my view, it was crucial that the grandmother be called as a witness. She was not called and it was not explained why she could not be called as a witness. The result is that there is no evidence of the first report. Further, it cannot be ascertained whether any undue influence or suggestibility was exercised in the manner the complainant was questioned.

[18] The State case against the appellant is entirely dependent on the evidence of the complainant. It is single witness evidence and it is the evidence of a child. The evidence of the complainant in view of other evidence that could have supported it is not clear and satisfactory in all material respects. See *R v Mokoena* 1956 (3) SA 81 (A) at 85G-H; *S v Sauls & others* 1981(3) SA 172 (A) at 180E-G. The fact that the complainant was very young when the incident took place weakens her evidence. Further, the passage of time between the date of the incident and the complainant testifying in court could have distorted the memory of the complainant and further have it clouded by imaginativeness and suggestibility.

[19] It is trite that evidence of children poses particular challenges. It is required that it to be approached with extreme caution. The danger is not only that children are highly imaginative but their story may be the product of suggestions by others. In the instant referred to above, the manner the complainant was led is close to exercising an influence on her. The questions suggested that something happened and she must tell the court what happened. It is not known how the grandmother of the complainant questioned her. The complainant testified that grandmother and her siblings told her that the appellant raped her. The complainant could not explain why she went away with a stranger, why she did not cry when the stranger sexually molested her and why she did not volunteer to report what the stranger did to her. If she could not tell the police and the doctor what happened why was she able to tell her grandmother what happened.

[20] It is trite that a court of appeal will not disturb factual findings of a trial court unless the latter had committed a misdirection or where the appeal court is convinced that the conclusion reached is wrong(*R v Dhlumayo* 1948 (2) SA 677 (A)). In my view, it is very dangerous in this case to base a conviction of the appellant on the evidence of the complainant alone. The learned regional magistrate failed to approach the evidence of the complainant with the necessary caution. In my view, the State failed to prove the guilt of the appellant beyond reasonable doubt. The conviction and sentence on the charge of rape falls to be set aside.

[21] I propose the following order:

1. The appeal against conviction- on the charge of rape is upheld.
2. The conviction and sentence on the charge of rape is set aside.

Mngadi J

I agree, it so ordered

Gani AJ

APPEARANCES

Case Number AR 589/18

For the Appellant Bongani Mbatha
Instructed by Legal Aid South Africa
 PIETERMARITZBURG

For the respondents M E Mthembu
Instructed by Deputy Director Public Prosecutions
 PIETERMARITZBURG

Heard on 10 September 2021
Judgement delivered on 14 September 2021