THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 257/13

Not Reportable

In the matter between:

MULIMISI ELIAS MULOVHEDZI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mulovhedzi v The State* (257/13) [2013] ZASCA 201 (2 December 2013)

Coram: **Ponnan, Shongwe and Petse JJA**

Heard: **26 November 2013**

Delivered: **2 December 2013**

Summary: **Evidence ─ adequacy of proof ─ single witness ─ corroboration.**

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Lukoto J sitting as court of first instance):

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

JUDGMENT

[1] On 26 September 2001 the appellant, Mr Mulimisi Elias Mulovhedzi, was charged in the regional court, Thohoyandou, Limpopo with the rape of his ten year old stepdaughter. Although the charge sheet was silent as to the applicability of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Act), the trial court, of its own accord, explained to the appellant at the outset that given the age of the complainant the provisions of s 52[1] of the Act would be invoked if a conviction ensued.

[2] Section 52 of the Act as it then applied required a regional court, when it has convicted an accused person of an offence for which life imprisonment is the prescribed sentence, to stop the proceedings and commit the accused for confirmation of the conviction and for sentencing in terms of s 52 of the Act to a high court having jurisdiction.

[1] Since repealed by s 52 of the Criminal Law (Sentencing) Amendment Act 38 of 2007.

[3] On 30 October 2001 and despite pleading not guilty the appellant was convicted as charged. Consequent upon the conviction the regional court stopped the proceedings and committed the appellant to the Limpopo High Court for confirmation of the conviction and for sentencing as contemplated in s 52 of the Act.

[4] The case served before Lukoto J who, having found that no substantial and compelling circumstances existed to justify a lesser sentence, sentenced the appellant to imprisonment for life as contemplated in s 51(1) of the Act. This occurred without the high court first complying with the procedure that it was obliged to follow in terms of s 52(2)*(b)*[2] of the Act.

[5] On appeal various grounds were advanced on behalf of the appellant concerning the conduct of the trial both in the regional court and to a lesser extent in the high court. It was contended that: (a) it was not apparent *ex facie* the record what the regional court's explanation to the appellant of the latter's procedural rights entailed as should have been the case; (b) the regional court failed properly to explain to the appellant his rights relating to cross-examination of State witnesses; (c) the regional court failed to assist the appellant in cross-examining State witnesses; (d) having explained the applicability and import of s 52 of the Act to the appellant, the regional court failed to encourage him to reconsider his earlier decision to conduct his own defence; and (e) the high court should not have proceeded to impose sentence without first satisfying itself that the appellant is guilty of the offence of which he was convicted and in respect of which he was committed for sentence as required by s 52(2)*(b)*(ii) of the Act.

[2] Section 52(2)*(b)*, inter alia, required a high court to which an accused is committed for sentence to make a formal finding of guilt before sentencing the accused unless it is not satisfied that the accused is guilty of the offence of which he or she has been committed for sentence.

[6] However, in the light of the view I take of the matter it is not necessary to deal with these alleged irregularities because I am satisfied that the guilt of the appellant had not been established beyond reasonable doubt. It is thus necessary at this juncture to set out the factual background. As already stated, the appellant was charged with rape. He pleaded not guilty and, in essence, put all of the elements of the charge against him in issue. In his plea explanation he told the court that he chastised the complainant on 21 December 2000 for having not slept at home the previous night.

[7] The complainant was the first witness to testify at the instance of the State. She told the court that she was at home with the appellant and three of her siblings whilst her mother was at Tshilidzini Hospital attending to one of her sick children there. She said the appellant asked her to prepare the place where he was going to sleep. After she had done so the appellant instructed her to get under the blankets and sleep. The appellant then took off her pair of trousers and had sexual intercourse with her. After the appellant had finished he left for the headman's homestead. The police then arrived at her home and took her to Vuwani from where she was fetched by her grandfather. She reported the incident to her mother upon the latter's return from hospital. She denied that she had not slept at home the previous night saying that the appellant assaulted her because she had refused to have sexual intercourse with him. Under cross-examination she stated that she reported her earlier previous sexual encounters with the appellant to the appellant's grandmother. But the latter was unsympathetic and chased her away saying that she must not set foot in her homestead again. She further stated that the appellant was

arrested by the police on the same night of the alleged rape. She said that the appellant had penetrated her hence she was told at the clinic that her womb was damaged.

[8] Ms Martha Mlaudzi, the complainant's mother also testified. She stated that the complainant reported to her that she had been raped by the appellant whilst she (ie the mother) was away at the hospital. She confronted the appellant about this allegation who said that 'he did not do that'.

[9] Two doctors were also called by the State. First, Dr Zomiya testified that she examined the complainant at Tshilidzini Hospital on 22 December 2000 after which she compiled a report. She found no injuries on her body. As to the date when the complainant last had sexual intercourse with consent, she said that the complainant was not sexually active. The gynaecological examination of the complainant revealed that her labia majora and labia minora were normal and had no injuries as were the vestibule, fourchette and perineum. No vaginal discharge or haemorrhage was seen. But of significance is that according to Dr Zomiya there were no fresh vaginal tears visible. Why it was thought that the evidence of Dr Shibange who examined the complainant on 10 September 2001 ─ almost nine months after the alleged rape ─ is relevant, is unclear. Dr Shibange said that upon examining the complainant he found what he described as 'some yellowish or whitish discharge, tenderness in the abdomen'. From this he concluded that the complainant had a sexually transmitted disease. However, he could not tell as to when the complainant was infected with such sexually transmitted disease or by whom.

[10] The appellant testified in his defence and denied the substance of the complainant's evidence. More particularly he denied that he had sexual intercourse with the complainant. He claimed to have only administered corporal punishment to the complainant, chastising her for having not slept at home the previous night.

[11] The trial court found that the complainant's evidence, approached with the required caution, was reliable. It went on to hold that the complainant's version was also corroborated by Drs Zomiya and Shibange. As against that, it found that the appellant's version was in the main so improbable that to accept it would imply that the complainant had falsely implicated the appellant. It sought to explain the absence of semen in the complainant's vagina on the speculative hypothesis that a condom might have been used. It further reasoned that the fact that the complainant had a sexually transmitted disease served to indicate that she had had sexual intercourse. It concluded by saying that:

'There could therefore be no question of mistaken identity. They [complainant and appellant] know each other very well and I am convinced that she could not have said it was him, unless it was.'

[12] Before considering whether or not the conviction of the appellant is supportable on the evidence adduced at the trial, it is necessary to reiterate the proper approach to be adopted when analysing the version of an accused in a criminal trial. This court has time and again said that:

'[T]here is no obligation upon an accused person, where the State bears the onus, "to convince the court". If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it

is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true.'[3]

[13] As to the corroboration of the complainant's evidence by Drs Zomiya and Shibange ─ as found by the trial court ─ it suffices to say that the nature of corroboration required for purposes of the cautionary rule is corroboration implicating the accused in the commission of the crime and not 'merely corroboration in a material respect or respects'. Thus in *S v Mhlabathi & another*[4] Potgieter JA said the following:

'It is clear from the authorities that if corroboration was required it had, for the purpose of the so-called cautionary rule, to be corroboration implicating the accused and not merely corroboration in a material respect or respects. (See *Ncanana's* case [*R v Ncanana* 1948 (4) SA 399 (A)] at p 405; *R v Mpompotshe and Another* 1958 (4) SA 471 (AD) at p 476; *S v Avon Bottle Store (Pty) Ltd And Others* 1963 (2) SA 389 (AD) at p 392.) I would like to emphasise that as was pointed out by Schreiner JA in *Ncanana's* case *supra* at p 405 it is not a rule of law or practice that requires the Court to find corroboration implicating the accused, but what is required is that the Court should warn itself of the peculiar danger of convicting on the evidence of the accomplice and seek some safeguard reducing the risk of the wrong person being convicted, but such safeguard need not necessarily be corroboration. *Once, however, the Court decides that in order to be so satisfied it requires corroboration, it would be pointless to look for corroboration other than corroboration implicating the accused.*' (My emphasis.)

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[3] *S v V* 2000 (1) SACR 453 (SCA) at 455a-c; *S v Shackell* 2001 (2) SACR 185 (SCA) para 30.
[4] *S v Mhlabathi & another* 1968 (2) SA 48 (A) at 50G-51A. Compare *S v Jackson* 1998 (1) SACR 470 (SCA) at 476e-f where Olivier JA said: 'The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.'

Although the aforegoing remarks were made in a different context they equally apply to a case such as the present where, as the trial court recognised, it was necessary to approach the complainant's evidence with caution because she was not only a single witness but also a child. (See also in this regard *R v W* 1949 (3) SA 772 (A) at 779 where it was said that corroboration meant other evidence which supports the evidence of the complainant and renders the evidence of the accused less probable on the issues in dispute.)

[14] As to the trial court's credibility findings, they are not, in my view, borne out by the evidence. Accordingly this court is at large to interfere despite the advantages that the trial court had of seeing and hearing the complainant.[5] To my mind there are several crucial aspects of the complainant's evidence that called for elucidation and which were not adequately probed. The failure to ventilate those aspects resulted in critical shortcomings in the State's case which negatively impacted on the reliability of the complainant's evidence. This is quite apart from the fact that the complainant's evidence is riddled with material inconsistencies. The evidence of the complainant was also unsatisfactory in several material respects. In her evidence-in-chief she said the appellant left immediately after having had sexual intercourse with her but in cross-examination she said he left at dawn. This is a clear contradiction. Again in cross-examination she said that she was told by a doctor in hospital ─ after the sheets became blood-soaked as a result of her (presumably vaginal) bleeding ─ that her womb was damaged and yet none of the doctors testified to that effect. Her version on this score cannot be the truth.

[5] *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 689-690.

[15] The trial court found that the evidence of Dr Zomiya corroborated that of the complainant 'to the effect that when examined on 21 December 2000, she had a fresh tear that is suggesting of sexual penetration. The fact that the tear was fresh suggests furthermore that penetration was not old. In other words, it had just taken place or recently. It could have happened either on the 22nd or on 21 December 2000, if it is said that the wound was still fresh'. The medical report of Dr Zomiya, however, specifically records: 'no fresh tears visible'. Thus it follows that the trial court fundamentally misconceived the evidence in a material respect. Moreover, the evidence of Dr Shibange whose examination of the complainant occurred some nine months after the alleged rape could hardly have afforded corroboration as the regional court found.

[16] It remains to echo the remarks of Nugent JA in *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 21:

'The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important.'

[17] For the reasons set out above the conviction of the appellant cannot stand. Accordingly the following order is made: The appeal is upheld and both the conviction and the sentence are set aside.

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X M PETSE
JUDGE OF APPEAL

APPEARANCES:

For the Appellant: M C Mogashoa
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