IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: A560/07

In the matter between:

ZANDISILE NDZELU Appellant

and

THE STATE Respondent

JUDGMENT: 25 APRIL 2008

VAN ZYL J:

INTRODUCTION

[1] The appellant was convicted on 25 July 2005 in the Regional Court, Wynberg, on a charge of raping a girl aged eleven during 2002. The matter was referred to this court for sentencing in terms of section 52 of Act 105 of 1997. The conviction was confirmed on 30 November 2006 and the appellant was sentenced to life imprisonment. He was subsequently, on 5 February 2007, granted leave to appeal against both the conviction and sentence. An application for bail pending appeal, however, was refused despite the fact that the State did not oppose the application.

[2] On 21 January 2008 the appeal was allowed by a full bench of this court and the conviction and sentence were set aside, with reasons to follow. On the same day I issued a warrant of liberation for the immediate release of the appellant, who has been in custody since his arrest on 26 June 2003, a period of more than four and a half years. Prior to that it would appear that he had been in custody for a period of some four months from 27 October 2002, when he was first arrested, to 27 February 2003, when the case was withdrawn for lack of evidence against him. It was subsequently reinstated at some time before his arrest on 26 June 2003. The details relating to this prior incarceration and

the reasons for the withdrawal and reinstatement of the case are sketchy and confusing. This in itself is a cause of some concern. Of more concern in this regard, however, is that the appellant was granted bail on 27 June 2003, the day after his arrest, in the amount of R1 500,00, which he was unable to pay. A number of subsequent applications for the amount to be reduced were refused, with the result that the appellant remained incarcerated until he was released by this court.

[3] In the appeal before us Mr P H Loots appeared for the appellant and Ms S F A Raphels for the respondent. The Court expresses its appreciation for their respective presentations. As mentioned above, the appeal was allowed on the day that it was argued in order to ensure the appellant's immediate release from what was clearly a totally unjustified incarceration arising from an ostensibly unreasonable bail condition that required him to pay an amount that was clearly beyond his financial means. The subsequent refusal of bail pending the present appeal was also, in my respectful view, questionable, particularly in view of the fact that the State did not oppose the application. This matter does not, however, require further consideration inasmuch as it did not play any role in this court's decision to allow the appeal in respect of conviction and sentence. The reasons for such decision appear from what follows.

THE EVIDENCE OF THE COMPLAINANT

[4] In the proceedings before the trial court, the complainant testified by way of closed circuit television in terms of section 153 of the *Criminal Procedure Act* 51 of 1977. She was apparently assisted, with the tacit approval of the court, by one Irene Dabene, who was described by the prosecutor as "sitting next to her just for moral support". Mr G Nzunga did duty as the court's official Xhosa/English interpreter.

[5] At the commencement of her testimony the complainant averred that the appellant, who lived next door to her home and whom she knew as "Tata Mjole", had raped her more than once at his home. The first time was on a Friday after school during March 2002. She had been playing with his children outside the house when he had called her inside and taken her to his room. When asked what had happened there she was, initially, unable to do so coherently or comprehensibly. She was literally coaxed into giving a description of what the appellant had done to her. According to the record her replies to the vast majority of questions put to her in this regard were inaudible. She was visibly upset and, only after an adjournment, was she able to continue.

[6] She then explained that the appellant had pulled her onto the bed and removed her panty. As she lay on her back he lay on top of her with only the top part of his body clothed. When asked what he had done, she was once again unable to reply audibly. When asked how it felt when he lay on top of her, her reply was that it had been painful. She could not, however, explain why it had been painful, her answers to questions once

again being inaudible. She attempted to demonstrate with the assistance of a male and female doll. According to the court's description of the demonstration the lower bodies of the dolls were exposed and the complainant moved the male doll up and down two or three times on the female doll. When asked where she had experienced pain she indicated that it had emanated from her private parts and explained that it had been because the appellant had been raping her. When asked with what he had done so, she pointed out the male doll's penis. The prosecutor then asked: "When he put that thing by your private parts was it just on top or was it inside?" Her reply was: "Inside".

[7] In response to a question whether the appellant had said anything, she testified that he had told her not to tell anyone. She had felt scared and, after putting on her panty and shorts, she went home without saying anything to her father or her aunt (to whom she referred as her sister) when they returned home from work late that evening. She likewise said nothing to her mother who, at that time, was living in the Eastern Cape.

[8] After being prompted by a series of leading questions as to further instances of alleged rape by the appellant, the complainant testified that the next incident took place on a subsequent Friday. As on the first occasion she had been playing outside with the appellant's children when he called her inside. This time he told her that he was going to send her on an errand. Once she was inside, however, he raped her a second time in the same place and in the same way as previously. Because she was still afraid of him, she initially told no one about it. When asked who the first person was whom she informed of the rape by the appellant, she answered that it was "the social workers". The next person she told was her mother, who had by then apparently returned home from the Eastern Cape and in fact accompanied her to the social workers. This creates the impression that her mother already knew of the rape allegations.

[9] In her further testimony, once again after an inordinate amount of prompting, the complainant referred to regular, in the sense of weekly, incidents of rape, all of which happened in exactly the same place and manner as the initial two instances. For the rest she appears to have visited the social workers more than once and was also examined by a doctor some months later. She was not asked for any details relating to these visits.

[10] The complainant's evidence in cross-examination was, if anything, even less satisfactory than in chief. Her answers were, for the most part, inaudible and at one stage the appellant's legal representative asked the court to place on record that she had failed to answer most of the questions and was in fact unable to do so. The court's response was that it was not a question of her being unable to answer inasmuch as the problem with her testimony had been evident from the beginning of her evidence in chief. She should hence not be pressured into responding quickly since her failure to do so would not be a true reflection of the nature of her evidence.

[11] An aspect which came to the fore for the first time in cross-examination related to an incident when her father was looking for her while she was sleeping in a car. When asked why she had slept there, her answer was once again inaudible. She did, however, mention that she was afraid of her father because she was "afraid to speak the truth". Later on she conceded that she had not slept in the car because her father was using it. When she was asked where she had then slept she became emotional and tearful and did not respond to the question. Nor did she respond when it was put to her that she had run

away from home and that her father had been driving around all night looking for her. In further cross-examination she testified that her father had two cars and that she had slept in the brown one which he had not been driving. This was all very confusing, if not incomprehensible.

[12] It was then put to the complainant that the appellant had seen her that morning with a plastic bag and walking with another man, whom he presumed was her boyfriend. Because she was afraid that her father would beat her if he thought she had been with this man, she had accused the appellant of raping her. She denied this, but had no answer when it was put to her that, according to the medical report relating to her visit to the doctor on 27 November 2002, she had previously had sexual intercourse and had suffered no injuries in the alleged rape by the appellant. In this regard her evidence relating to the number of times the appellant had allegedly raped her and when these assaults had occurred was, once again, virtually incomprehensible.

[13] In reply to questions by the court the complainant stated that she had slept in the car that night because she had been afraid to tell her father that the appellant had raped her. In further cross-examination she mentioned that she had also run away from her father on other occasions after she had been raped. She had then run to her grandfather, but had likewise not told him about the rape.

THE EVIDENCE OF OTHER STATE WITNESSES

[14] The mother of the complainant testified that she had been in the Transkei at the time of the alleged rapes on her daughter. She had returned home between October and November 2002 when her husband, the father of the complainant, had requested her by telephone to do so. On her return she went to the school of the complainant where certain information was imparted to her and it was suggested that she take the complainant to social workers. She did so on that very day. One of the social workers, who was not mentioned by name, then informed her of what the child had told her. Her words were: “Sisi your child has been raped by a man you are staying with”. This was apparently a reference to the appellant and not to the complainant’s father, as was subsequently confirmed by one Ms Linda Monakali, a counsellor at the Ilitalabantu Organisation that deals with violence against women and children. On her advice, it would appear, the complainant’s mother laid a charge against the appellant on that very day.

[15] In her further evidence she testified that the complainant had told her nothing about what had happened to her. What she knew, she had heard from the social workers. When she attempted to elicit information from the complainant, she would simply cry and not reply at all. Despite her reluctance to speak about the incident, however, it was not apparent that her behaviour had changed. Nor could the fact that the complainant had failed her grade at school that year (2002) be attributed to the incident.
[16] In cross-examination she testified that, as a result of the incident, the complainant had run away to her grandfather's home and returned only when she returned from the Transkei. She was unable to explain why the complainant had testified that she had told her about what had happened when in fact she had not done so. Nor could she explain why her husband had told her nothing of the complainant's disappearance and his searching for her all night. According to her the complainant was still a child playing with dolls. It was clearly beyond her comprehension that the complainant might have been sexually active at such a tender age.
[17] The next witness was Dr S M Trope, who testified that he had examined the complainant on 27 November 2002. According to the information furnished to him, the complainant had allegedly been raped on an unspecified day during October 2002. Although her hymen was not intact and there was no hymenal tissue present, he found no indication of swelling or fresh tears. On the contrary, her vaginal entrance was very large, extending 20 by 15 millimetres. This was indicative of repeated sexual penetration over an extended period of time.
[18] The aforesaid Ms L Monakali testified that she had given counsel to the complainant, who had been referred to her by social workers. She did not mention the dates on which she had held counselling sessions with the complainant, but it would appear that there was more than one. In her report dated 25 February 2003 she relied on background information relating to an alleged rape during mid-October 2002. The complainant had been "able to confess and give full details of what has happened". The details appearing from the report, however, differed substantially from her evidence, in so far as it might have been comprehensible, in the trial court. More specifically it would appear that the appellant had been undressed when the complainant entered his bedroom. When she had refused to undress, he removed her panty. He then covered their faces with a blanket and held his hands over her mouth to prevent her from screaming while he was raping her.
[19] Ms Monakali indicated that she had furnished the complainant's parents with a letter to the police so that they could lay a charge against the appellant. When she saw them again they told her that the case against the appellant had been withdrawn. On her suggestion the case was reopened. The complainant did not, however, return to her for further counselling since the family had apparently moved to the Eastern Cape.
[20] In cross-examination Ms Monakali testified that the complainant had told her of only one incident involving an alleged rape by the appellant. This emerged during the course of three to four sessions, Ms Monakali apparently being the first person to whom the complainant had divulged the detail of the incident.

THE EVIDENCE OF THE APPELLANT

[21] The appellant denied having raped or otherwise sexually assaulting the complainant. He suggested that she had falsely accused him of rape in order to conceal the fact that she might have been involved in a sexual relationship with a boyfriend or someone else and was afraid that her father, of whom she was afraid, might get to know about it. He had in fact seen the complainant one day in October 2002 when she was walking with some school children while carrying a plastic bag containing clothes. Later that day, while he was in his house, he heard the complainant's father asking his children whether they had seen the complainant. He went out and asked the father why he was looking for the complainant. The father replied that she had not slept at home the previous night and that he had in fact been in his car looking for her all night.

[22] Despite intensive cross-examination the appellant, in substance, stood by his denial and version of the events relating to when and under what circumstances he saw the complainant and spoke to her father. He was unable to tender any reason why she should incriminate him falsely. According to him he had had no further contact with either the complainant or her father after the events of which he testified. In an attempt to elicit some kind of concession from the appellant, the prosecutor resorted to sarcasm and to repetitious, bullying and aggressive questioning, which was quite unacceptable and unfair. It related in the main to small differences in his testimony which, for the most part, were of limited relevance.

THE JUDGMENT OF THE TRIAL COURT

[23] In assessing the evidence of the complainant, the regional court accepted that she had been confused about the dates, times and frequency of the alleged rapes, but had been sure that it was the appellant who raped her. The court likewise accepted that she had made no report to her mother, father or other family members, but had in fact told a social worker what had happened to her. In doing so, she had mentioned only one incident of alleged rape which, the court held, constituted a contradiction of her evidence.

[24] Despite these considerations and the fact that the complainant was a single witness in respect of whose evidence caution should be exercised, the court was satisfied that she had testified with "sufficient clarity" and that her evidence had been supported, though not corroborated, by her report to Ms Monakali. Her delay in making this report, the court held, had been satisfactorily explained and was hence, in the circumstances, made within a reasonable time. As for Dr Trope's evidence, it was true that it did not indicate forced sexual intercourse, but it did make it clear that she had been penetrated and sexually assaulted. In this regard, the court held, the contradictions in her evidence were not of a material nature and did not render her evidence unreliable. Her version of the relevant events was indeed acceptable and reasonable, thereby constituting a *prima facie* case against the appellant, who was obliged to rebut such case.

[25] With regard to the appellant's evidence, the court held that the contradictions raised during cross-examination were material. In addition his version had not been substantiated by any other evidence, such as that of his children or the complainant's father. As such his defence constituted a bare denial and could not be accepted as reasonably possibly true. The court hence concluded that the State had proved beyond reasonable doubt that the appellant had raped the complainant on at least one occasion.

THE MAIN SUBMISSIONS ON BEHALF OF THE PARTIES

[26] The gist of the argument by Mr Loots on behalf of the appellant was that the regional court had erred in holding that the State had succeeded in proving the guilt of the appellant beyond reasonable doubt. In this regard it had failed to properly analyse and evaluate the evidence of the State witnesses and had failed to have due regard to the cautionary test relating to a single youthful witness such as the complainant. In addition it had erred in accepting that the complainant's testimony had been satisfactory. It should in fact have found that her evidence was so vague and unsubstantiated that it could not be

properly tested. In this regard it had been contradicted, rather than corroborated, by the evidence of Ms Monakali concerning the time, frequency and particulars of the alleged rape. By the same token the court had erred in not finding that there were a number of serious improbabilities in the State evidence.

[27] Mr Loots argued further that the court had erred in rejecting the appellant's evidence as palpably false. It should rather have found that it had been at least partly corroborated by the complainant's own evidence that she had spent a night in her father's car and had not gone home. It had been further corroborated by the evidence of Dr Trope that his examination of the complainant had not revealed any rape-related injuries and that the size of her vaginal opening pointed to frequent penetration over a substantial period of time. This was in fact indicative of the fact that she had been sexually active for some time. It might also explain why she had falsely implicated the appellant, namely in an attempt to conceal the true facts of her sexual activity. The court should hence, Mr Loots submitted, have accepted the appellant's version as reasonably possibly true.

[28] Inasmuch as our learned colleague, to whom the case was referred for sentencing after the conviction of the appellant, associated himself with the findings of the regional court when confirming the conviction, Mr Loots suggested that such confirmation should likewise be set aside.

[29] In her argument on behalf of the respondent Ms Raphels conceded that the evidence of the complainant was difficult to follow and that she had been hesitant to explain what had happened to her. There was, however, sufficient evidence to prove that she had been raped and that she had identified the appellant as the perpetrator. Thereafter she had reported the rape to a counsellor and "to an extent" to her mother. Ms Raphels accepted that caution should be exercised in assessing the testimony of the complainant as a single witness, but submitted that caution should not displace common sense. In this regard she found support for the complainant's version in the evidence of Dr Trope relating to the indications of repeated sexual penetration of the vagina. The problem with the date of the rape, namely March or October 2002, she submitted, was attributable to the complainant's youthfulness and to the fact that she had testified as to having been raped more than once.

[30] Ms Raphels submitted further that the appellant's evidence should not be accepted as credible in view of the assumptions and unsubstantiated statements he appears to have made. In addition he had adapted his evidence during cross-examination when he was unable to give a satisfactory reply to questions put to him by the State prosecutor. This indicated that he was a poor witness whose version could not be reasonably possibly true.

THE RELEVANT LEGAL PRINCIPLES

[31] It is a well established principle of law that a court of appeal will not interfere with a trial court's evaluation of the evidence placed before it, unless there has been a

serious error of judgment or misdirection. This would, of course, be the case where the court has erred in finding that the State has proven the guilt of the appellant beyond reasonable doubt. See *R v Ndhlovu* 1945 AD 369 at 386; *S v Van der Meyden* 1999 (1) SACR 447 (W); *S v Phallo and Others* 1999 (2) SACR 558 (SCA) par [10] at 562*g*-563*b*.

[32] It is likewise settled law that a court must have due regard to the fact that the evidence of a single and young witness must be approached with caution. In this regard it must be satisfied that such witness is able to distinguish between the truth and a lie and must understand the dangers inherent in telling a lie. See *S v L* 1973 (1) SA 344 (C) at 347H-348C and 349F; *S v T* 1973 (3) SA 794 (A) at 796C. On the relevant cautionary rule see also *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G; *S v Hlongwa* 1991 (1) SACR 583 (A) at 587*a-b*; *S v Pretorius en 'n Ander* 1991 (2) SACR 601 (A) at 609*b-c*; *S v Khumalo en Andere* 1991 (4) SA 310 (A) at 328A-C; *S v Mnguni* 1994 (1) SACR 579 (A) at 581*g-j*; *S v Vumazonke* 2000 (1) SACR 619 (C) par [10]-[11] at 622*f*-623*d*.

[33] Section 170A of the *Criminal Procedure Act* 51 of 1977 makes provision for the appointment of an intermediary through whom the complainant may be enabled to testify when it appears to the court that the complainant will be exposed to undue stress or suffering should he or she be required to testify. See on the application of this section *K v The Regional Magistrate NO, and Others* 1996 (1) SACR 434 (E) [reported as *Klink v Regional Court Magistrate NO and Others* in 1996 (3) BCLR 402 (SE)]; *S v Mathebula* 1996 (2) SACR 231 (T). Useful guidelines for the circumstances in which such section may be invoked are set forth in *S v Stefaans* 1999 (1) SACR 182 (C) at 187*i*-188*i*. See also *S v F* 1999 (1) SACR 571 (C). In the present case it would appear that the person sitting beside the complainant and furnishing her with "moral support" (par [4] above) was not regarded as, nor was intended to be, an "intermediary" in terms of section 170A. Neither the trial court nor the defence objected to her apparently innocuous presence.

EVALUATION OF THE EVIDENCE

[34] When the evidence is considered and evaluated against the background of the facts and circumstances set forth above, it is abundantly clear that no proper finding on the merits of the conviction could ever have been made on the basis of the complainant's evidence. In response to questions on the most salient and material aspects of the case she was unable to furnish any answer, or any audible answer, at all. When her answers were to some degree audible, they were, for the most part, incoherent, incomprehensible or, at best for her, exceedingly difficult to comprehend.

[35] Even if the trial court were satisfied, as it apparently was, that the complainant's testimony was sufficiently comprehensible for purposes of establishing whether or not the appellant was guilty as charged, no conviction could have been sustained. The plethora of contradictions and illogicalities in her version made it virtually impossible to determine what exactly the correct facts were. In this regard one needs only to have regard to the date when the alleged rape took place, namely during March or October 2002, and the number of times, be it weekly or otherwise, that she was allegedly raped. The State at most proved one rape on an undetermined date in October 2002, which makes nonsense of her evidence relating to a series of regular incidents of rape

commencing in March 2002.

[36] It is difficult to escape the impression that the complainant had probably been sexually abused from a very youthful age and was sexually active and experienced at the time the appellant came on the scene. This was certainly the case when Dr Trope examined her during November 2002. His evidence provided no support whatever to the State's case that the complainant had been raped by the appellant in October 2002 or even, at the earliest, in March 2002. The same applies to the evidence of her mother or Ms Linda Monakali, neither of whom had first-hand knowledge of any alleged rape and apparently relied on the report of an anonymous social worker who did not testify and who, it would seem, did not specifically identify the appellant as the miscreant.

[37] It is hence clear that the evidence of the complainant's mother and Ms Monakali provides no corroboration for the complainant's vague and unsubstantiated allegations. All they do prove is that the complainant failed to make any report to her mother, father, aunt, grandfather or any other family member, and in fact made no report to Ms Monakali, who apparently assumed that the unnamed social worker in question had correctly established that a rape had taken place. The report she heard from such worker (par [14] above) was that which she had told the complainant's mother, namely that the complainant had been raped by a man with whom she was living. How the appellant, a neighbour, was identified as this man does not appear from the evidence.

[38] It is somewhat disturbing that the trial court, in its judgment, dismissed the many contradictions in the complainant's evidence as immaterial, but held that those attributed to the appellant were material, despite the fact that they were elicited during unfair cross-examination. Even more disturbing is the rejection of the appellant's evidence because it was not corroborated by other witnesses and constituted a bare denial. This comes close to holding that the appellant should prove his innocence. In any event a bare denial cannot, in the absence of corroborative evidence, simply be rejected as untruthful because the complainant's evidence is acceptable. This cannot be a basis on which to find that the appellant's version is not reasonably possibly true, particularly when, as in the present case, the court does not refer to the appellant's demeanour or reliability as a witness.

CONCLUSION

[39] It follows from these considerations that the trial court should have rejected the evidence of the complainant and should have held that the State did not prove the guilt of the appellant beyond reasonable doubt. It should in any event have held that, even if the State evidence was acceptable, the version of the appellant was reasonably possibly true.

[40] By the same token it must respectfully be held that our learned colleague, to whom the matter was referred for purposes of sentence, should not have confirmed the conviction and sentenced the appellant in terms of the relevant legislation.

[41] It is for these reasons that this court set aside the conviction and sentence and ordered the immediate release of the appellant.

D H VAN ZYL

Judge of the High Court

I agree.

D M DAVIS

Judge of the High Court

I agree.

W H VAN STADEN

Acting Judge of the High Court