IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A422/2012

DATE: 26 OCTOBER 2012

In the matter between:

MALAMALA MTYI Appellant

and

THE STATE Respondent

J U D G M E N T

BOZALEK, J:

The appellant was found guilty in the Regional Court for the Cape, sitting at Wynberg, on one count of rape and two counts of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, i.e. unlawful, sexual penetration/rape. On the same date, namely, 30 March 2012, the accused was sentenced to 15 years imprisonment on count 1 and 20 years imprisonment on count 2 and 3, which were taken together for the purposes of sentence. The court ordered that the sentence on the latter two counts would run concurrently with that on count 1 with the

result that an effective sentence of 20 years imprisonment was imposed.

The appellant pleaded not guilty to the charges and was legally represented throughout his trial. The magistrate granted the appellant leave to appeal against conviction and sentence but he has abandoned the latter and pursues only his appeal against conviction. The state's case was that in 2006, on a date unknown, the appellant who was aged 58 years at the time of his conviction, raped his six year old niece, Esetu Mtyi, and that some four years later in an incident in November 2010, he again raped her both vaginally and anally.

The appellant pleaded not guilty to the charges but offered no plea explanation. The State lead the evidence of Esetu Mtyi, ("Esetu"), her aunt Ms Khayisa Mtila and the medical practitioner, Dr A Norula, who examined Esetu after the incident in November 2010.

The appellant gave evidence on his own behalf and called an alibi witness, Mr S Sangque.

Esetu, who was in grade six at the time she testified, gave evidence that she and her mother had been living with the appellant in 2006 in New Crossroads. On an occasion when

she and the appellant were alone in the dwelling, he had told her to go and fetch rice out of his room but had then locked the door, removed her underwear and raped her. Thereafter he warned her not to tell anyone of the incident failing which he would kill her. She had accordingly not disclosed to anyone what had happened.

In 2010 she had been living in Nyanga East with her aunt and was sent by her mother, who was still living with the appellant, to fetch grant money from him. It appears that the appellant may have deceived her into thinking her mother was present in the house and, when she was inside, pushed her onto a bed and raped her both vaginally and anally. Although he made the same threat to Esetu as on the previous occasion, under repeated questioning from her aunt who had noticed that she was withdrawn, not eating and tearful, Esetu admitted that she had been sexually abused by the appellant.

Criminal charges were laid and some two days after the alleged rape Esetu underwent a medical examination. Dr Norula testified that upon examination she found redness, bruising and hypo pigmentation of Esetu's genitalia. In particular she found that her hymen was irregular, thickened and deficient; that she was suffering from a vaginal discharge; that she had healing tears of the anus with swelling, red

thickening, redness and bruising and a lack of *sphincter tone*. She concluded that her findings were compatible with recent forcible vaginal penetration with an object and also with possible recent anal penetration or attempted penetration.

The appellant testified that he was related to Esetu but denied ever sexually assaulting her. He raised an alibi defence in relation to the day in November 2010 when he was alleged to have raped Esetu on two occasions and called Mr Sangque as a witness to substantiate that alibi and to testify that the appellant had not been home that afternoon but at a nearby house completing a painting job.

In convicting the appellant the magistrate found that both Esetu and Ms Mtila impressed as very honest witnesses and that the former testified clearly, logically, without any hesitation and that she had adhered to her version of events at all times.

The magistrate found that there were sufficient guarantees of the complainant's evidence in the form of the medical evidence, Ms Mtyi's observations of Esetu's demeanour on the days after the alleged rape and in the latter's eventual disclosure of what had transpired at the appellant's house. The magistrate noted that the appellant's evidence was riddled

with contradictions and attempts by him to mislead the court; further that his version of the particular day in November 2010 was at odds in important respects with the version put on his behalf and with that of his alibi witness.

The magistrate found that the appellant's evidence was false and that there was no merit in the allegation that Ms Mtila or Esetu's mother had put her up to making a false complaint, bearing in mind that the appellant was a complete stranger to Ms Mtila prior to the case and the child's limited relationship with her mother.

As regards the appellant's alibi witness, the magistrate found that he had made such a poor impression, not even being sure about the date on which the events were alleged to have taken place, that he discounted his evidence entirely.

On appeal it was conceded on behalf of the appellant that Esetu must have been raped but it was contended that there was a reasonable possibility that some other person was responsible, particularly in the light of the appellant's alibi defence. Reliance was placed on a *dictum* from Woji v Santam Insurance Company Ltd 1981(1) SA 1020 (A) to the effect that the trustworthiness of a young witnesses' evidence must depend on the child's powers of observation, recollection and

narration on the specific matter testified about. It was submitted that no such testing or enquiry had taken place. This is to misconceive the nature of such a test which is in effect an examination of the child's evidence as a whole, not some prior abstract or formal enquiry. And as I've indicated from the magistrate's remarks on the complainant's evidence, she did conduct such an enquiry into its credibility.

As regards to the credibility of Esetu's evidence, I can find no fault with the magistrate's approach. She was obviously well aware both of the witnesses youthfulness and that she was a single witness to the alleged rapes. She applied the cautionary rule to Esetu's evidence as enunciated in S v Sauls & Others 1981 (3) SA 172 (AD) and, as I have mentioned, not only found her to be an impressive witness but also that there were a number of guarantees for the veracity of her evidence.

As regards the appellant's reliance on his alibi, it was his case that he spent the day from eight o'clock to five o'clock at another house, busy painting. Apart from the significant discrepancies noted by the magistrate between the appellant's account of that day and that of his alibi witness, there are strong indications in the evidence of Mr Sangque that the painting job was completed by lunchtime whereafter the two of them proceeded to appellant's house. On several occasions

in his evidence Mr Sangque testified that at half past one on the day in question the appellant finished painting, washed his hands and they left together for the appellant's home.

Significantly, on this version the appellant was at home at the time when the complainant says she went to his house and was raped by him and it is completely at odds with his own account of having worked elsewhere till five o'clock that day. The suggestion that Esetu substituted the appellant as the person who raped her for someone else equally does not stand up to closer scrutiny. There can be no question of mistaken identity since the appellant was well known to Esetu and no credible reason as to why Esetu would falsely implicate the appellant was ever put up or is evident.

As mentioned, the suggestion that Ms Mtila encouraged Esetu to falsely incriminate the appellant appears highly improbable given that he was completely unknown to her prior to the incident and she had to prise out of Esetu the very fact that she had been sexually abused. What is also significant in this regard is that had this been a false identification or incrimination by the complainant one would have expected that this would have been more readily furnished by the complainant rather than being the result of the mother and the aunt nagging away at her until she revealed the fact that she

had been abused by the appellant.

It was further submitted that it was highly unlikely that Sangque would falsely testify in support of the appellant's alibi given that he was Esetu's grandfather. In my view little weight can be given to this factor since the relationship between Esetu and this witness appears to have been an attenuated one and the witness himself appear to regard it as more significant that the appellant was his brother-in-law.

In any event, as the magistrate noted, there was considerable doubt as to whether Sangque and the appellant were testifying about the events at the same day, given that the former commenced his testimony by referring to the relevant day as being the 12th of December, a month after the incident took place. It is well established that the trial court's findings of fact, will be presumed to be correct: "in the absence of demonstrable and material misdirection" and will "only be disregarded if the recorded evidence shows them to be clearly wrong". S v Radebe and Others 1997 (2) SACR 641 (SCA) 645e-f:

> "So too a court of appeal will always be most hesitant to reject the trial court's findings on credibility given the advantages which the trial court enjoys in seeing and

hearing the witnesses and in being steeped in the atmosphere of the trail".

See Rex v Dlumayo and Another 1948 (2) SA 677 (A) at 689.

Having regard to the evidence as a whole I am unpersuaded that the magistrate misdirected herself in any respect, material or otherwise, or, in the final analysis, that she erred in finding that the state had proved its case against the appellant beyond reasonable doubt.

Given that the appellant no longer pursues his appeal against sentence I consider that for these reasons **the appeal against conviction and sentence should be dismissed**.

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BOZALEK, J

I agree.

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DAVIS, AJ

/RG

It is so ordered.

BOZALEK, J