FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, GRAHAMSTOWN

JUDGMENT

ECJ:

PARTIES**:** **MTUNZI LEVE**

And

THE STATE

(b) Registrar: **CA 60/09 – CC 34/08**

(c) Magistrate:

(d) High Court: **EASTERN CAPE HIGH COURT, GRAHAMSTOWN**

DATE HEARD: **31/08/09**

DATE DELIVERED: **10/09/09**

JUDGE(S): **JONES J, LIEBENBERG J, VAN ZYL J**

LEGAL REPRESENTATIVES –

Appearances:

1) for the Appellant(s): **ADV: J.G. Brisley**
2) for the Respondent(s): **ADV: M. Moodley**

Instructing attorneys:

a) for the Appellant(s): **JUSTICE CENTRE / LEGAL AID BOARD (PE)**
b) for the Respondent(s): **DIRECTOR OF PUBLIC PROSECUTION (PE)**

CASE INFORMATION -

- *Nature of proceedings*: **APPEAL**

Not reportable

THE HIGH COURT OF SOUTH AFRICA

In the Eastern Cape High Court
Grahamstown

CA 60/2009
CC 34/2008

In the matter between

MTUNZI LEVE **Appellant**

and

THE STATE **Respondent**

Coram JONES, LIEBENBERG and VAN ZYL JJ

Summary Appeal – rape – anal penetration of a 5 year old little boy – corroboration of the child's evidence of rape by the medical evidence – in issue on appeal was the sufficiency of the single evidence of a child witness on the identity of the perpetrator – satisfaction of the cautionary rules of evidence was sought by the trial court and found to be present on a consideration of the totality of the evidence – in the absence of a misdirection, there was no basis for departing from the trial court's findings of fact – the conviction was confirmed on appeal.

JUDGMENT

JONES J

[1] The appellant was convicted in the High Court, Port Elizabeth of the rape of a 5 year old little boy, and given a sentence of 10 years' imprisonment. He now appeals against his conviction with the leave of the court *a quo.*

[2] The rape allegedly occurred at the appellant's home in Zwide, Port Elizabeth in the early morning of Sunday, 18 May 2008. The complainant was the only witness who gave evidence implicating the appellant. There were, however, other witnesses for the State: one Dausi, an adult man who occupied a room in the appellant's home and who was present in his room on the morning of the rape; the complainant's mother, Mrs Fish, to whom he made a complaint shortly after the incident; and Dr Meslane, a medical doctor who examined the child at the rape crisis centre in Port Elizabeth later that morning. The appellant was the only witness for the defence.

[3] The background is that the complainant and his mother, Mrs Fish, who lived in Gauteng Province, were temporarily on holiday in Port Elizabeth visiting relatives, and were staying at the home of Mrs Fish's uncle which was a few houses away from the appellant's home. The appellant lived there with his father and a lodger, the witness Dausi. The complainant had struck up a friendship with the appellant whom he called Boetie and who used to let him play games on his cell phone. The complainant called him his friend and wanted to play with him, despite the fact that the appellant was a grown man.

[4] It was the State case that the complainant got up that Sunday morning and asked his mother if he could go to Boetie's to play. It is accepted that he meant the appellant. She said no, but gave him permission to go outside to the toilet with an injunction to come back quickly. He went to the toilet and then went to the appellant's house. He was let in by a black man who turns out to be Dausi. The appellant was not there. Dausi told him that he was at the tavern a few houses down the street. According to the complainant, he asked Dausi to go and fetch him, and Dausi agreed. This was done, and the complainant, the appellant and Dausi went inside the appellant's house. Dausi went into his room which was also occupied at the time by a woman and her baby. The complainant and the appellant went into the appellant's father's room which the appellant unlocked with a key. He locked the door after them. Inside, he is alleged by the child to have committed the act of sodomy which is the subject of the charge. Afterwards, he unlocked the door to let the child out. Dausi heard him struggling with the kitchen door, and got up to open it for him. This was about 20 minutes after he had first let the child in. In the meantime, Mrs Fish had become alarmed when, after about 5 minutes, the complainant had not come back from the toilet. She went outside to look for him. He was not at the toilet. She went to the appellant's house to look for him there, but everything seemed quiet and shut up, so she did not call out to him. She went back inside her house. After some 10 or 15 minutes the complainant came back. He was walking in a funny manner, holding his stomach. He went straight up to her and said 'Mammie, my holle is seer'. She asked him what had happened and he said 'Boetie het die spinnekop in

my hol gesit'. She did not understand what he was saying, pulled his pants and underpants down and saw signs of interference – he was wet and red. She woke her uncle and they went immediately to the appellant's home. Dausi says that they arrived about 5 minutes after the child had left. They looked for the appellant inside, but he was not there. Neither was his father. The only people at the house were Dausi, and the woman and baby in his room. The matter was then reported to the police. The appellant was later brought to the charge office while she and the complainant were waiting there. He had been arrested at the tavern. Mrs Fish says that he apologised to her, but the trial judge made nothing of this in arriving at a verdict. The child was examined by Dr Meslane later that morning.

[5] The defence was a denial that the appellant had been at his home at the time of the offence. He had spent the previous evening drinking at the tavern before going to bed. That Sunday morning he got up and went back to the tavern, where he remained until the police came to arrest him. He denied that Dausi and the complainant came to fetch him from the tavern and that he went back to his home with them. Importantly, this denial not only contradicted the evidence of the child. It was also supported by the evidence of Dausi. The appellant went on to deny being at his home with the complainant that Sunday morning, or abusing or interfering with the complainant in any manner.

[6] . In summary, the chief grounds of appeal are

- that the trial court incorrectly preferred the evidence of the complainant to that of the appellant and the State witness Dausi on the question of fetching the appellant from the tavern, a point which was material to the alibi defence;
- that the evidence implicating the appellant was insufficient, the State having relied on the single evidence of a child witness on the identification of the perpetrator, and the trial judge having accepted that evidence without the degree of caution required by the circumstances.

[7] The only direct evidence of penetration of the anus is the evidence of the complainant. But the medical evidence of Dr Meslane was that there had been traumatic anal penetration. This fully corroborates the essence of the child's description of what had been done to him, and Mrs Fish also saw clear signs of sexual interference. There can be no doubt that on Sunday morning, 18 May 2008 this child was raped within the meaning of section 3 of the Criminal Law (Sexual Offences and Related Matters) Act No 32 of 2007. The only issue on trial, and the only issue before us on appeal, is the identity of the perpetrator. Once again, the only direct evidence of identification of the appellant is the evidence of the complainant. The question on appeal is whether that evidence was sufficient for proof beyond reasonable doubt, regard being had (a) to the conflict between the evidence of the child and Dausi about fetching the appellant from the tavern, and (b) the danger of relying on the single uncorroborated evidence of a child witness, taking into account the requirements of the cautionary rule of practice which must be applied to that evidence.

[8] The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a re-hearing because otherwise the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility unless they are vitiated by irregularity or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies. See the well-known cases of *Rex* v *Dhlumayo* 1948 (2) SA 677 (A) 705 and the passages which follow; *S* v *Hadebe* 1997 (2) SACR 641 SCA 645; and *S* v *Francis* 1991 (1) SACR 198 (A) 204C-F. These principles are no less applicable in cases involving the application of a cautionary rule. If the trial judge does not misdirect himself on the facts or the law in relation to the application of a cautionary rule but instead demonstrably subjects the evidence to careful scrutiny, a court of appeal will not readily depart from his conclusions.

[9] The defence argument on appeal is not based on any alleged misdirection by the learned trial judge which might have opened the door to disregarding his conclusion on the facts that the child was penetrated by the appellant. Nor could it be. The judgment *a quo* reveals no grounds of possible misdirection. I had occasion to make the following comment recently on the question of applying cautionary rules in an unreported judgment of the full bench, *S* v *Dyira* (Eastern Cape High court, Grahamstown, Case No CC 222/07 dated 2 June 2009):

> In our law it is possible for an accused person to be convicted on the single evidence of a competent witness (section 208 of the Criminal Procedure Act No 52 of 1977). The requirement in such a case is, as always, proof of guilt beyond reasonable doubt, and to assist the courts in determining whether the onus is discharged they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution (*Rex* v *Mokoena*, 1956 (3) SA 81 (AD) 85, 86). This means that the courts must be alive to the danger of relying on the evidence of only one witness because it cannot be checked against other evidence. Similarly, the courts have developed a cautionary rule which is to be applied to the evidence of small children (*R* v *Manda*, 1951 (3) SA 158 (AD) at 162E to 163E). The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity (*Viveiros* v *S* [2000] 2 All SA 86 (SCA) para 2). Here, more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness (Schmidt, *Law of Evidence 4 – 7)*.

The judgment *a quo* applied all of these principles. The learned judge was fully aware of the onus which rested on the State to prove its case beyond reasonable doubt. He was also fully aware of the need to examine the evidence of a single child witness with caution before it could be accepted as proof of guilt beyond reasonable doubt. His judgment expressly referred to the need for caution in the case of the evidence of this very young child; it cites authorities dealing with the danger of a reliance on the evidence of young children; and it

analyses the evidence of the complainant in the light of the reasons for the need for caution which are relevant in this case. Two points – imaginativeness and suggestibility – were correctly singled out by the judge *a quo* as being significant in this case. The blurred lines between reality and imagination in a child's description of sexual misconduct, which is beyond his experience and understanding, may have given rise to the confusion and contradictions apparent in portions of the child's evidence of the act of penetration. But this confusion loses importance in the light of the medical corroboration. That corroboration, and detail in the child's description, for example, of the use of a condom, together make it quite clear that there is no danger in accepting this child's evidence of what had been done to him. Nothing was imagined or suggested as far as that part of the inquiry was concerned. Suggestibility by an adult is also a possibility when it comes to the identity of the rapist. The trial judge correctly held that this was eliminated by the evidence of Mrs Fish, whom he found to be an excellent witness. The child's complaint to her was immediate and spontaneous, not only in respect of what had been done but as to who did it. The child came out with the appellant's name entirely of his own accord and without any prompting or reluctance. I do not believe that, in referring to the admissibility of evidence of what the complainant said to his mother in terms of section 58 of the Act, the learned judge overlooked the rule against self-corroboration. He used the evidence, as I have said, to eliminate the possibility of suggestibility. That evidence was also relevant to the credibility of a complainant, because failure to complain can give rise to criticism that he did not behave as would be expected of a child in the circumstances. The complaint shows consistency on his part, and lack of consent (which, in any event, is not an issue in this case).

[10] In the absence of misdirection, the defence argument was confined to the submission that the learned judge was wrong in his evaluation of the evidence. The first point is that he was wrong in accepting the evidence of the child that he asked Dausi to fetch the appellant from the tavern and that Dausi did so. Mr *Brisley*'s main point is that this is not only contradicted by both Dausi and the appellant, it is also against the inherent probabilities. An

acceptance of Mr *Brisley*'s argument requires us, in effect, to overrule the trial judge's credibility finding on the issue. I am not satisfied that there are proper grounds for doing so on appeal. The learned judge, who was aware of the argument based on the probabilities and bore it in mind, deals with the issue in the following terms:

> In my view, the only way to resolve this is to consider Dausi's evidence and to weigh it against the evidence of [the complainant] and to find whether there is any reason to believe one in preference to other. I have already said that Dausi did not create a bad impression as a witness. Furthermore, it was the State who presented his evidence. It was made part of the State case. Notwithstanding this, I have come to the conclusion that Dausi's evidence in this regard should not be accepted. For [the complainant] to have been untruthful, and he would have to have been deliberately untruthful in this regard, he would firstly have to have known that the accused was at the tavern; secondly he would, for some or other reason, have fabricated the fact that he came back. I watched him giving evidence on this matter, particularly when he was cross-examined, and I do not for one moment accept that he has either the guile or the ability to fabricate the description he gave of how, when they returned from the tavern, the accused entered the house first and Dausi last. What the reason was for Dausi not to have mentioned this, I do not know.

It is not, in my judgment, possible to conclude from a reading of the record and on the basis of certain of the probabilities that this credibility finding is clearly wrong. This means that there is no serious criticism of the complainant's credibility on the identity issue. If that is so, much of Mr *Brisley*'s argument falls to the ground. The child was not, after all, deliberately dishonest on the issue of the appellant coming from the tavern to his house. He does not have any motive for a false implication, and it is most unlikely that he would be able to get away with a deliberately false implication without being exposed as a lying witness in cross-examination. The trial judge found that 'from his observation [of the child], with whatever caution one approaches his evidence, he was not fabricating this'.

[11] The trial court found that the complainant knew the appellant too well to be mistaken. But this does not necessarily mean that his evidence of identification passes the test of proof beyond reasonable doubt. There still remains the danger that the single evidence of this child may not be sufficiently reliable. This brings me to Mr *Brisley*'s second point, which is that the trial judge did not consider the complainant's evidence with the caution that was

necessary in the circumstances. I have already shown that he indeed approached his evidence with a considerable degree of caution in regard to the reasons for the need for caution which suggest themselves for consideration in this case. He dealt with imagination and suggestion. He also found on the facts that there was no possibility in this case of the complainant trying to hide the identity of the true perpetrator by substituting someone in his place. The judgment goes further. It says that in order to consider the complainant's evidence with the necessary caution, 'one must look at the other evidence that was presented in this matter'. He proceeded to do so. In my view, the total picture presented by the evidence as a whole eliminates the danger that the evidence of the complainant was possibly mistaken. The objective support it gives to his implication results in proof of guilt beyond reasonable doubt.

[12] The objective and indisputable evidence reveals –

- that the complainant wanted to go to the appellant's house that morning to play;
- that in fact he went there, asked for the appellant and was let into the house by Dausi;
- that his mother thought that he must have gone there when he did not come home, and went to look for him there;
- that he remained at the appellant's house for about 20 minutes before Dausi let him out again;
- that within 5 minutes after he had left the appellant's house
    - it was discovered that he had been sexually interfered with; this must have occurred during the 20 minutes that he was at the appellant's house;
    - he told his mother that the appellant had interfered with him;
    - his mother and uncle went to the appellant's house to look for him;
    - the appellant was not present; nor was his father;
    - the only people there were Dausi, the woman and the baby;

- that the complainant knew that the appellant's father's room had to be unlocked with a key.

The only people with access to the house where the rape took place were the appellant, the appellant's father and Dausi. Dausi was not the person who assaulted the complainant. This is excluded not only by the complainant's failure to implicate him, but by the presence of the woman and her baby, and by the evidence of his conduct throughout. The appellant's father was not there when Mrs Fish went inside to look for the appellant. The appellant was, on his own version, in the near vicinity but he said that he was also not at the house. Whoever assaulted the child must not only have had access to the house but also access to the appellant's father's room. Who else but the appellant? The complainant says that the appellant in fact had a key. How could he have known that a key was necessary to gain entrance to that room? Why would he say that the incident occurred in the father's room, rather than the appellant's? Is he to be attributed with the guile to realise that that room would be a more likely choice for sexual activity because the appellant's own room did not have a lock? The trial judge found that the complainant's evidence implicating the appellant, taken together with the undisputable evidence referred to above, pointed overwhelmingly to an inference of guilt. I am unable to fault his reasoning.

[13] In the result, the appeal is dismissed.

RWJ JONES
Judge of the High Court
4 September 2009

LIEBENBERG J I agree

HJ LIEBENBERG
Judge of the High Court

VAN ZYL J I agree

D VAN ZYL
Judge of the High Court