IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – GRAHAMSTOWN)

CASE NO. 06/10
DATES HEARD: 24-25/2/10
DATE DELIVERED: 3/3/10
NOT REPORTABLE

In the matter between:

THE STATE

and

MLUNGISI MICHAEL MDINISO

JUDGMENT

PLASKET, J:

[1] The accused is charged with two counts of rape, the first in terms of the common law and the second in terms of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He pleaded not guilty to both charges.

[2] In count 1, the indictment alleges that the accused is guilty of rape in that 'during the period prior to 16 December 2007 and at or near 1524 Old Lingelitsha Township, Berlin, in the district of King William's Town, the accused unlawfully and intentionally had sexual intercourse with S W,

currently an eight year old female person, without her consent and against her will'.

[3] In count 2, the indictment alleges that the accused is guilty of rape in terms of the statute in that 'during the period between 16 December 2007 and 8 August 2008 and at or near 1524 Old Lingelitsha Township, Berlin, in the district of King William's Town, the accused unlawfully and intentionally committed acts of sexual penetration with S W, currently an eight year old female person, by having sexual intercourse with her *per vaginum* more than once without her consent and against her will'.

[4] The first date mentioned in the indictment, 16 December 2007, is the date on which the Criminal Law (Sexual Offences and Related Matters) Amendment Act came into force. The relevance of the second date mentioned in the indictment, 8 August 2008, was never explained during the trial and remains a mystery.

[5] No admissible evidence was led that so much as mentioned the rape alleged in count 2. As a result, the accused is entitled to be acquitted on that count. The only evidence against the accused relates to count 1 in that it was alleged by the complainant that he raped her on one occasion while her mother was still alive. Her mother apparently died on 22 January 2008.

[6] One evening on or about 10 August 2009 the complainant soiled herself. Her aunt Siziwe Khubele decided that she had done so because she had been sexually abused. She demanded to know from the complainant who had abused her. When the child remained silent, she threatened to call the police to get the information out of her. Not to be outdone, the complainant's grandmother, Andasi Wayisi, threatened to assault the child with a stick and then, according to both the complainant and Ms Khubele, assaulted her with a shoe to force the information out of her. The child, having first said that she

was afraid of her grandmother, then said that the accused, who was Ms Wayisi's boyfriend, had raped her.

[7] On the following morning, the degrading treatment of the complainant continued. Ms Wayisi called neighbours. They ordered the complainant to strip, to lie on a bed and to open her legs. They inspected her genital region and concluded she had been abused. Ms Wayisi then ordered a child of about the same age as the complainant to strip. She concluded that the complainant had been abused because her vagina looked bigger than the other child's.

[8] The complainant was taken to the Cecilia Makiwane Hospital on the same day. She was examined by Dr Cheree Turnbull, the first witness called by the State. Dr Turnbull's evidence was that she found signs of inflammation in the complainant's para-urethral folds and that her hymen was all but gone: all that was left was a small slither from one to three o'clock. This, she concluded, was evidence that the complainant had been penetrated, probably more than once.

[9] Dr Turnbull also noted, in the J88 form that she completed, that the complainant had a 'history of urinary incontinence and faecal incontinence' and that this 'started last year'. There was no physical reason for the incontinence. She stated, however, that this condition can be caused by psychological trauma brought about by, for instance, a divorce, emotional abuse or sexual abuse.

[10] Dr Turnbull's evidence was not challenged in any meaningful way and it can be accepted as having been proved by the State beyond reasonable doubt that the complainant had been sexually penetrated. The only issue in dispute is whether the State has proved beyond reasonable doubt that she was penetrated, and thus raped, by the accused.

[11] The report to Ms Wayisi and Ms Khubele, not having been voluntary and having been induced by threats and an assault is not admissible. See Milton *South African Criminal Law and Procedure* (3 ed) (Vol 2: Common Law Crimes), at 461. Its only relevance is that it goes to the consistency of the complainant's allegation that she was raped but it is not corroboration of her version. See *R v M* 1959 (1) SA 352 (A), at 355G-356B; *S v Dyira* 2010 (1) SACR 78 (E), at paragraph 5. In this case, as the fact of the complainant having been raped is not disputed, the report made by the complainant, whether admissible or not, takes the matter no further.

[12] The basic principles of criminal law and the law of evidence that apply in this case are trite. The first principle is that the guilt of the accused must be proved by the State and that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. In the matter of *S v T* 2005 (2) SACR 318 (E), at paragraph 37, I had occasion to say the following of the importance of this principle:

> 'The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof – universally required in civilized systems of criminal justice – is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of tyrannical systems of law. South Africans have bitter experience of such a system and where it leads to.'

[13] It follows from the requirement that the State must prove an accused person's guilt beyond a reasonable doubt that the onus rests on it to prove every element of the crime alleged, including that the accused is the perpetrator of the crime, that he or she had the required intention, that the crime in question was committed, and that the act in question was unlawful. See Schwikkard and Van Der Merwe *Principles of Evidence* (3 ed), at paragraph 31.3.1.

[14] It also follows from the fact that the onus rests on the State to prove the guilt of an accused beyond reasonable doubt that no onus rests on the accused to prove his or her innocence. See *S v Mhlongo* 1991 (2) SACR 207 (A), at 210d-f; *R v Hlongwane* 1959 (3) SA 337 (A), at 340H. In order to be acquitted, the version of an accused need only be reasonably possibly true. The position was set out thus by Nugent J in *S v Van der Meyden* 1999 (1) SACR 447 (W), at 448f-g:

> 'The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.'

[15] Much the same point was made by Zulman JA in *S v V* 2000 (1) SACR 453 (SCA), at paragraph 3(i) when he stated:

> 'It is trite that there 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.'

[16] These statements of the law beg the question of what is meant by proof beyond reasonable doubt. In *S v Mlambo* 1957 (4) SA 727 (A), at 738A, Malan JA stated that, while it was not incumbent on the State to 'close every avenue of escape which may be said to be open to an accused', it would be sufficient, in order to secure a conviction, to 'produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused'. See too *S v Phallo and others* 1999 (2) SACR 558 (SCA), at paragraph 10; *S v Mavinini* 2009 (1) SACR 523 (SCA), at paragraph 26.

[17] In this case the complainant was a single witness insofar as the commission of the offence is concerned: she testified that when her mother and grandmother were away from home, the accused had called her into the house and had raped her. The fact that she is a single witness brings into play a cautionary rule, as does the fact that she is a child. The position of such a witness and the court's approach to her evidence was set out thus by Jones J in *S v Dyira* supra, at paragraph 6:

> '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 51 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 … .'

[18] Corroboration is not the only way in which these cautionary rules can be satisfied. When all is said and done, a trial court must be satisfied that despite the potential dangers inherent in the acceptance of the evidence of a single witness or a child witness, the evidence of that witness is reliable.

[19] As there is no corroboration of the complainant's evidence that she was raped by the accused, what then of the quality of her evidence? The complainant is now nine years old. According to Ms Pumza Sakaza, a clinical psychologist who testified in support of an application for the complainant to testify with the aid of an intermediary, she is in grade 1 for the third time. She is struggling in school and is now in a special school. The reason is that she was assessed to be intellectually slow.

[20] This shone through in her evidence, despite the fact that she testified with the assistance of an intermediary. While it is true that she was steadfast in her accusation that the accused raped her, her evidence was often vague and far from clear. Her answers were often contradictory and sometimes there was no possible connection between the question and her answer.

[21] It is also clear that the version that she gave to the State when the indictment was drafted is markedly different from her evidence. As stated above, the two counts covered the periods respectively of prior to 16 December 2007 and between that date and 8 August 2008. It is not clear whether only one incident of rape is alleged in count 1 but count 2 makes it clear that the accused is alleged to have raped the complainant 'more than once' during the period specified in that count. Only one incident was mentioned by the complainant in her evidence and that was on an unknown date before her mother died. That was on 22 January 2008, if the evidence of Ms Wayisi, who was hopeless when it came to dates, is to be believed. There is no indication as to the relevance of 8 August 2008: it is a date a few days over a year before the complainant was examined medically and, according to her evidence and that of her aunt, a bit over a year before her incontinence manifested itself.

[22] The evidence of Ms Wayisi and Ms Khubele takes the matter no further on the question in issue, namely the identity of the person who raped the

complainant. They were, however, not very good witnesses. Both were prone to vagueness and their versions differed in some significant respects.

[23] In the circumstances I have outlined I am unable to conclude that the applicable cautionary rules in respect of the complainant's evidence have been satisfied. In addition, the accused's version, when viewed in the light of the totality of the evidence, is reasonably possibly true. A large amount of his cross-examination dealt with his conjecture that Ms Wayisi had influenced the complainant to implicate him because he was not able to pay his way when he visited her. He certainly did not fare well on this aspect: his thesis as to how he came to be charged is unlikely and was shown to be so in cross-examination. It is, however, irrelevant to his guilt or innocence as no onus rests on him to explain why the charges were laid against him. See *S v Lotter* 2008 (2) SACR 595 (C), at paragraph 38.

[24] I conclude that the State has failed to prove the accused's guilt beyond reasonable doubt. He is acquitted in respect of both count 1 and count 2.

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C. PLASKET

JUDGE OF THE HIGH COURT

APPEARANCES:

For the State: Ms W. Packery of the office of the Director of Public Prosecutions, Grahamstown.

For the Accused: Mr M. Xozwa of Legal Aid South Africa, Grahamstown.