

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

Case no:61/2021

Date heard: 16 February 2022

Date delivered: 18 February 2022

NOT REPORTABLE

In the matter between

The State

and

Thembinkosi Blom

Accused

JUDGMENT

GOVINDJEE, J

Background and evidence

[1] The accused was charged with raping TN M... ('the complainant') on 14 December 2020 at his home in Scenery Park, East London. He pleaded not guilty.

[2] A report by an authorised medical practitioner, completed following a medico-legal examination on 15 December 2020 ('J88 report'), was accepted into evidence by agreement, coupled with an affidavit by the examining medical practitioner, Dr YJ Mnyanda, in terms of s 212(4) of the Criminal Procedure Act, 1977¹ ('the Act').

¹ Act 51 of 1977.

[3] That report confirms that the complainant suffered from pain, redness, and fresh tears on the labia minora and the vaginal opening, as well as swelling to the hymen. This was suggestive of forceful vaginal penetration.

[4] The complainant testified via an appointed intermediary and in a separate room containing appropriate closed-circuit television facilities. This followed an unopposed application to permit this method of testimony given the age of the complainant and the possibility of undue mental stress or suffering caused by testimony in open court.² That application was supported by the submission, by agreement, of a confidential psychological report following examination of the complainant's mental state and was based on the report's recommendations.

[5] The clinical psychologist who had interviewed the complainant had concluded that she would be able to provide an account of her experience despite her youthfulness and distress, and that she understood what it meant to tell the truth and the consequences of telling lies. The court spent some time establishing if that was indeed the case and, having satisfied itself, admonished the witness in terms of s 164 of the Act.

[6] She testified that she and her friend Simakuhle ('Nana') had visited the accused's home. He was known to her as 'Tshawe' but she confirmed knowing his actual first name. He had initially asked them to lower their trousers a bit, and subsequently asked them to do so completely. The complainant had not wanted to do so and the accused then removed her trousers and panty. The accused placed her on his bed, naked at least from the waist down, and inserted his penis into her vagina. She was lying on her back on his bed and he was on top of her, without his trousers, which he had removed after taking off her clothes. The complainant could see the accused's penis at some point during the act, but then covered her eyes. She had cried because of the pain she experienced in her vagina. Nana was on the sofa during this time. The two children went to Nana's home, and Nana reported what had happened to her mother.

² S 158(2)(a) and ss 170A(1) and (3) of the Act.

[7] The complainant was able to clearly identify the home of the accused and the bed where she alleged she had been raped on photographs submitted to court and accepted by the defence. This was the same house that the complainant had pointed out to the police.

[8] When his version was put to the complainant, the accused had no difficulty with accepting that the two children had visited his home on 14 December 2020. The accused would deny undressing the complainant and raping her. When this was put to the complainant, she remained unshaken and was vehement in her version that he had been the perpetrator. She testified that her mother had told her to come to court to narrate what had happened for the matter to be closed, but the accused was lying if he suggested that she was not speaking the truth or that her mother had requested her to lie to court. A report had been made to Nana's grandmother, who had told the complainant's grandmother what she had heard, but the complainant could not recall the details of that report.

[9] Mrs Ntengo, Nana's grandmother, testified that the accused was her husband's nephew. The complainant and Nana had entered her home. The complainant had been shivering and the witness had heard that 'Tshawe' had undressed the complainant in his bedroom. The complainant had covered her mouth while her friend narrated the story, also saying that this had happened to Nana herself. Mrs Ntengo had proceeded to the accused's home and, in his presence, informed his mother, who had subsequently passed away, what she had heard. The accused and his mother had both then cried and the witness had left. The incident had affected their family because of the familial relationship between the accused and her husband's family. Prior to the incident, her relationship with the accused and his family had been very good. The accused was the only 'Tshawe' known to the children and to her, living in their neighbourhood. He would be seen in the company of the children, loving them and buying sweets for them.

[10] The complainant's mother testified that the complainant had reported to her on the day in question. When engaged, she had indicated that the accused had undressed her and placed her and Nana on the bed after they had visited him to ask him for money for sweets. The mother had been emotional at the time and had

not wanted to hear about everything that had occurred. The complainant had been taken for medical examination at the Thuthuzela Centre at Cecilia Makiwane Hospital and a case had been opened with the police. She had accompanied her child with forensic personnel when the child had subsequently pointed out the accused's home and pointed towards the accused's bed as the site where she had been undressed and placed. The child had initially been reluctant to enter that home. The visit and pointing out were confirmed by the photograph album accepted into evidence.

[11] The accused testified that he was 43 years of age and unmarried. The complainant was a friend whom he loved dearly. He had been happy to see her and Nana when they visited him. This had been on or about 3 or 4 December 2020, and not on 14 December 2020 as alleged. His attention was drawn to a song sung by a neighbour. The words of the song referred to natural sexual intercourse between males and females. It had been some time since he had experienced sexual intercourse with a female. He understood the song to be referring to him. Was it being suggested that he had a problem because he was not involved in a love relationship? This led to what he described as 'evil thoughts'. He would show that he could have sexual intercourse by using his penis with these children. When these thoughts arose, he picked up the complainant and threw her into the air and caught her. He was satisfied just by placing her on his bed. His senses returned to normal. These were young children, and they did not deserve what he was going to do to them.

[12] When the thoughts dissipated, he picked the children up and took them to Nana's home. Nana's grandfather was present. He told him what had happened and asked for prayers to combat the evil spirits that had wanted him to have sexual intercourse with children. The grandfather was very pleased and they prayed together. After the prayer, Mrs Ntengo had arrived and told him that he needed help. She had then taken the complainant home and the accused had left. He had been arrested the following week on 16 December 2020 and charged with rape. He felt pained by the accusation which he denied.

[13] The accused explained during cross-examination that he would play with the children and support them in their play activities. This would usually be in the presence of Nana's grandfather. On this occasion the grandfather had not accompanied the children and his mind had been distracted by the song he had heard. He had not seen the singer but heard a female voice from near his gate. His name was not specifically mentioned in the song, but he assumed it was directed towards him because he did not have a lover. It was at this point that he wanted to prove his manhood and do what he described as a 'dirty thing' by having sexual intercourse with the children. In the end he had not done so. He accepted that it would become known if he had forced them into sex, given the respective sizes of their sexual organs. The problem had been caused by the song and the accused had been mistaken in not identifying the singer instead of focusing on the children. He had wanted to prove that he could use his testicles and had walked up and down his house telling himself that his thoughts were wrong. He had never reached the point of sexual arousal. He then denied his earlier version that he had placed the complainant on his bed. When pressed, the accused admitted that he had taken the child to the bedroom even though this was wrong. His intention at that moment was to have sexual intercourse with the child. He had never undressed the complainant or penetrated her and was amazed by the allegation.

[14] When confronted with the J88 report, the accused argued that the child may have been penetrated somewhere else. The complainant was lying by accusing him and the suggested date was incorrect. He had reported the matter only because of his evil thoughts and felt overpowered by subsequent events. He had not realised that he should have put more of his version to the various state witnesses, even though his counsel had given him the opportunity to do so. Mrs Ntengo had been lying about seeing him crying with his mother and he could not fathom her intentions by testifying against him. The complainant had also been lying and could not possibly have had the vaginal tears and injuries depicted in the J88. The doctor did not know his or her work. He had stopped himself from forcing himself onto the complainant and could not understand why he was being implicated by his friend, the six-year-old complainant.

Applicable law and analysis

[15] It is trite that the evidence of young children should be accepted with great caution. While no fixed rule in respect of corroboration is applicable, in *S v Manda*, the Appellate Division noted inherent dangers in relying upon the uncorroborated evidence of a young child.³ The imaginativeness and suggestibility of children have been held to be only two of several elements that require that their evidence be scrutinised with care to the point of suspicion.⁴ A trial court must fully appreciate the inherent dangers in accepting such evidence.

[16] While her allegations of sexual penetration are supported by the available medical evidence, the complainant in this matter is a single witness in respect of her identification of the accused as her rapist. S 208 of the Act provides that an accused may be convicted of an offence on the single evidence of any competent witness. There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness.⁵ The evidence must be weighed by considering its merits and demerits before deciding whether, despite shortcomings, defects or contradictions, the truth has been told. The cautionary rule that the evidence of a single witness must be clear and satisfactory in every material respect does not mean that any criticism of that witness' evidence, however slender, precludes a conviction.⁶ The exercise of caution cannot be allowed to displace the exercise of common sense.⁷ The court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true, and notwithstanding that the testimony was unsatisfactory in some respect.⁸

[17] An accused person may only be convicted if, after proper consideration of all the evidence presented, his guilt has been established beyond reasonable doubt. It follows that an accused person must be acquitted if it is reasonably possible that he

³ 1951 (3) SA 158 (A) at 162E-163F. See *S v Artman and Another* 1968 (3) SA 339 at 340H.

⁴ *Ibid.*

⁵ *S v Weber* 1971 (3) SA 754 (A) at 758.

⁶ *R v Bellingham* 1955 (2) SA 566 (A) at 569, quoting *R v Nhlapo* (AD 10 November 1952).

⁷ *S v Sauls and Others* [1981] 4 All SA 182 (A) at 187.

⁸ *R v Abdoorham* 1954 (3) SA 163 (N) at 165, as quoted in *S v Sauls supra*.

might be innocent.⁹ Before rejecting an accused's version on the probabilities, the court must be able to find, as a matter of probability, that the accused's version is simply not reasonably possibly true.¹⁰ Where there is a conflict of fact between the evidence of the state witnesses and that of the accused, the court is required to consider the merits and demerits of the state and defence witnesses, as well as the probabilities of the case, before concluding whether the guilt of an accused has been established beyond reasonable doubt.¹¹

[18] It is necessary to adopt a holistic approach to analysing the available evidence in this matter.¹² In *S v Chabalala*,¹³ the Supreme Court of Appeal explained this as follows:

'The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper count of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.'

[19] There is overwhelming evidence supporting the state's charge in this instance. The testimony of the complainant, coupled with the uncontested J88 report, confirms that the complainant was sexually penetrated on the day that her mother and friend's grandmother heard about the incident. This was on 14 December 2020 and her medical examination the following day reflected fresh tears and injuries. The accused admitted that the complainant and Nana had visited him during December 2020 but took issue with the date of this visit. His evidence confirms that he had experienced sexual desires in respect of the complainant, triggered by a suggestive song that he heard from outside. On his own version, he grappled with himself in trying to move away from those thoughts. On that version he managed to do so by playing with the child by throwing her into the air and catching her. According to the complainant, matters went much further. She was

⁹ *S v Van Aswegen* [2001] JOL 8267 (SCA); *S v Van der Meyden* 1999 (2) SA 79 (W).

¹⁰ *S v Shackell* 2001 (2) SACR (SCA) 194*g-i*.

¹¹ *S v Guess* [1976] 4 All SA 534 (A) at 537-538; *S v Singh* 1975 (1) SA 227 (N) at 228.

¹² *Van Aswegen supra*.

¹³ 2003 (1) SACR 134 (SCA) para 15. Also see *S v Dlamini* 2019 (1) SACR 467 (KZP) para 25.

undressed, he undressed himself, placed her on her back on his bed and raped her painfully.

[20] Despite her tender age of 6, the complainant proved to be a remarkably composed, honest, confident and reliable witness. She could not remember details of the disclosure to Nana's grandmother after the incident but she was steadfast in her identification of the accused as her rapist and provided independent recollection of the details of the events of that day. I am satisfied that this was not because of suggestion or a fanciful imagination. The medical report confirms her testimony that she had been sexually penetrated.

[21] By contrast, the accused was a poor witness, contradicting himself in respect of whether he placed the child on the bed and failing to put much of his version of events to the state witnesses, despite having the opportunity to do so. The impression created was that he had conceived of a version, approximating the truth in some respects but stopping short of acknowledging the full extent of his conduct, as the case proceeded. There is, for example, no reason why he would not have put his version of returning the children to Mrs Ntengo's home if this is really what had happened. Mrs Ntengo was a forthright witness who had been on very good terms with the accused and made no attempt to testify in a way that was deliberately designed to implicate him. I accept her version that the children had not told her the full extent of what had occurred as a first report,¹⁴ that she had visited the accused and his mother on the day of the incident and that they had wept in response.

[22] The accused's denial that he was the perpetrator is difficult to believe given the totality of evidence, including his own admission of sexual intent. He had been alone with the children in his home, and at some point in his bedroom with them. He had been triggered by the thought of sexual activity with them, having not experienced sexual intercourse for some time. His bare denial, and suggestions

¹⁴ S 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007) provides that in criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.

that he had been alone with the children more than a week earlier and that the child must have been raped somewhere else during that time is not reasonably possibly true. Similarly, his suggestion that the medical report was contrived is unquestionably erroneous.

[23] The complainant knew the accused very well, including his clan name and first name and had identified him to her mother without difficulty. She had also easily identified the accused's house and bed as the scene of her violation. The complainant's evidence has been scrutinised with care, bordering on suspicion, and found to be that of a credible witness testifying truthfully. The totality of evidence, including the medical evidence, testimony of the complainant and that of the other state witnesses, coupled with the assessment of the accused's denial and evaluation of the probabilities of the matter, provides a clear picture of the events that unfolded. The accused's denial is simply not reasonably possibly true given the available evidence. Notwithstanding consideration of the dangers associated with a single child witness, particularly one as young as six years of age testifying about events from more than a year ago, I am satisfied that the complainant's identification of the accused may be safely relied upon, for the reasons described. The state has proved beyond reasonable doubt that the accused is guilty of rape as charged.

Order

1. The accused is found guilty of the crime of rape as charged.

A. GOVINDJEE

JUDGE OF THE HIGH COURT

Appearances:

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