IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: A22/2019

In the matter between:

SIMON MOTLOUNG Appellant

and

THE STATE Respondent

CORAM: MATHEBULA, J et CHESIWE, J

HEARD ON: 29 APRIL 2019

REASONS BY: MATHEBULA, J

[1] On 29 April 2019 we granted the following order:-

"1. The appeal is upheld
2. Both convictions and sentences are set aside.

Hereunder follows the reasons thereof.

[2] The appellant was tried before the Regional Magistrate, Phuthaditjhaba. He was convicted on two (2) counts of rape. Following his convictions he was sentenced to life imprisonment on each count. The appeal came before us as of right.

[3] Although the State has indicated throughout that it was supporting both convictions and sentences, on the day of the hearing Mr Strauss correctly conceded that the opposition was without merit and the appeal should succeed. We agree with him.

[4] The evidence for the State was narrated by a little girl aged six years named S. According to her they were playing outside with her eighteen month old sibling P when they were lured by the appellant to enter his house under the pretext that he will give them chocolates. Instead of doing that he undressed and penetrated both of them with his manhood. It is unclear on which date did this occurrence take place. Both children were examined by Health Care Practitioners who also prepared Medico-Legal Examination Reports. The conclusions on both children was that there was “no physical injuries noted on examination consistent with history given.” Other witnesses namely Puseletso Motloung (grandmother), Maki Motloung (mother) and M Bolofo (Professional Nurse) also testified for the State.

[5] On charge 1, the evidence of S was used as a basis to convict the appellant. The grandmother did notice a blood clot on the private parts of the toddler. Nothing strange or suspect was identified before noticing the clot. Even the J88 medical report does not point towards any physical injuries. No DNA was found linking the

accused to any offence. S also did not at that stage report anything that the appellant did rape the child. No charge was laid to the police to that effect. The grandmother contradicts the evidence of S that anything was reported to her.

[6] The contradictions thickened in the evidence of Maki regarding the chronology of the events. In her oral testimony she testified that she took the child to the hospital and it was confirmed to her that the child was raped. It was at this point that the child reported to her that the appellant raped them. In her written statement made to the police handed in as exhibit "A", it was the traditional healer who revealed to her that the children were raped by a close male relative. It was then at this point that she took S to the hospital to be examined as well. Thereafter S related to her that the appellant had raped her. It is important to note that the medical examination on S took place about seven (7) weeks after P's examination. There is no precise day pertaining to when these alleged rapes took place. Neither did S report to anyone on the same day or few days thereafter.

[7] It is trite that a court of appeal will ordinarily accept the factual findings of the trial court unless there is an indication of material misdirection or are shown by the record to be wrong. The approach of the appellate court was succinctly stated that it is at liberty to disregard these findings of fact even though based on credibility.[1] We hold the view that the trial court committed a serious misdirection by accepting the versions of S and Maki as the truth disregarding the contradictions in their versions.

[1] **R v Dhlumayo and another 1948 (2) SA 677 (AD) at 706**

[8] Section 208 of Act 51 of 1977 provides that an accused person may be convicted on the offence he is charged with based on the evidence of a single witness. The only requirement is that such evidence must be satisfying in all material respects. We have already alluded to the contradictions in the evidence of the two (2) key witnesses and the improbabilities of their testimonies. It is also on this basis that the state counsel conceded that conviction cannot be sustained.

[9] The learned magistrate was alive to the necessary caution when dealing with the evidence of a child. He was also conversant with the principle that the accused only had to advance a version that was reasonably possibly true to be entitled to an acquittal. It is in the application of these principles that the learned magistrate fell short. There is no evidence in the J88 that confirms that the child was penetrated. The Health Care Practitioner conceded that the injuries could have occurred a week or so prior to the examination. The most important aspect is the concession that they may even have been self-inflicted. This evidence was overlooked by the court. The learned magistrate was swayed by the demonstration of S of what was interpreted as a sexual act. On this aspect the learned magistrate concluded that the child was correct it has happened. I do not agree, with respect, that it is the only inference to draw from this conduct. Taking this as an isolated event confirming that indeed the children were raped will create a problem particularly in the face of many other contradictions and impossibilities in the matter.

[10] These led us to the conclusion that the appeal ought to succeed.

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M. A. MATHEBULA, J

I concur

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S. CHESIWE, J

On behalf of the appellant:	Mr P. van der Merwe
Instructed by:	Legal Aid BLOEMFONTEIN
On behalf of respondent:	Adv. M Strauss
Instructed by:	Director Public Prosecutions BLOEMFONTEIN

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