IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

JUDGMENT

NOT REPORTABLE
CASE NO: AR507/2014

In the matter between:

THANDISIZWE JALI — APPELLANT

And

THE STATE — RESPONDENT

Coram : Seegobin, Poyo Dlwati JJ et Hemraj AJ
Heard : 27 May 2016
Delivered : 02 June 2016

ORDER

On appeal from the Regional Court, UMzimkhulu (before Mr Sihlahla, sitting as a court of first instance) it is ordered that:

The appeal is upheld and the conviction and sentence are set aside.

JUDGMENT

SEEGOBIN J:

[1] This is an appeal against conviction and sentence. The appellant, a 33 year old male, was convicted on 6 December 2010 in the UMzimkhulu Regional Court, KwaZulu-Natal, of two counts of rape committed on two different dates in respect of a 14 year old girl. He was sentenced to life imprisonment after both counts were taken as one for the purpose of sentence.

[2] This appeal first came before the Full Bench (*Lopes J and V Naidoo AJ*) on 19 May 2015. In view of the fact that the learned Judges were unable to reach any consensus on the outcome of the appeal the matter was referred to this Court.

[3] The appellant, who was legally represented, pleaded not guilty in the court *a quo*. His defence was a bare denial.

[4] The charge sheet alleged that the two incidents of rape occurred on 28 September 2009 and 3 October 2009 respectively. The State's case rested on the evidence of the complainant who was 15 years old by the time the trial commenced on 4 August 2010, as well as on the evidence of the witness *M N* to whom the first report was allegedly made, and the complainant's mother *Z D*.

[5] The J88 medical report (Exhibit B) was admitted by agreement. Dr Reddy who completed the report was never called as a witness. The report indicates that the young complainant was examined by Dr Reddy on 7 October 2010 at the Rietvlei Hospital. Her general history was recorded as follows: "Patient allegedly raped on 3.10/9. Presents now on 7/10/9 for evidence collection. Allegedly raped by same man this year August". Below the heading 'CONCLUSIONS' on the form Dr Reddy placed a question mark before the word rape as follows: "? Rape".

[6] The complainant was a single witness to the alleged offence and therefore her evidence was required to be approached with caution. In terms of s208 of the Criminal Procedure Act 51 of 1977 an accused person can be convicted of any offence on the single evidence of any competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility[1]. The correct approach to the application of the cautionary rule was set out by Diemont JA in *S v Sauls and Others*[2], as follows:

> "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* 1971(1) 3 SA 754 (A)). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in *R v Mokoena* 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean
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> > 'that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded'
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> (per Schreiner JA in *R v Nhlapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[1] See, for example, S v Webber 1971(3) SA 754 (A) at 758 G-H.
[2] 1981(3) SA 172 (A) at 180 E-G.

[7] In *S v Stevens*[3], the SCA cautioned:

> "Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate behaviour are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection. Vulnerable sections of the community, who often fall prey to such behaviour, are entitled to expect no less from the judiciary. However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural safeguards are properly applied and adhered to."

[8] In light of the above principles and for the reasons setout hereunder, I entertain serious doubt as to whether the guilt of the appellant was proved beyond a reasonable doubt. I start with the evidence of the complainant:

[8.1] She testified that at about 16h30 on 28 September 2009 she was returning from a friend's place when she met up with the appellant who she referred to as *T*. The place where she met up with the appellant was along a passage where there was grass. After greeting the complainant the appellant grabbed her by her hand. He pulled her towards him and pushed her to the ground and covered her mouth. He thereafter lifted her skirt and removed her panty but not completely. He merely moved it to one side of her leg. He thereafter lowered his trouser and proceeded to rape her. She described the rape as being painful and that she bled from her vagina. After the incident the appellant offered her R150 which she refused to accept.

[8.2] she testified that the appellant threatened to kill her if she told anyone about what had happened. It was for this reason that she decided

[3] [2005] 1 All SA 1 (SCA).

to keep quiet. However, by 5 October 2009 when she failed to get her periods, she decided that she was not going to keep quiet any longer. At this point in her evidence she was specifically asked by the prosecutor whether there was any similar incident to the one of the 28 September 2009 that occurred to her and her reply was "No, your Worship, no incident".

[8.3] The complainant went on to testify that on 5 October 2009 she requested the witness M N to lend her her phone so that she could phone her mother. When M asked her what happened the complainant informed her that she will tell her once she had spoken to her mother. She then phoned her mother. She testified that thereafter she told Mampofana about the incident of 28 September 2009.

[8.4] To a leading question from the prosecutor as to whether she told M about any other incident she then said that on one day the appellant called her saying that he wanted to take her somewhere. This, according to the complainant, occurred on 3 October 2009. She testified that on this occasion the appellant called her from her home saying that he wanted to send her somewhere. When she went to his house he asked her to come inside and get the money. She entered his house. The appellant asked her to take the money which she did. He then closed the door. He then grabbed her and pushed her onto the bed. He proceeded to rape her in the same manner as on the first occasion.

[8.5] She went on to testify that after he finished he tried to give her some money which she refused to accept. She then dressed and left. Once again the appellant threatened that he would kill her if she made a report to her mother. When she made the report to her mother and M on

5 October 2009, her mother came home. M then examined the complainant. She reported that there was 'something that had happened there'. The complainant was taken to the doctor on 6 October 2009 to be examined.

[8.6] The witness M testified that the complainant had reported to her that one day the appellant had raped her. The complainant provided her with details of what happened only after her mother arrived. Initially in her evidence the witness was adamant that the complainant mentioned only one incident of rape. When the prosecutor questioned her further on this aspect, she then said that she was not sure. However, when the court questioned her she maintained that the complainant informed her that the appellant had raped her for the second time. When the witness was cross-examined by the appellant's legal representative, she created the distinct impression that she was experienced in inspecting girls to determine whether they were still virgins and/or whether something was amiss. As far as the complainant was concerned she concluded (from the inspection) that something had taken place on more than two occasions.

[8.7] The evidence of the complainant's mother was only relevant in order to prove the complainant's date of birth which was 15 September 1994.

[9] The appellant testified and also called *Inspector Caluza* as a witness in his defence. The appellant denied raping the complainant as alleged. He denied meeting the complainant on 28 September 2009 or calling her to his house on 5 October 2009. He agreed that he was known to the complainant as they are neighbours. He suggested that the complainant probably had sexual intercourse with someone else and was now implicating him. He further said that the

complainant was engaged in a love relationship with boys and that she would spend the night at their place.

[10] Inspector Caluza was the first investigating officer in the matter. The gist of his evidence was that the complainant had told him that she made a mistake when she mentioned that she was raped twice when it was only once. Inspector Caluza thereafter interviewed the witness M who confirmed that the complainant reported only one incident of rape to her. Inspector Caluza testified that he entertained some doubt about the complainant's version. Inspector Caluza's written statement was handed in as Exhibit "C" at the commencement of the trial. In that statement he records that he had information to the effect that the appellant was not at home on 3 October 2009 which was a Saturday. He records that the complainant then told him that she was not raped by the appellant on that Saturday. She stated that she made a mistake because she was disturbed in her mind. In his oral testimony Inspector Caluza stated that the complainant had indicated that she was confused.

[11] It becomes patently obvious from the evidence that I recounted above, that there are certain serious discrepancies and shortcomings in the State case which tend to create some doubt as to the veracity of the complainant's version and her credibility as a witness. I set out some of these hereunder:

> [11.1] The *first* is that she was adamant that the appellant only raped her once. It was only when she was prompted by the prosecutor through a leading question that she then testified about a second incident. Even the witness M was sure that only one incident was mentioned. She later said that she was not sure whether the complainant had mentioned another incident. It was only when she was questioned by the court did she say that two incidents were mentioned. Even Inspector Caluza, whose

credibility was never questioned, was doubtful whether there were two incidents or not. In my view, and bearing in mind that these incidents were alleged to have been committed within days of each other, there's no conceivable reason why the complainant would be unsure of the number of incidents unless of course she was fabricating her version which seems more likely.

[11.2] The *second* relates to the date when she went to hospital. She maintained that she went on the 5th and 6th of October 2009 whereas the J88 medical report (Exhibit "A") recorded that she was examined on 7 October 2009.

[11.3] The *third* relates to the general history recorded by Dr Reddy which suggests that she was raped on 3 October 2009 and by the same man in August. There was no reference whatsoever to the month of August in the evidence, whether by the complainant or by any other witness.

[11.4] The *fourth* is that even Dr Reddy seems to have entertained some doubt about the rape/s having regard to what he wrote under the heading 'CONCLUSIONS'. In my view, Dr Reddy ought to have been called as a witness to explain why he placed a question mark before the word 'rape' in the report. Bearing in mind the tender age of the complainant and the fact that the second incident allegedly occurred about four days before she was examined by Dr Reddy it seems highly unlikely that no injuries would be found by him.

[11.5] The *fifth* relates to the first report and whether this was in fact made to the witness M or to the complainant's mother. M maintained

that the complainant initially only told her that she was grabbed by Gege, referring to the appellant. M only heard of the alleged rape once the complainant's mother arrived. In these circumstances it can hardly be suggested that the first report was made to M. However, a crucial aspect of M's evidence is that when she inspected the complainant she concluded that something had taken place on more than two occasions. This seems to suggest that the complainant was far more sexually active than she would have anyone believe.

[11.6] The *sixth* relates to why the complainant would willingly go to the appellant on the 3 October 2009 knowing that he was the one who had raped her barely five days before. The appellant did not reside in the same house as the complainant and she could have made some excuse or the other not to go to him when he called her. In my view, no rape victim would want to be in the company of someone who has just committed the most despicable act on them. The complainant's version in this regard just does not have the ring of truth about it.

[12] Having regard to the serious deficiencies in the State case, it is more probable, in my view, that the complainant had engaged in sexual intercourse with her boyfriend and for reasons known only to herself she decided to implicate the appellant. Inasmuch as the crime of rape has reached endemic proportions in the country, there is now an even greater need for judicial officers to be vigilant about the matters that come before them. A greater scrutiny of the evidence is required to ensure a safe conviction. A rape conviction should only follow upon the clearest of evidence. This must include all the evidence including the medical evidence that is available. A failure to properly consider and apply all the procedural safeguards could result in a failure of justice as happened in this matter.

[13] In light of all of the above I am not persuaded that the guilt of the appellant was proved beyond a reasonable doubt. It follows that the conviction cannot stand.

ORDER

[14] The order I make is the following:

The appeal is upheld and the conviction and sentence are set aside.

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POYO DLWATI J

I agree

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HEMRAJ AJ

Date of Hearing	:	27 May 2016
Date of Judgment	:	02 June 2016
Counsel for Appellant	:	I Khan
Instructed by	:	Justice Centre, Pietermaritzburg
Counsel for Respondent	:	A Watt
Instructed by	:	Director Public Prosecutions, Pietermaritzburg