IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL CASE NO: **AR429/2017**

In the matter between:

LUCAS MARTINUS JOHANNES HEROLDT **Appellant**

and

THE STATE **Respondent**

APPEAL JUDGMENT

Delivered: 11 May 2018

MBATHA J (PLOOS VAN AMSTEL J concurring)

[1] The appellant was arraigned in the Regional Court, Durban on four charges, namely, one count of rape in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Sexual Offences Act), two counts of sexual assault in contravention of s 5(1) of the Sexual Offences Act, and one count of exposing or displaying child pornography in contravention of s 19*(a)* of the Sexual Offences Act.

[2] The appellant pleaded not guilty to all the counts. He was convicted on 31 August 2010 of rape and one count of sexual assault, and sentenced to 15 years' imprisonment, both counts having been taken together for purposes of sentence. The appeal is in respect of the convictions only.

[3] The charges giving rise to the convictions and sentence arose from the report made by the complainant to her father. The complainant, who was five years old at the time, testified that Uncle Lucas, referring to the appellant, had penetrated her 'cookie' and bum with his 'willy' and as a result her 'cookie' hurt, and that on diverse occasions, he had touched her 'cookie' and buttocks, licked her 'cookie', made her touch 'his balls' and placed 'his balls' in her mouth. This report set the wheels of justice into motion and culminated in the arrest and prosecution of the appellant. It is, however, not necessary to recapitulate all the evidence led at the trial.

[4] The appeal turns on whether the complainant was able to appreciate the difference between the truth and a lie and whether the guilt of the appellant was established beyond a reasonable doubt. The basic principle of our law is that the guilt of the accused must be proved by the State beyond a reasonable doubt. No onus rests on the accused to prove his innocence.

[5] It is trite that only admissible evidence can be accepted as evidence in a court of law. It is therefore required of presiding officers when dealing with child witnesses to determine whether they have the competency to testify. The court a quo found that the complainant was able to distinguish between the truth and falsehood. The approach by the court a quo to establish this was as follows:

'Court: Please ask the witness her full names, please.
Witness: JG.
Court: Okay, J, how old are you now?
Witness: I am five.
Court: Do you go to school yet or not?
Witness: Yes.
Court: What grade?
Witness: Doing Grade R.
Court: Grade R. She's a very young child. Do you know what it means to tell lies?
Witness: Yes.
Court: Is it good or bad to tell lies?
Witness: Bad thing.
Court: And the colour of that top you are wearing today, is it a pink top?
Witness: Yes.
Court: And if someone were to tell you that it's a yellow top, would that be true or would it be lie?

Witness: Lie.

Court: Okay, I am happy that you know the difference, J. The court warns you that what you tell us today must be the truth, the whole truth and nothing but the truth, okay?

Witness: Yes.'

[6] The above extract from the record reflects that the court was aware of the complainant's tender age before posing the questions to her to establish if she knew the difference between falsehood and the truth. The learned magistrate's questions were direct and specific as she enquired from the complainant whether 'is it good or bad to tell lies', which elicited a response from the complainant that it was a bad thing to tell lies. To determine if the complainant understood what she was saying, the learned magistrate also made use of the colours of her top to ascertain if she could make a distinction. The answers proffered by the complainant in this regard were clear and precise. There was nothing to suggest that she could not distinguish between the truth and falsehood.

[7] The competency test is often used in relation to child witnesses to determine if they understand the difference between truth and falsehood. This is a prerequisite for the oath, affirmation and an admonition in terms of s 164 of the Criminal Procedure Act 51 of 1977. The authors P J Schwikkard and S E van der Merwe in *Principles of Evidence* 4 ed (2016) at 451 state as follows:

'Even very young children may testify provided that they *(a)* appreciate the duty of speaking the truth; *(b)* have sufficient intelligence; and *(c)* and can communicate effectively.' (Footnote omitted.)

[8] I am satisfied from the extract from the record above that the learned magistrate determined that the complainant understood what it meant to tell the truth. It however did not end there as the record clearly reflects that the learned magistrate also admonished the complainant. The finding by the learned magistrate that the complainant was competent to give evidence was re-affirmed by the manner in which she gave evidence. Her evidence was clear and consistent throughout, despite the lapse in time from the time of the incident to the time when she testified in court. There was nothing to suggest that she could not distinguish between the truth and falsehood.

[9] It was submitted on behalf of the appellant that the court failed to exercise the necessary caution when assessing the evidence of the complainant and failed to take into account worrisome features of her evidence such as the use of the words 'willy' and 'cookie', which words were not clarified to determine what the complainant was referring to.

[10] It is patently clear from the record that she was referring to the male and female genitalia. Parents find appropriate words to use for private parts or genitalia when they talk to young children. It has been accepted that 'willy' is an informal name for 'penis' as stated in the *Oxford Dictionary*.[1] The *Urban Dictionary* describes 'willy' as 'a term used in polite conversation instead of "penis"'.[2] It goes on to say that 'it is also a term used by kids'. 'Cookie' according to the *Online Slang Dictionary* is described as 'a euphemism for the female sexual organs'.

[11] The report given by the complainant to her father was that 'he put balls on her face', using the terminology that her father uses for private parts. She used the very same phrase at the Bobbi Bear Clinic. It was clarified by her mother that it was only after this incident that she was taught the word 'willy'. There could therefore be no suggestion that anyone did not appreciate what she was referring to.

[12] It cannot be suggested that the appellant was falsely accused of the charges. The circumstances of this case tend to reduce the element of suggestibility as the complainant had just returned from a visit to the appellant when she reported the incident to her father. She knew the identity of her perpetrator and this occurred on multiple occasions.

[13] Sections 58 and 59 of the Sexual Offences Act now govern the use of the evidence relating to previous consistent statements made by complainants in proceedings involving sexual offences. Section 58 provides that:

'Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statements.'

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[1] *Oxford South African Concise Dictionary* 2 ed (2010) at 1362.
[2] See Urban Dictionary https://www.urbandictionary.com/define.php?term=willy.

Section 59 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.'

The parents of the complainant testified in the court a quo as to the report that was made to them by the complainant.

[14] Although there is no requirement for corroboration of the evidence of a child witness, in this case there was independent corroboration in the form of a medical report which completely excluded the risks of suggestibility. In *R v Manda*[3] the court held as follows:

'…the nature of the evidence given by the child may be of a simple kind and may relate to a subject matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility. In such circumstances it might perhaps be unfortunate if the courts acted upon a rigid rule that corroboration should always be present before the child's evidence is accepted.'

[15] Despite the presence of the medical report it was strongly argued in favour of the appellant that the court a quo misdirected itself by accepting the medical evidence as presented in the J88 medical form, in the absence of the testimony of the medical doctor who examined the complainant.

[16] The medical report was handed in by consent in the court a quo and there were no challenges to the findings by the medical doctor. The conclusions made by the medical doctor who examined the complainant are that the injuries in the vaginal and anal areas are consistent with penetration as opposed to the appellant's version that the complainant sustained the vaginal injuries when he accidentally leaned back on a couch and hit her vagina with his head. Besides the conclusiveness of the findings by the doctor, the appellant's version does not explain the cuts in the complainant's vagina and anal area. The findings by the medical doctor are conclusive and are in line with *MM v S*[4] where the court stated as follows:

'In principle, unless there is no issue about the fact of rape the doctor should be called as a witness. Certainly wherever the implications of the doctor's observations are unclear the

[3] *R v Manda* 1951 (3) SA 158 (A) at 163B-C.
[4] *MM v S* [2012] 2 All SA 401 (SCA) para 24.

doctor should be called to explain those observations and to guide the court in the correct inference to be drawn from them.'

The court a quo also found that the complainant's evidence was strongly corroborated by solid medical evidence.

[17] The medical evidence cannot be evaluated in isolation or be rejected because there may be an innocent explanation for the clinical findings. The correct approach is that a court may not decide a case in the light of inferences which arise only from selected facts considered in isolation.[5] The court a quo was correct in finding that the uncontested clinical findings contained in the J88 slots in with the mosaic of facts which the court ultimately found to have been proved and that it did not stick out like a sore thumb.

[18] Counsel for the appellant submitted that since the complainant was a single witness, her evidence needed to be clear and satisfactory in every material respect. Counsel submitted that it was riddled with inconsistencies, contradictions and was unreliable due to the suggestibility and susceptibility of the minor child. It is trite that evidence of a single witness is always treated with caution, and in criminal proceedings a conviction will normally follow only if the evidence is substantially satisfactory in every respect or if there is corroboration.[6] This applies to the complainant who is a single witness in regard to the incidents that she testified about.

[19] The trial court was satisfied that the complainant's evidence was reliable and there could be no reason to believe that she had been coached or that it was due to her imaginativeness. In this respect, the court a quo was alive to the fact that it was dealing with evidence of a child witness and treated it with the necessary caution. The court a quo accepted the evidence of the complainant and concluded that although the complainant's evidence was not without any blemish, as 'she did, however, get mixed up with her numbers and it was clear she could not count properly', and that 'she did not know how many times it happened but she was adamant that it happened numerous times' and 'she was adamant that it was Uncle

[5] *R v Sacco* 1958 (2) 349 (N) at 353.
[6] *Stevens v S* (2005) 1 All SA 1 (SCA) para 17.

Lucas that hurt her, in the way that she described', it accepted her evidence as the truth. It attributed these shortcomings to her tender age. Our courts have held that evidence can be satisfactory even if it is open to criticism.[7]

[20] Evidence of a previous consistent statement is admissible in sexual offences cases to show consistency. In this case, the complainant made a report on her own to her father as he was giving her a bath that Uncle Lucas put his balls inside her, that her cookie was sore and that she licked his balls with her tongue and he licked her cookie. Her father immediately observed that her vagina was red whereafter he confronted the appellant. The report was made shortly after her return from the appellant's house and she knew the identity of the culprit. The complainant stuck to her version throughout the trial.

[21] I am accordingly satisfied that there is no basis to interfere with the court a quo's findings that the State had proved beyond a reasonable doubt that the appellant is guilty of the crimes of rape and sexual assault.

[22] The appeal against the conviction is dismissed.

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MBATHA J

[7] *S v V* 2000 (1) SACR 453 (SCA) para 2.

Date of hearing	:	20 April 2018
Date delivered	:	11 May 2018

Appearances:

For the Appellant	:	Adv L Marais
Instructed by	:	Justice Centre Pietermaritzburg
For the Respondent	:	Adv ME Mthembu
Instructed by	:	The Director of Public Prosecutions Pietermaritzburg