IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

AR No: 478/19

In the matter between:

THOKOZANI MAKHAYE **APPELLANT**

and

THE STATE **RESPONDENT**

ORDER

On appeal from: The Regional Court, Pietermaritzburg (Mr C.F. Masikane sitting as court of first instance)

1. The appeal against conviction is upheld, and the conviction and sentence of the appellant is set aside.
2. The order of the trial court is substituted thereof with: 'Not guilty and discharged'.

JUDGMENT

Delivered on:

Mngadi J:

[1] The appellant, by virtue of an automatic right of appeal, having been convicted and sentenced to life imprisonment by the Regional Court,

Pietermaritzburg, appeals against both conviction and sentence. The appellant was charged before the regional court with and convicted of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act), and sentenced to life imprisonment.

[2] The charge of rape was read with the provisions of section 51 and/or 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA). It alleged that in that upon or about 18 June 2016 and at or near Emagodini in the regional division of KwaZulu-Natal, the accused did unlawfully and intentionally commit an act of sexual penetration with the complainant, NM by inserting his penis in her vagina without the consent of the said complainant. Section 51(1) and Schedule 2 of the CLAA was applicable, in that the complainant was 14 years old at the time of the commission of the offence. The appellant, who was legally represented, pleaded not guilty to the charge. The learned regional magistrate, after hearing evidence, convicted the appellant as charged. Having found no substantial and compelling circumstances to impose a sentence less than the prescribed minimum sentence of life imprisonment, sentenced the appellant to life imprisonment.

[3] The appellant, when the charge was put to him, pleaded not guilty to the charge. He did not disclose the basis of defence but elected, as he was entitled, to remain silent. The State adduced evidence of five (5) witnesses, namely; the complainant, her younger sister, her mother, the induna and the medical doctor. The appellant testified for the defence and he did not call any witnesses. The only documentary evidence was the medical examination report (J88) on the complainant. In the course of the trial, it transpired that the appellant was denying that he had sexual intercourse with the

complainant.

[4] The complainant was subjected to a competency enquiry. She stated that she was fifteen (15) years old and in grade 8 at school. She knew the difference between the truth and lies. It was right to tell the truth. She did not understand the nature and import of an oath. The court then admonished her. At the instance of the State, the court allowed her to testify through an intermediary as envisaged in the provisions of s 170A of the Criminal Procedure Act 51 of 1977.

[5] The complainant testified that she was staying at Emaqadini area. She was staying with her mother Z[….] M[….] and her younger sister NM. On 18 June 2016 she was fourteen (14) years old. In the afternoon, her mother sent her together with NM to the shop to buy bread and chips. On the way before they reached the shop, the appellant called her to him. She told him she would not be able to go to him. She knew the appellant because she often saw him on her way to church. She did not know his name but her sister knew him and knew his name.

[6] The complainant testified that the appellant then grabbed her. He grabbed her before they had entered the shop although they were close to it and it was visible. He held her and NM proceeded to the shop leaving her behind. She asked the appellant to release her but he refused. NM returned from the shop and she ran to their home and she called their mother. She testified that the appellant dragged her downhill. At the foot of the hill, he kissed her and caused her to fall to the ground. He dragged her and she resisted and she got injured. She sustained bruises on her knees and an abrasion on her thigh.

[7] She testified that the appellant after he had caused her to fall removed her panties and he also removed his pair of trousers. He got on top of her. She was lying on the ground on her back and facing up. He removed his trousers and he placed it on the ground. He took out a knife and he placed it above her. He told her that when he is done with her, he will stab her and also stab himself. He then forced her legs apart and he inserted his penis into her vagina. He made movements having sexual intercourse with her. Then her mother called out aloud for her. The appellant covered her mouth with his hand. She moved her head to the side and she responded to the call by her mother. He released her and let her leave. He asked her which direction should he take towards her mother or other direction. She told him to take the direction towards her mother. She went to her mother but the appellant took the other direction. She told her mother and the others what the appellant did.

[8] The complainant testified that when the appellant released her, she took her panty . She carried it in her hand when she went to her mother. She reported to her mother that there is a boy who pulled her. He had proceeded to N[….]

D[….]s place. She and her mother proceeded to D[….]'s place. She told her mother that the boy called her and she refused to go to him. He dragged her and he removed her panty and he had sexual intercourse with her without her consent. She testified that at D[....]'s place they wrote a letter for her to take to the clinic. She went to the clinic. She was referred to Umphumulo hospital. She went to Umphumulo hospital and the doctor examined her.

[9] The complainant testified that when she saw the appellant going to church, the appellant proposed love to her but she rejected the proposal. It was a month before the incident. When he grabbed and dragged her he was not saying anything to her. She did not cry for help. She knew that there were people at the shop and there was a homestead not very far from where the appellant raped her. She did not cry for help because there had recently been a death in her family and they were warned not to make noise otherwise it will become a habit. She felt pain in her vagina. She had a boyfriend and she was having consensual sexual intercourse prior to the incident.

[10] The complainant under cross-examination testified the doctor who examined her did not ask her any questions. She did not tell the doctor she had sexual intercourse prior to the incident. She also did not tell the doctor that she had never had sexual intercourse before as it was recorded in the medical examination report. The appellant grabbed and held her and she did not proceed to the shop. NM alone proceeded to the shop and she bought the bread and the chips. Asked whether NM saw that she had been grabbed by the appellant and she left her and proceeded to the shop, she said she did not see that because the appellant had not yet grabbed her at that stage, he started to grabb her after NM had entered the shop. She did not tell NM to go and call their mother. The appellant grabbed her by the arm and she grabbed him in the other arm. She sat down and dragged her and she sustained the bruise on the knee and on the leg. The area where she fell down had thorns. She left the appellant and she did not know whether he put on his trousers or not. She saw him walking across after he had crossed the river. She did not know whether he took his knife or not. She reported to her mother with a panty on her hand and her mother saw the panty. She went to her mother and she was crying. Her mother asked her why she was

crying. Her mother was not angry with her and she did not assault her.. She agreed that the appellant was standing at the shop when she went passed him with NM.. She stated that the appellant did not finish raping her, he was disturbed by her mother.

[11] NM after the competency enquiry was allowed to also testify through an intermediary. She testified and her evidence largely agreed with the evidence of the complainant. But she testified that the complainant entered the shop with her and they both bought the bread and chips and exited the shop. The appellant grabbed the complainant on their way home. He walked with the complainant and they were holding hands on the road towards their home. Where the road deviates from the one to her home, the appellant grabbed and pulled the complainant down-wards. She proceeded to her home. Her mother asked her where was the complainant. She told her that the appellant grabbed and dragged her away. She proceeded to where the appellant had dragged the complainant with her mother.

[12] NM testified that when they were at the spot where the appellant dragged away the complainant, her mother called aloud for the complainant. Initially the complainant did not respond. When she responded, she responded as if she was held. The complainant came out up to them. She was carrying on her hand one of her shoes. The complainant was not carrying her panty in her hand as she testified that when she proceeded where her mother and sister were, she had her pair of panties in her hand. The complainant told them what happened. At home, the complainant showed them the bruises on her legs and on her thigh. She was wearing her panty. She knew the appellant; she used to see him on her way to church.

[13] Z[....] M[....] testified that she was the complainant's mother. She testified that she sent the complainant and NM to the shop to buy bread and chips. Nm returned from the shop alone. She reported to her that a boy grabbed the complainant and dragged her towards the fields. She went to look for the complainant. She called out for the complainant. The complainant approached. She was not wearing her right shoe. She had a bruise in the hip area and on the knee. She was crying. She saw a short boy proceeding down the river. She testified that the complainant told her that she was accosted by a boy, he took

her near the river, he took out a knife and he placed it above her, he told her that after he had finished with her he would stab her and stab himself, he lowered the complainant's panty and his pants, he inserted his penis into her vagina and he had sexual intercourse with her.

[14] Z[....] M[....], further, testified that it was not yet dark when she went to look for the complainant. She did not see a panty in the hand of the complainant when she approached her. She did not know the appellant but he came to her home to apologise. NM told her that when they left the shop the appellant joined them and he walked with them on the road. She told her that where the path to her home deviates from the road, the appellant deviated with the complainant and NM quickly ran up to her home and reported to her. She said she was not the one who approached the appellant to pay a cow as damages, it was the appellant who came to her home.

[15] The learned regional magistrate asked Z[....] M[....] to tell the court what happened when the appellant came to her home and apologised. She testified that he came to her home with his brother. She called the induna. The regional magistrate asked her what they discussed. Z[....] testified that they he came to apologise. He said he heard allegations that he raped the complainant and he said he did not know whether he was drunk. She said the induna said nothing could be discussed since the matter was with the court. There was no discussion about the cow.

[16] The State then after an adjournment called Steven Patane Khanyile. He testified that he was the induna. He was called to the complainant's home. He went to their home. He found the appellant. The appellant said he had come to apologise for raping. He denied that nothing was discussed because he said the matter was before the court. The appellant was sober and he spoke freelily.

[17] The last witness for the State was doctor Nomzamo Nompumelelo Gumede. She testified that she was the Chief Executive Officer on Umphumulo hospital. The complainant was examined by a doctor Kotzagiri. Dr. Kotzagiri has since retired and emigrated. She confirmed that the medical examination report is part of the official hospital records under her care and custody. The report recorded an abrasion 2x1 cm on the right knee caused by rough objects or rough surface. The patient was 15 years old, She had never had a child and had never

had sex before. It was found that the hymen was absent, the vagina allowed one finger, there were no injuries over the genetalia. Specimens were collected and were given to Sbongokuhle Sicelo Sithole.

[18] The appellant testified as follows. They were in a love relationship with the complainant for about a year before the date of the incident. They did not see each other that often. He had a steady girlfriend and the complainant had a steady boyfriend that he knew. He saw the complainant on 18 June 2016. He was coming from the funeral. He asked to speak to her and she told him that she was coming back. He sat down on the side of the road next to a shop. The complainant came back. It was about 16h00 to 16h30. The complainant was with her sister. He walked with the complainant until he reached a spot where he had to take another path. He asked her to speak with him for more time. She had no problem. They proceeded down the road towards where she fetched water. They stood there. They then heard the complainant's mother calling for the complainant. She was saying she knew that the complainant was with a man. She asked whether he should go with the complainant to her mother to assure her that nothing was happening but the complainant advised him not to do that. He parted with the complainant and he took another path. The complainant proceeded to her mother. He saw the complainant's mother at a distance striking at the complainant but he could not make out what she was using.

[19] He testified that after three days he met the complainant's mother. She asked him what did he do to her child. He told her that he was in hurry he would come to her home to explain. She said he needed to pay two cows as damages. He said he would not do so because he had done nothing to her child. He then over some few days learnt that the police were looking for him for raping the complainant. He asked his brother to accompany him to the home of the complainant to explain that nothing happened. They were invited in and directed go and seat in the rondavel. The relatives and neighbours came to them in the rondavel and they accused him of raping the complainant. They sent for the induna and told the induna that 'herewere the people who raped the complainant.' The induna said nothing should be discussed because the matter was with the police. He testified under cross-examination that one Anele knew of

the relationship between him and the complainant. They used to meet when they were attending night service at church. The complainant did not have a cell phone and she was still schooling. He was with her for about 10 minutes when her mother called her.

[20] The learned regional magistrate stated that the issues to be decided is whether the complainant went with the appellant on her own free volition, and whether the appellant had sexual intercourse with the complainant without her consent. He went on to reason that if the meeting between the complainant and the appellant was a pleasant one, the complainant's sister would not have gone and summon her mother. He found that it did not make sense that the complainant instead of coming out and say she was with her boyfriend, would come out and falsely accused her boyfriend of raping her. The learned regional magistrate found that the discrepancies between the evidence of the complainant and that of her sister on when was the complainant grabbed were immaterial as well as whether the complainant had a panty in her hand or not. Those discrepancies, reasoned regional magistrate, did not justify the rejection of the complainant's evidence in *toto..* He found the evidence of the induna that the appellant confessed crucial. He found that the appellant went to the complainant's home to apologise because he had raped the complainant and he wanted them to accept his apology and withdraw the criminal charges laid against him. He stated that it made no sense that the appellant would take the complainant to a secluded spot to talk to her instead of standing on the road with her.

[21] The hearing of an appeal against findings of fact is guided by the principle that in the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. See *S v Hadebe and others* 1998 (1) SACR 422 (SCA) at 426b.; *R v Dhlumayo and another* 1948 (2) SA 677 A . The conviction of the appellant, whether he had sexual intercourse with the complainant, and if so, whether it was without the consent of the complainant, is founded on the evidence of the complainant. It was the evidence of a single witness and a child. The evidence of the complainant as evidence of a child is

required to be approached with great caution. See *R v Manda* 1951 (3) SA 158 (A) at 162H. The danger inherent in relying upon the uncorroborated evidence of a child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care, amounting perhaps to suspicion. The trial court must fully appreciate the danger inherent in the acceptance of such evidence, and where there is a reason to suppose that such appreciation was absent, a court of appeal may hold that the conviction should not be sustained. See *Manda* at 163E-F. In this matter, the medical evidence was neutral on the issue of whether sexual intercourse took place between the complainant and the appellant.

[22] The regional magistrate appreciated that there was a risk in relying on the evidence of the complainant but found other evidence supporting the evidence of the complainant. In addition, the evidence of the complainant as a single witness evidence was required to be clear and satisfactory in all material respects to found a conviction, which appears to have escaped the attention of the regional magistrate. In my view, the discrepancies in the supporting evidence were not, with respect, accorded due consideration by the regional magistrate which amounts to a failure to approach the evidence with the required caution. See *S v Oyira* 2010 (1) SACR 78 (ECG) para 5.

[23] In my view, either the following discrepancies were not given any weight or they were overlooked by the learned regional magistrate :

(a) The complainant testified that the appellant grabbed and held her before she went to the shop but her sister contradicted her and testified that they were together when they entered the shop and they bought the items and they exited the shop together. The discrepancy is, in my view, material because it relates to the issue of whether the appellant pounced on the complainant, grabbed her and dragged her way.

(b) NM's evidence is that when the appellant was walking on the road with them from the shop there was nothing untoward in the behaviour of the appellant, which is contrary to the evidence of the complainant.

(c) The complainant’s evidence that she parted with the appellant and she carried the panty in her hand when she approached her mother and her sister is not correct. There is no way that her mother and her sister would not have

noticed that she was carrying her panty in her hand. In fact, her sister testified that she saw that the complainant was wearing the panty when she showed them the injuries. The contradiction is material and affects the credibility of the complainant.

(d) The complainant told the doctor that she had never had sexual intercourse before the incident. The doctor found evidence, which suggested that was not correct. The complainant made a volte-face and testified she had had sexual intercourse with her boyfriend.

[24] The learned regional magistrate failed to approach the evidence of the complainant and NM with extreme caution as evidence of children. If he had he done so, the behaviour of the complainant's sister not to wait for the complainant on the road but proceed home and report that the complainant went way with a male person would not have appeared strange. Likewise, it would not have meant much that the complainant did not tell her mother that she was with her boyfriend. The learned regional magistrate in those circumstances would not have found the discrepancies immaterial and he would not have found the behaviour of the complainant and her sister improbable.

[25] The injuries found on the complainant, which the doctor attributed to being caused by a rough terrain, tended to support the evidence of the complainant. However, the contradictions alluded to above show the complainant as a mendacious witness. She was carrying one shoe in her hand, which suggests that she might have stumbled and injured herself when she hurried to her mother on the rough terrain. The complainant as a child might have thought of nothing else except to save herself from the wrath of her mother.

[26] The learned regional magistrate elicited the evidence that the appellant tendered an apology. In my view, the accusations levelled against the appellant and the fact that the induna was advised that he had come there with his brother, might have resulted in the induna concluding that the appellant was apologising for doing what he was accused of having done without properly listening to the appellant. Evidence of a confession, which is an unequivocal admission of guilt, must be clear.

[27] The learned regional magistrate misdirected himself in requiring the appellant to prove that the inconsistencies in the evidence of the State witnesses justified that the evidence be rejected in *toto.* There is no such an onus on an accused person. If there is a reasonable possibility that the evidence of the state witnesses implicating the accused might not be correct, it means the guilt of the accused has not been proved beyond reasonable doubt and the accused is entitled to an acquittal.

[28] The State bore the onus to prove the guilt of the appellant beyond a reasonable doubt. In terms of section 208 of the CPA, an accused 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. It is required to be clear and satisfactory in every material respect. It is not the labels that are given to the evidence by a judicial officer that count. Evidence, as it appears on record, must be clear and satisfactory in all material respects. The exercise of caution entails scrutiny of the evidence, noting discrepancies and attaching due weight to the discrepancies that are found. See *R v Mokoena* 1932 OPD 79 at 80; *R v Mokoena* 1956 (3) SA 81 (A) at 85-86; *S v Webber* 1971 (3) SA 754 (A) at 757-759; *Stevens v S* [2005] 1 All SA 1 (SCA) para 17; *S v Artman and another* 1968 (3) SA 339 (A) at 340H

[29] In my view, the evidence of the State, approached with the necessary caution, falls short of proving the guilt of the appellant beyond reasonable doubt.

[30] I am of the view that the conviction of the appellant falls to be set aside. I, accordingly, propose the following order:

1. The appeal against conviction is upheld, and the conviction and sentence of the appellant is set aside.
2. The order of the trial court is substituted thereof with:
   'Not guilty and discharged'.

Mngadi J

I agree and it is so ordered.

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Madondo DJP

APPEARANCES

Case Number	:	AR478/19
For the Appellant	:	Z Fareed
Instructed by	:	Pietermaritzburg Justice Centre Pietermaritzburg
For the respondent	:	S Singh
Instructed by	:	Director of Public Prosecutions PITERMARITZBURG
Heard on	:	18 September 2020
Judgement delivered on	:	23 October 2020