IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: **AR388/2022**

In the matter between:

ZWELAKHE MAPHUMULO **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Radebe J and Mossop J
Heard: 18 October 2024
Delivered: 18 October 2024

ORDER

On appeal from: uMzimkhulu Regional Court (sitting as the court of first instance):

1. The appeal against conviction and sentence is upheld.
2. The appellant's conviction on a count of rape and his sentence of life imprisonment is set aside.

JUDGMENT

MOSSOP J (RADEBE J concurring):

[1] The appellant was convicted in the uMzimkhulu Regional Court on a charge of raping his cousin (the complainant), a 12-year-old girl at the time. He was thereafter sentenced to life imprisonment after the trial court found an absence of substantial and compelling reasons entitling it to deviate from the prescribed minimum sentence contemplated by s 51(1) of the Criminal Law Amendment Act 105 of 1997. By virtue of the provisions of s 309(1)*(a)* of the Criminal Procedure Act 51 of 1977 (the CPA), the appellant exercises his automatic right of appeal to challenge both his conviction and sentence.

[2] The facts presented by the State were, on the face of it, not complex. The appellant and the complainant both resided at the same homestead located in the area known as Donsomlenzana. The homestead was that of the complainant's aunt, Ms N[...] M[...] (Ms M[...]). At the homestead was a tuck shop. Sometime in 2017,[1] the complainant testified that she had been instructed by Ms M[...] to go to the tuck shop to serve customers wishing to make purchases there. She did as she was told. The appellant later arrived at the tuck shop and, without much ado, stated to the complainant that he wanted to sleep with her. The complainant became distressed at hearing this and began crying, at which the appellant left. Nothing consequently happened on this occasion, but the complainant testified that she told Ms M[...] exactly what had occurred. This startling and disturbing story, however, apparently did not resonate with Ms M[...], for it appears that she did nothing about it.

[3] According to the complainant, the day after the appellant disclosed his desire to sleep with her, she was again at the tuck shop to serve customers. She had not been ordered to do so by her aunt on this occasion but had gone to the tuck shop of her own volition. The appellant arrived at night and entered the tuck shop. Ordinarily,

[1] The charge sheet alleged the date of the rape to be 1 September 2017. The complainant, however, never disclosed the date of either of the two incidents that she narrated that involved the appellant. She was impermissibly led by the State prosecutor on the date of the rape, who stated to the complainant that there was 'an incident that occurred on the 1 September 2017 …', to which the complainant agreed. But it was clear from her evidence that she did not know the date because when she explained what had occurred on the date of the alleged rape, she stated: 'Then the following day it was on a Thursday even though I cannot recall the date Zwelakhe appeared again.'

customers would not enter the tuck shop but would remain outside from where they would be served. The appellant again said that he wanted to sleep with the complainant. The complainant testified that she again started weeping and the appellant then closed her mouth with a cloth. He took off her underwear and made her lie on her back on the floor of the tuck shop. The appellant then dropped his trousers, forced her thighs open, got on top of her and inserted his penis into her vagina. He then moved on top of her. When he finished, he got up and left.

[4] The complainant testified that she was bleeding. She used the cloth that had been used by the appellant to gag her to wipe up her blood from the floor. As to what happened next, she stated that:
'I wiped off the blood and went to show my aunt and then myself and my aunt we went to show my dad and my aunt told me to go and throw away the cloth in the river.'

[5] There can accordingly be no doubt that the first report of what had allegedly occurred was made by the complainant to Ms M[...]. Again, her aunt appeared to be indifferent to what she had just been told, for after having heard what the complainant informed her had happened to her, she then left to purchase some beers from a tavern. The complainant testified that she grabbed her school bag and left the homestead and went to her grandmother's home. There, she explained that:
'I told her the story, after that she took me to the clinic.'

[6] She, however, did not remain at the clinic to be medically examined. She stated that whilst in the queue at the clinic, she saw the appellant:
'… and his siblings and my aunt, then I ran away before I could even go in. I went to another granny that I did not know.'

[7] The unknown granny called a female police officer, who was on maternity leave in the area, and who later testified at the trial. The police officer, Constable Nonhlanhla Shabalala (Cst Shabalala), testified that she telephoned the Intsikeni Police Station after hearing the complainant's version of her rape by the appellant. A social worker was also called, who took the complainant to a place of safety and, ultimately, to the hospital. At the hospital, the complainant testified that she was:

'… examined in my vagina, they said they could not see anything and they gave me some tablets.'

[8] The only other witness called by the State was Ms Nolwanze Duma (Ms Duma), a local ward committee member. She testified that the complainant was brought to her by a Ms Maya (Ms Maya), who reported to Ms Duma that the complainant had come to her homestead and told her that she had been raped. Ms Duma confirmed that Ms Maya narrated the facts of what allegedly occurred to the complainant to her. According to Ms Duma, the local ward councillor was telephoned and informed of what had happened, who in turn called the complainant's aunt and requested her to come to her. She did so, as did the complainant's father, his girlfriend, and the appellant's mother. When they arrived, the complainant inexplicably fled again.

[9] That was the evidence presented by the State. Despite the apparent simplicity of the complainant's version, it was not an easily understood narrative. Evidence that one would have expected to hear was absent, as will be made clear shortly. While it was presented as a continuous, evolving series of events, it was anything but that.

[10] It is, unfortunately, necessary to discuss several areas of concern arising out of the proceedings, the trial court's judgment and the conclusion to which it ultimately came.

[11] The first area of concern lies at the heart of the proceedings. The State's case was that of a single witness, namely the complainant. Her evidence was accordingly critical to the decision to convict the appellant. I am, however, by no means certain that the complainant appreciated what it was to take the oath prior to testifying. My trepidation in this regard stems from an observation made by the doctor who examined the complainant at the hospital to which she was taken. He recorded the following on the J88 document that he completed under the heading 'Mental health and emotional status':
'Slight mental retardation.'

[12] This observation by the doctor appears to have led to a report (the report) being prepared by a clinical psychologist regarding the complainant's mental condition. The report is not under oath nor is it confirmed by an affidavit and the clinical psychologist was not called at the trial. The report stated that its purpose was intended to address the question of whether the complainant:
'… can be able to testify in court with the assistance of an intermediary.'

[13] I appreciate that this is not exactly the same issue that I am presently dealing with, namely the ability to understand an oath and its significance, but it does reveal the apparent vulnerability of the complainant, because the report, dated 18 April 2018, revealed that the complainant at that stage was doing grade three for the third time. There was thus clearly something wrong. The complainant's cognitive functioning was assessed in the report as being 'fair'. The conclusion of the report stated the following:
'The psychological assessment indicated that her intellectual functioning is between mild and moderate intellectual disability (mental retardation) range.

- She can tell the court about her rape.
- Her ability to testify in court with the assistance of the intermediary is below average.'[2]

[14] In both criminal and civil trials, the evidence relied upon by a judicial officer to come to a finding is obtained from the oral testimony of competent witnesses. The CPA presumes that everyone is a competent and compellable witness.[3] Section 194 of the CPA, however, provides as follows:
'No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.'

[2] While the content of the report considered the desirability of the complainant testifying through an intermediary, it is worth noting that the regional magistrate did not consider this option and an intermediary was, consequently, not used.
[3] Section 192 of the CPA.

[15] How this is to be applied was explained in *S v Katoo*,[4] where the Supreme Court of Appeal stated the following:

''The first requirement of the section is that it must appear to the trial court or be proved that the witness suffers from *(a)* a mental illness or *(b)* that he or she labours under imbecility of mind due to intoxication or drugs or the like. Secondly, it must also be established that as a direct result of such mental illness or imbecility, the witness is deprived of the proper use of his or her reason. Those two requirements must collectively be satisfied before a witness can be disqualified from testifying on the basis of incompetence.'

[16] The record of proceedings does not reveal what the regional magistrate thought of the complainant's mental capacity because the issue appears not to have been considered at all by the regional magistrate. That the regional magistrate must have appreciated that there might be a problem in this regard brooks of no doubt in view of the contents of the report. That being so, she was required to investigate further and determine whether the complainant was capable of taking the oath. There would have to be a finding as to whether the proposed witness knew what it meant to take the oath and what that entailed. As was stated in *S v Matshivha*:[5]

'The finding must be preceded by some form of enquiry by the judicial officer, to establish whether the witness understands the nature and import of the oath. If the judicial officer should find after such an enquiry that the witness does not possess the required capacity to understand the nature and import of the oath, he or she should establish whether the witness can distinguish between truth and lies and, if the enquiry yields a positive outcome, admonish the witness to speak the truth.'

[17] In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and others*,[6] the Constitutional Court stated that:

'The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a precondition for

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[4] *S v Katoo* 2005 (1) SACR 522 (SCA); [2006] 4 All SA 348 para 11.
[5] *S v Matshivha* 2014 (1) SACR 29 (SCA); [2013] ZASCA 124 para 10.
[6] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and others* [2009] ZACC 8; 2009 (4) SA 222 (CC) para 166.

admonishing a child to tell the truth that the child can comprehend what it means to tell the truth. The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused's right to a fair trial were such evidence to be admitted. To my mind, it does not amount to a violation of s 28(2) to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for the administration of justice.' (Footnote omitted.)

[18] The extract referred to above refers to a child. The complainant was 12 days shy of her 18th birthday when she finally testified at the appellant's trial, and thus was not a child, but the principle crystallised in the extract just referred to would apply to her with her own unique qualities and apparent intellectual challenges.[7]

[19] Regrettably, no inquiry was conducted by the regional magistrate. Not a single question was ever put to the complainant when she took to the witness box about her understanding of what it meant to take an oath. In my view, given what was known by the court a quo about the complainant, it was not open to the regional magistrate to simply permit the complainant to take the oath. The failure by the court to conduct an inquiry into the complainant's mental capacity is fatal and imperils the conviction of the appellant, for there was no other evidence adduced by the State that established the appellant's guilt.

[20] The second area of concern is that the regional magistrate failed to distinguish between true corroboration of the complainant's version and previous consistent statements made by her. It is so that s 58 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 now permits the reception of previous consistent statements by a complainant in criminal proceedings involving the alleged commission of a sexual offence. But such statements do not constitute independent evidence of the offence alleged to have been committed. Such statements only

[7] *S v SM* 2018 (2) SACR 573 (SCA) para 18 (*SM*).

establish the consistency of the witness, for a lie can just as easily be repeated as the truth.[8]

[21] In her judgment, the regional magistrate narrated in detail what Cst Shabalala had said she had been told by the complainant regarding the particulars of the rape. The regional magistrate also found that the evidence of Ms Duma 'confirmed the evidence of the complainant'. She thus concluded that:
'Her evidence was confirmed was corroborated (sic) by the first witness, N[...] T[...] (sic) as well as the second witness, Nolwandle Duma … So the evidence of this child was corroborated by two witnesses as far as to how the accused raped her …'.

[22] Neither of these two witnesses, in fact, corroborated the complainant's version. They simply recited what the complainant had told them. Repetition of a version does
not make it the truth and consequently, such statements have no probative value.

[23] The regional magistrate stated further that:
'It is clear that sexual intercourse took place as per evidence of the child, which is corroborated by other evidence.'
Quite simply, there was no other corroboration, if this was intended to refer to corroboration other than the perceived corroboration by Cst Shabalala and Ms Duma. There were no witnesses to the crime. As shall be discussed next, there was also no forensic evidence to establish the commission of the crime by the appellant. The evidence of the first report would have been admissible,[9] being an exception to the rule against self-corroboration, but for reasons that were not disclosed, it was not called by the State. In sexual cases, the first report is received to rebut any suspicion that a complainant has fabricated the allegation.[10] What was clear to the regional magistrate is, accordingly, not clear to me.

[24] The third area of concern is similar to the previous issue just discussed. The regional magistrate considered the J88 document completed by the doctor who

[8] *R v Rose* 1937 AD 467 at 473; *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) para 17.
[9] *S v Hammond* 2004 (2) SACR 303 (SCA).
[10] *S v Banana* 2000 (3) SA 885 (ZS) at 895E.

examined the complainant as also corroborating her version of events. In this regard, the regional magistrate found in her judgment that:
'…the doctor says that alleged she had been raped by her cousin on 1 September, which is therefore that even her evidence and the evidence of these witnesses is corroborated by the evidence of the doctor in this J88 report.'
The doctor, likewise, could not corroborate the complainant's version. He simply recorded the complainant's allegation made to him, which was:
'Alleged to have been raped by her cousin on 01/9/2017
She denies having previous sexual encounters.'

[25] The most significant aspects of what the doctor recorded on the J88 document were the date of his examination of the complainant and the conclusion to which he came. The date of the examination was 13 September 2017, some 12 days after the alleged rape. His conclusion regarding the allegation of rape and the examination that he performed was the following:
'Lack of positive finding on clinical examination does not rule out vaginal penetration.'

[26] The doctor came to that conclusion after recording that the complainant's physical examination was normal in all material respects, including the examination of her genital area. Significantly, he recorded that there were no signs of any fresh tears in the complainant's hymen, which was described as being 'annular' in appearance. That is troubling, given the complainant's version of what allegedly happened and the bleeding that she described.

[27] In *S v MM*, [11] Wallis JA stated that it was becoming an increasing feature of rape cases that a doctor's report is:
'…simply handed in by consent and the doctor [is] not called to give evidence. That practice is, generally speaking, to be deprecated. It means that there is no opportunity for the doctor to explain the frequently subtle complexities and nuances of the report; to clarify points of uncertainty and to amplify upon its implications and

[11] *S v MM* [2012] ZASCA 5; 2012 (2) SACR 18 (SCA) paras 15 and 24 (*MM*).

the reasons for any opinions expressed in the report. That may make the difference between a conviction and an acquittal, or perhaps a conviction on a lesser charge.'
The doctor's evidence should have been called to clarify both his examination and his finding, but it was not.

[28] The fourth difficulty is the timeline of the evidence adduced by the State. As mentioned previously, it was presented as a seamless narrative that flowed sequentially from the date of the alleged rape. But, in truth, it did not. The period from the date of the alleged rape to the date of the medical examination is some 13 days. What happened over this period is clouded by a lack of particularity. Time is simply unaccounted for in the evidence of the complainant.

[29] The fifth area of concern arises from the nature of the defence raised by the appellant. His defence was an alibi. He stated that he was in Durban at the time of the alleged rape. The law on the issue of alibis is clear. There is no onus on an accused person to establish such a defence. It is the task of the State to disprove it. In *R v Mokoena*,[12] the court held that:
'If the *onus* is upon the Crown to rebut the alibi, as it certainly is, then the evidence as a whole must be considered and the fact that the accused and his witness told stories, which in some respects disagree, does not mean that the Crown case has been proved beyond reasonable doubt ...'.

[30] If an alibi might be reasonably true, the accused must be acquitted. The correct approach is to consider the alibi in the light of the totality of the evidence presented to the court, as stated in *Mokoena*. In evaluating the defence of an alibi, in *R v Hlongwane*,[13] Holmes AJA stated as follows:
'At the conclusion of the whole case the issues were: *(a)* whether the alibi might reasonably be true and *(b)* whether the denial of complicity might reasonably be true. An affirmative answer to either (a) or (b) would mean that the Crown failed to prove beyond reasonable doubt that the accused was one of the robbers.'

[12] *R v Mokoena* 1958 (2) SA 212 (T) 217G-H (*Mokoena*).
[13] *R v Hlongwane* 1959 (3) SA 337 (A); [1959] 3 All SA 308 (A) at 339C-D.

[31] In *S v Musiker*,[14] the Supreme Court of Appeal observed that once an alibi has been raised, it has:

'… to be accepted unless it was proved to be false beyond reasonable doubt'.

The State appears not to have realised that it bore the onus of disproving the appellant's alibi, for it made no attempt to do so.

[32] The result is that the State's case was predicated upon the evidence of a single witness. It is so that the evidence of a single witness is capable of founding the conviction of an accused person, if it is satisfactory in every material respect.[15] In this instance, the single witness' capacity to testify under oath is, at best for the State, uncertain. When the complainant's version of events is considered in the light of the findings of the doctor who examined her, there is, at the very least, reasonable doubt about that version.

[33] After a consideration of the evidence and after anxious consideration, one is left with the disquieting feeling that an injustice has been visited both upon the complainant and the accused, primarily from the failure by the court a quo to properly consider the mental capacity of the complainant. Ours is a violent society and more often than not, those that suffer that violence are female. Victims of gender-based violence must be given the full protection of the law. That is not possible when the basic principles, long engrained in our legal system, are simply ignored.

[34] The result, in my view, is that it is unsafe to allow the appellant's conviction to stand. By virtue of that conclusion, it is not necessary to consider whether the sentence of life imprisonment was a just sentence.

[35] I would accordingly propose that the appeal be upheld, and that the appellant's conviction and sentence be set aside.

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[14] *S v Musiker* [2012] ZASCA 198; 2013 (1) SACR 517 (SCA) para 15.
[15] *Cupido v S* [2024] ZASCA 4 para 19.

MOSSOP J

I agree and it is so ordered:

RADEBE J

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