IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: **AR296/2019**

In the matter between:

JOE ELIAS MBOMBIE **APPELLANT**

AND

THE STATE **RESPONDENT**

ORDER

1. The appeal against the conviction is upheld

2. The conviction and sentence is set aside.

JUDGMENT Delivered:

Mngadi J - (Jikela J: Concurring)

On appeal from: Pinetown Regional Court (Mrs Asmal, sitting as the court of first instance):

[1] The appellant appeals as of automatic right against conviction and sentence.

[2] The Appellant stood charged before the regional magistrate with one Count of rape of a ten (10) year old, complainant, it being alleged that on or about 28

November 2008, he did unlawfully and intentionally commit an act of sexual penetration with the complainant by inserting his penis into her vagina without her consent. The appellant who was legally represented throughout the trial pleaded not guilty to the charge. The regional magistrate after hearing evidence convicted the appellant as charged. Having found no substantial and compelling circumstances for a court to impose a lesser sentence, sentenced the appellant to the prescribed minimum sentence of life imprisonment.

[3] The complainant [N..M..] testified as follows. On n 28 November 2008 when her mother went to work, she remained in her home with other children. One M[...] did not stay with her. She had come from rural area to assist her with cleaning. Her father and M[...]'s father were brothers. The appellant was renting a room in the same place in which they rented. When she and M[...] returned from the toilet, the appellant was in his room. The appellant called M[...] to do some work for him. M[...] was sixteen (16) years old. M[...] did the work for the appellant by making the bed and washing dishes. The complainant remained outside. She wanted to enter the room, but they did not want her to enter.

[4] The complainant testified that the appellant then went outside. M[...] started pulling the appellant by his penis. This happened outside in the yard. She went to her mothers' room, and they followed her. The appellant was wearing a blue shirt and black pants. The appellant's zip was opened and M[...] pushed her hand into the appellant's underwear and pulled his penis. She got inside the house. She started washing dishes. The appellant and M[...] followed her into the room. The appellant said he was aroused. M[...] told the appellant to sit on the chair and stretched his arms. M[...] helped her and put her on the appellant's lap facing him. The appellant kept moving like pushing something. She was wearing long brown pants and a t-shirt. She demonstrated how the appellant was sitting on the chair by indicating a person sitting on a chair with arms and legs spread outwards. M[...] lifted her and she demonstrated sitting on the appellant's lap facing him. M[...] sat on Thembas' small chair. All the other people were at work.

[5] The complainant testified that the appellant was holding her having his arms around her. She was trying to move away from him. M[...] noticed that the appellant

did not have power to hold her tight and she came and pressed her on her shoulders. When she tried to scream, she blocked her mouth. She (the complainant) and the appellant were not dressed.

[6] Asked how they ended up with no clothes, she said the appellant told M[...] he wanted to undress her. The appellant then lifted her arms and M[...] pulled her T-shirt off. The appellant then got up and lifted her legs and M[...] pulled her pants off. This happened after she had been lifted and placed on the appellant. The appellant as he was sitting on the chair did not have any clothes on him. He undressed after he had undressed her. The appellant kept on moving shaking his body moving forward. M[...] went out to peep outside. Asked before he started moving what did he do, she said he inserted his penis in her. Asked where in her, she said in her vagina. She said she was crying it was painful. She did not bleed. Asked how long the appellant kept moving, she said it was 10 hours, which was a short while. Asked when M[...] saw that uncle T[...] was coming what was the appellant doing she said she was shaking. Asked when M[...] told him that uncle T[...] was coming what did he do, she said he left, he wore his pants and left, he was wearing a vest under his shirt, black which was on the floor. Uncle T[...] went into his room. As he was opening the door she told him. Her mother arrived after she had told uncle T[...]. At that time M[...] was outside. Her mother did not ask M[...], or the appellant anything. She also did not ask uncle T[...].. M[...] was then at her house which is near her house.

[7] The complainant under cross-examination testified as follows. Asked what she meant or understand by being aroused, she said she knew nothing. She said when she saw M[...] pulling the appellant's penis, they were outside, and they were sitting. She said after she told her mother, she asked them why they did something so bad. She said the appellant had been consuming liquor, and he was drunk. She said the appellant was in a relationship with M[...]. Before that the appellant tried to grab her mother. Her mother asked M[...] why they did something so bad and M[...] was with the appellant. They both did not say anything.

[8] P[...] M[...] testified as follows. She was the mother of the complainant. She knew the appellant for about two years. On 28 November 2008 when she returned from work, she received a report to take the complainant to the doctor. From home

she went to the clinic. She did not speak to the appellant who had fled and M[...] ran away. M[...] returned after few weeks. She did not notice any change in the complainant. She met T[...] on her return. He asked her whether she had taken the child to the clinic, and she said yes.

[9] T[...] M[...] testified as follows. He knew the appellant. He remembers the events of 28 November 2008 around 11:30 in the morning. He was from a neighbour to his room. When he was about to reach his room, he heard a child crying. He then saw M[...] standing by the door on the complainant's house. When he was near the toilet, he met the complainant. He asked her why she was crying, the complainant told him that M[...] threw her on the bed and took the appellant and put him on top of her. The appellant as he was on top of her, he moved up and down. Whilst the complainant was telling him her mother arrived. He told her to come and hear what the complainant was saying. The complainant said M[...] alerted the appellant that here is uncle T[...] coming. He was the appellant going to his room from the complainant's house. He did not see anything. When M[...] was standing at the door, the door was open. He could not recall what the appellant was wearing. The complainant said when the appellant was on top of her, he had taken off his pants whilst he moved.

[10] Maxwell Ngcobo testified that he was a medical doctor with fourteen (14) years' experience. On 28 November 2008, he examined the complainant who reported that she was raped on the same day 28 November 2008 during the day by a known person. She could not specify time. He found that she had bruises on both left and right labia majora, as well as labial minora which findings are suggestive of vaginal penetration. He completed a medical report J88 which he identified, and it was handed in as an exhibit.

[11] The medical report (J88) on the sketch section shows no notations. It is written next labia majora: bruised bilaterally as well as next to labia minora. Under hymen it records a configurative of annular and shows nothing next to swelling, bumps, clefts, fresh tears, synechiae and bruising.

[12] The regional magistrate on judgement stated the prosecutor advised the court that M[...] was a reluctant witness and had been charged. The learned regional magistrate commenced her evaluation and analysis of the evidence by stating that, it was common cause that the complainant was raped on 28 November 2008, and that what is in issue is that the appellant raped her as she alleges. It is not on record on what basis the learned regional magistrate based her decision that it was common cause that the complainant was raped on 28 November 2008. From the start the appellant denied that he raped the complainant. There was no admission by the defence at any stage of the trial that on the day in question the complainant was raped. The learned regional magistrate having taken as common cause what needed to be proved caused her to misdirect herself on the issues in dispute. The misdirection resulted in the court regarding part of the state case as common cause which impacted on the court in judging the rest of the state case.

[13] The learned regional magistrate stated that the complainant appeared to be an intelligent girl and testified in a straightforward convincing manner, she appeared to have a clear recollection of the events relating to the charge. She answered questions in a respectful, childlike manner without guile or hesitation. There was not a hint of deviousness or any indication that she was manipulating the facts.

[14] The regional magistrate sought to explain the difference between how the complainant testified she was raped and the report the complainant made to T[...] as caused by the fact that T[...] had been drinking that morning. However, It was never put to T[...] that he was mistaken regarding what complainant told him regarding how she was raped. Therefore, his evidence stands, and it is direct conflict to that of the complainant. The fact that the alleged incident had just happened and T[...] was keen to know what happened the difference is inexplicable. M[...] is related to complainant and there was no evidence that M[...] a 16-year-old was in a love relationship with the appellant who was 32 years old. The state decided not to charge M[...] with the appellant although the evidence of the complainant makes her a co-perpertrator. There was no explanation why the state planned to call M[...] as a state witness instead of charging her as a co-accused.

[15] The appellant and M[...] had the appellant's room at their disposal. This does not explain the claim that during the day outdoors M[...] would be playing with the appellant's penis until he got aroused. If T[...] came whilst the appellant was raping the complainant, he should have noticed the state of dress of both the complainant and the appellant. The complainant in her evidence did not say that she cried, cries that could have been heard by T[...].

[16] The complainants' mother did not testify that the report made to her differed from the report made to T[...]. She did not testify that the complainant was dressed in a manner that suggested that something had happened. She said when she arrived the appellant was not there which contradicted the evidence of the T[...] and the complainant. She did not say she asked the appellant and M[...] how could they do something so bad like that that to the complainant.

[17] The doctor was not asked to explain what is it that he described as bruise, what size was it, where was it in labias and how old was it. He was also not asked why the hymen was intact.

[18] The learned regional magistrate in my view misdirected herself in taking it as a common cause that the complainant was raped on 28 November 2008. This led to her failing to exercise proper caution to the approach to the evidence of the complainant. In particular, she overlooked the material discrepancies in the evidence of the complainant and the unsatisfactory features. The hearing of an appeal against findings of fact is guided by the principle that in the absence of 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) p426b. 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. The allowance given to evidence of young children, in my view, is that the child would not experience the incident like an adult and should not be expected to react to incidents like an adult.

[19] There was no other evidence that corroborated the evidence of the complainant. Despite the doctor on his examination observed what appeared to him to be bruises somewhere on the labias, the medical evidence viewed holistically was neutral on the issue of whether sexual intercourse took place. In my view, the discrepancies in the evidence were not, with respected, accorded due consideration by the regional magistrate which amounts to a failure to approach the evidence with the required caution.

[20] The defence has raised the issue that an interpreter that interpreted for the appellant during part of the cross-examination had not been sworn in as an interpreter and that his competence was not proved. The record of the proceedings show that a Mr Marungulu interpreted for the appellant from part of the cross-examination of the appellant. The state arranged for his services and sourced him from its database of foreign language interpreters. He interpreted for the appellant from that stage until his cross-examination was competed which was about 15 pages of typed evidence as well as when judgment was delivered. During the delivery of the judgment the regional magistrate realised when Mr. Marungulu commenced to interpret he was not sworn in as an interpreter. He then swore in as an interpreter and he continued to interpret. The record show that there was effective understanding between Mr Marungulu and the appellant. There is no substance in my view that competence of Mr Marungulu was in doubt.

[21] The appellant was sworn in when he gave his evidence. He was sworn in when he commenced giving evidence through the interpreter who spoke the language of his preference at that stage. The cross-examination was the continuation of giving of that evidence. Mr Marungulu was in the service of the state as a casual interpreter which establishes that his services as an interpreter in the particular language were frequently used. Whenever carrying out that service, he would be sworn to interpret honestly and correctly to the best of his ability. Ideally, the person interpreting is sworn in before he commenced to interpret. But the swearing in of Mr Marungulu by the regional magistrate cured the defect if any. It had the effect that in those proceedings he appreciated that he had to interpret truthfully and to the best of his ability and he had done so, and he would continue to do so.

[22] The material discrepancies in the evidence of the complainant weakened the reliability and credibility of the evidence of the complainant. It results in the evidence by the state falling short of proving the guilty of the appellant beyond reasonable doubt. The conviction of the appellant falls to be set aside.

[23] I make the following order:

1. The appeal against the conviction is upheld.

2. The conviction and sentence is set aside.

Mngadi J

I agree

Jikela J