IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A590/2010

DATE: 11 FEBRUARY 2011

In the matter between:

MARTIN DAVIDS Appellant

and

THE STATE Respondent

J U D G M E N T

STEYN, J:

On 31 March 2009 the legally represented appellant was charged with one count of rape in the Cape Town Regional Court. It was alleged that on 14 July 2000, in the area of Woodstock, Cape Town, he unlawfully and intentionally had sexual intercourse with a 12 year old female person, Floriesa Jacobs, without her consent. The appellant pleaded not guilty to the charge. He made no formal admissions in terms of section 220 of the Criminal Procedure Act. On 31 August 2009

the appellant was convicted on the charge and was sentenced to 15 years direct imprisonment. Leave to appeal was refused. On 23 August 2010 the appellant was given leave to appeal by petition in respect of conviction and sentence.

The state called only one witness, namely the complainant, Ms Jacobs. She was 12 years old when the incident occurred, but was 21 years old when she testified in court. Complainant is the step-sister of the girlfriend of the appellant, Miranda Jacobs ("Miranda"). From the testimony presented in the matter, it appeared in due course that complainant and Miranda were not on very good terms when the incident occurred. Complainant had known the appellant for quite a few years by July 2000. Complainant's family did not like the appellant, possibly because he started dating Miranda when he was married to somebody else.

According to complainant she was alone at home on an unknown date in July 2000 during school holidays. She was watching television in her mother's room when the accused entered. He kissed her on her cheek and started rubbing her vagina over her clothing. After he stopped, she got off the bed and urinated in a bucket, whereafter she got into another bed in the same room. Appellant lay on her, got in bed with her, removed her and his clothing below the waist and had

sexual intercourse with her against her will.

The details provided by complainant regarding exactly what allegedly happened, differed from time to time and also differed in material respects from the version presented by her in her statement to the police at 18:20 on 14 July 2000. There were some improbabilities in her version as well. These discrepancies and improbabilities viewed cumulatively, indicate the unreliability of the complainant's uncorroborated testimony.

I mention just a few aspects. Complainant testified that the incident happened during the school holiday. Later she testified that her one sister, Beulah was not at home and she had gone to school. She rectified this discrepancy when the contradiction was pointed out to her. Complainant testified that she opened the bedroom door when appellant knocked. Under cross-examination she stated that she told appellant to enter and in her statement to the police, she stated the appellant entered after knocking with no reference as to whether she opened or called out. After appellant kissed her, the details of which version were not consistent, complainant said initially that appellant played with her private parts on top of her jeans. This she changed to her pyjama pants. In her statement to the police she stated that he placed her fingers

inside her private parts.

Under cross-examination she said for the first time that she told the appellant to stop when he was rubbing her, after she first said she did not tell him to stop as she was frightened. The version of the complainant that she urinated in a bucket after the appellant fondled her private parts, whereafter she got back on to her bed prior to appellant's rape of her, was not described in her statement. There was no explanation why complainant did not leave the room after the fondling incident. The evidence in this regard was improbable in the circumstances.

The complainant testified that appellant had a knife which he held to her throat when he lay on top of her on top of the blankets. He said if she shouted, something was going to happen. This knife was never mentioned in her statement to the police and her version relating to how and why the knife was produced, was not satisfactory or convincing. No evidence was presented whether the knife was subsequently retrieved or not.

The complainant first said she "shouted *ma*" to her grandmother who lives in the adjacent house, but she amended this a few times to say she never shouted, but only said *ma*, because the grandmother could hear. Later she testified that

the grandmother was hard of hearing. In her statement she did not mention calling out at all. This evidence was also improbable.

Complainant's version in court relating to the actual rape, varied from her statement. Her version in her statement of trying to fight appellant off, was not given in her testimony in court. In fact she said at one stage she was frozen. In court her testimony relating to penetration was less extensive than her version in the statement. For example, she testified a few times that appellant could not penetrate her as she was moving around. Then later this was varied to say penetration did take place. There was no medical proof that penetration took place.

In her testimony in court, complainant said appellant got dressed and left after the incident, while in her statement he threatened that she should not tell anyone. Complainant's version of what she did after the alleged rape, also varied considerable from her statement. In her testimony she stated she went to her grandmother's house after the incident and while she was lying on her bed, her brother walked past. He was the first person she spoke to subsequent to the incident. She did not know where her grandmother was, who did not know that complainant was in the house or that she left with her brother. In her statement, however, she stated that she

immediately told her grandmother and the brother is not even mentioned. When the contents of the statement were read to her during cross-examination, she changed her version and said she told her grandmother, who initially thought her father was the culprit.

Complainant's evidence regarding her clothing when she left to go and look for her mother with her brother, was unconvincing. It was only during cross-examination when she told the version of her jeans and her top that were coincidentally in her grandmother's room.

Initially her version was that she got dressed after the incident, locked the home and when to her grandmother's house where her brother told her to put on only her shoes. According to the complainant the incident happened in the morning and she was still in her pyjamas. After she reported the incident to her brother, they went to fetch her mother and rushed to the police station where her statement was taken. Late afternoon the detectives took her to Red Cross Hospital. It is not clear how it transpired that her statement was only taken at 18:20 on that day.

The medical report of the district surgeon, the J88 was handed in to court by agreement between the parties. On this

document it appears that on 14 July 2000 at 20:10, a doctor, A James, examined the complainant at the Red Cross Children's Hospital in Rondebosch. The document records that the complainant's clothing was clean, except for a yellowish stain at the crotch of her panties. She was in good health and no injuries were detected. The hymen was intact. It was recorded that there was semen in the vestibule of her vulva and there was a yellowish discharge of the labia minora. It was noted that the gynaecological examination had been easy.

There was no indication in the report that the complainant's condition was consistent with the charge of rape since there were no injuries, the lack of which, considering the age difference of the complainant and the appellant, in the circumstances, is improbable. There was no indication in the report or in the evidence of the complainant that she had been traumatised by the incident, which is unlikely. According to the J88 document there was a swab taken of the alleged semen that was found. No further evidence was presented in this regard. No medical practitioner testified. The testimony is wholly unsatisfactory. There is no indication how the practitioner knew that the substance he found was semen, and if it was, there is no evidence whose it was. It has to be noted that appellant denied any sexual conduct with the complainant. I find it hard to imagine why the defence allowed the J88 to be

handed in, but the court cannot allow this error of judgment to prejudice the appellant.

Neither the complainant's mother or brother were called to testify. I refer to S v Texeira 1980 (3) SA 755 (A), where the court found that the failure of the state to call a witness to confirm the evidence of a single witness, justified the inference that in the state counsel's opinion, his evidence might possibly give rise to contradictions which could have reflected adversely on the credibility and reliability of the single witness. In circumstances where the complainant's brother was the first person complainant allegedly told about the rape, the evidence of the brother would have been of cardinal importance, especially since the identity of the first person to whom the report had been made varied.

The explanation for why this matter was not pursued from July 2000 until middle August 2008 was not comprehensively explained. According to the complainant, the police were aware of the address of the appellant and of his daily movements. Complainant admitted that she saw the appellant from time to time. Miranda had a second baby by the appellant after the incident, of whom complainant was the godmother. They stayed in the home and were visited by the appellant. However, according to her, there was never enough time for

her to alert the police. She said Miranda continued her relationship with the appellant against her and her mother's will. It is inexplicable that it took nearly eight years before the police could be alerted about the presence of the accused at the home of the complainant and that this happened after there had been an argument between Miranda and the appellant, whereafter the appellant was arrested.

The appellant was not an exemplary witness. He testified that he had know the sister of the complainant for about 13 years at the date when the matter was heard in June 2009. Despite the fact that complainant's family disliked him, he stayed with Miranda at one of the two properties of the Jacobs family in Walmer Estate from time to time until his eventual arrest in 2008. From the appellant's testimony it can be gathered that he regards the complainant as the main culprit who did not like him to stay at the house, who caused trouble for him and who wanted to have him evicted. The appellant denied categorically that he ever interfered with or raped the complainant.

He was staying at the house of the complainant on the particular day, being 14 July 2000. He saw the complainant inside the house in the corridor, but hardly spoke to her. When he returned to the home on the evening of 14 July 2000, he was told by Miranda that her mother had informed her that he

had sexually assaulted the complainant. He denied it and he was only arrested eight years later. According to him he continued to stay in the home with his girlfriend and their two children and the complainant and her family.

Miranda Jacobs, the sister of the complainant, gave evidence on behalf of the appellant. Her evidence did not always conform with the evidence of the appellant, but one has to be mindful of the fact that she testified about something that happened nine years earlier. She recalls that she was informed on 14 July 2000 by her mother that the appellant had sexually assaulted her sister. According to her, the appellant was chased away by the complainant's father when he came back to the home, either the night of the incident or the next night. She also testified that most of the time he was living there with him and this includes the period after the incident before his arrest years later. She was surprised to hear that the police were looking for the appellant, because everybody in the house knew he was living there. She also admitted that her mother became upset when she, Miranda, had an argument with the appellant and the next day the appellant was arrested.

In her judgment, the presiding magistrate was impressed with the evidence of the complainant. She paid scant attention to the improbabilities and inconsistencies of her evidence in circumstances where she was a single witness on a serious

charge that had been committed eight years earlier when she had been a child. She failed to mention the fact that neither the complainant's brother or mother was called to testify or that the reason for such omission was not mentioned or explained. She made a serious misdirection when she found that it was common cause that the complainant had been threatened and raped on the morning in question. Appellant made no such concession.

She found that the complainant had reported the rape to her brother first, while not giving due attention to the directly conflicting testimony contained in her statement to the police on the day of the incident. She failed to question the relevance of the contents of the district surgeon's report in circumstances where no supporting evidence was presented to court. The magistrate was not justified in finding that the complainant's testimony was supported by the medical report. She mistakenly found that the medical examination took place shortly after the incident, without taking into account that it actually took place many hours after the alleged assault. In essence, the magistrate was misdirected in finding that the testimony of the complainant, considering the fact that she was a single witness whose evidence should be viewed with caution, was satisfactory in all material respects and proved the guilt of the appellant beyond a reasonable doubt.

She found that the evidence of the appellant was pathetic, which can be described as an exaggeration and did not consider fully the legal principles of the onus on the state to prove the guilt of an accused beyond reasonable doubt, regardless of what his version may be. The lack of acceptable corroboration for the version of the complainant was not given due consideration.

It is trite law that the state has to prove the guilt of an accused beyond a reasonable doubt. Linked to this is the equally well known principle that if the version of the accused is reasonably possibly true, he is entitled to be acquitted. The *locus classicus* in this regard is still R v Difford 1937 AD 370, where Watermeyer, AAF said the following on page 337:

> "It is equally clear that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict, unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal. The court need

not believe the version of the accused as long as there is a reasonable probability that his version is true. I refer to R v M 1946 AD 1023 on 1027. The fact that his version is improbable, does not mean it should be rejected."

See S v Shackell 2001 (2) SACR 185 (SCA) on 194g-i. In a case such as the present where the state's case rests mainly on the direct evidence of a single witness, the cumulative effect of the evidence needs to be weighed carefully. It has been said that the trial court should weigh the evidence of a single witness and should consider its merits and demerits an and having done so, should decide whether it is satisfy that the truth has been told despite shortcomings or contradictions. The nature and circumstances of the offence should also be considered carefully.

The appellant's version in this matter was not completely satisfactory. However, the testimony and facts of the case call for a cautionary approach to the evidence of the complainant. I believe it is reasonably possibly true that the appellant did not molest the complainant as alleged by her and denied by him. I accordingly find that the state has not proved the guilt of the appellant beyond a reasonable doubt. **ACCORDINGLY I WOULD UPHOLD THE APPEAL AND SET ASIDE THE**

CONVICTION AND SENTENCE in this matter.

STEYN, J

HLOPHE, JP: I fully agree. In the result the following order is made. The appeal is upheld and the judgment of the court *a quo* is set aside.

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HLOPHE, JP