

SOUTH AFRICA / JUDGMENT

Chetty v S (AR221/2022) [2024] ZAKZPHC 96 (10 January 2024)

[2024] ZAKZPHC 96

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

S Singh, Hadebe

CASE / FILE NUMBER

AR221/2022

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IN

THE HIGH COURT

OF SOUTH

AFRICA

KWA-ZULU

NATAL DIVISION,

PIETERMARITZBURG

Case no.:AR221/2022

In the matter between:

SIVAJI
GONASEN CHETTY
APPELLANT
and
THE
STATE
RESPONDENT

Delivered:

This judgment was handed down electronically by
circulation to the parties' legal representatives by
email. The date and time for hand-down
is deemed to be 12h30
on 10 January 2024
ORDER
The appeal against the
conviction in respect of both counts is dismissed.

JUDGMENT

Delivered on: 10 January 2024

S. Singh AJ et Hadebe J (concurring)

Introduction

- [1] The appellant was convicted of one count of rape of a minor child in contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("the Act") and one count of sexual assault of a minor child in contravention of s 5(1) of the Act. This appeal is against the conviction only. He was legally represented, pleaded not guilty to both counts, testified and led witnesses in his defence.
- [2] The appellant was sentenced to 15 years' imprisonment on count 1 of which seven years was suspended for five years on condition that he does not contravene s 3 of the Act by committing the same offence during the period of suspension. He was sentenced to six years' imprisonment on count 2 which was ordered to run concurrently with the sentence in count 1.

Grounds of appeal

- [3] The appellant raised two points in /imine.
- (a) The first issue for determination on appeal is the procedural irregularities allegedly committed by the court a quo which, according to the appellant, rendered the complainant's evidence inadmissible. The argument in this regard is that the court a quo made a finding that the young complainant understood the meaning of the oath and the affirmation without the court having mentioned the word oath in determining whether the witness understood the nature and import of the oath.
- (b) The second issue is that the court a quo did not treat the complainant's evidence with caution.
- [4] It is not in dispute that the complainant was a victim of rape and sexual assault. The identity of her perpetrator, whom she said in her evidence in the court a quo was the appellant, her great grandfather, is disputed by the appellant. However, the appellant confirmed during cross-examination that the complainant knows who raped her.
- [5] The further grounds of appeal are that:-
- (a) The State relied on the evidence of a single witness, the five-year-old child, and the court a quo was obliged to treat her evidence with caution which the court a quo allegedly failed to do sufficiently. Regardless of her age, the State had to prove commission of the offences against the complainant beyond reasonable doubt. It is further alleged that the court a quo applied a lesser test in the case against the appellant because the complainant was a young

child, and intervened in the cross-examination of the complainant by reminding the appellant's counsel that she is a young child and that he needs to curtail his cross-examination, and to get to his defence instead of asking questions not understood by her.

- (b) The appellant avers that the child witness was not a reliable and credible witness, that the court a quo erred in rejecting his version and accepting the evidence of the State and in the circumstances, he did not have a fair trial. The appellant avers, further, that the complainant testified in her evidence-in-chief of only being raped and sexually assaulted on the sofas in the house, which is what she also pointed out to the police. However, when confronted during cross-examination on her police statement, she said it happened in the wendy house as well.

- [6] The points in limine raised by the appellant are neither plausible nor legally correct. In terms of s 164(1) of the Criminal Procedure Act 51 of 1977 ("the CPA") unsworn or unaffirmed evidence is admissible in respect of a child witness who may not understand the nature and import of the oath or affirmation, and such a witness may be permitted to testify in criminal proceedings provided that in lieu of the oath or affirmation, such a witness must be admonished by the presiding judicial officer to speak the truth. This was done by the court a quo. The court a quo did not mention the word 'oath' and did not interfere with the defence or their evidence. The complainant was also questioned in great detail, which included whether she understood the difference between the truth and lies to which the complainant responded that she understood same. The court a quo was satisfied with her competency. The complainant, in the view of this appeal court, was correctly found by the court a quo to be compliant with the competency test and was a competent witness.

- [7] The cautionary rule relating to the evidence of children has been dealt with in a number of cases emanating from the superior courts of South Africa including *S v Jackson* 1998 (1) SACR 470 (SCA) and in *S v M* 1999 (2) SACR 548 (SCA) at 554-555. However, the recent case of *Maila S* [2023] ZASCA 3 is most relevant in that it sets out the legal approach recently endorsed by the Supreme Court of Appeal as stated hereunder:

'[17] ... To ensure that the evidence of a child witness can be relied upon as provided ins 208 of the CPA,[1] this court stated in *Woji v Santam Insurance Co Ltd*,[2] that a court must be satisfied that their evidence is trustworthy.'

- [18] This court has, since *Woji*, cautioned against what is now commonly known as the double cautionary rule.[3] It has stated that the double cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single child witness's evidence, tested through (in most cases, rigorous) cross-examination, should be "trustworthy". This is dependent on whether the child witness could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers. Furthermore, the child witness's evidence must not have changed dramatically, the essence of their allegations should still stand. Once this is

the case, a court is bound to accept the evidence as satisfactory in all respects; having considered it against that of an accused person. "Satisfactory in all respects" should not mean the evidence line-by-line. But, in the overall scheme of things, accepting the discrepancies that may have crept in, the evidence can be relied upon to decide upon the guilt of an accused person. What this Court in *S v Hadebe*[4] calls the necessity to step back a pace (after a detailed and critical examination of each and every component in the body of evidence), lest one may fail to see the wood for the trees.[5] This position has been crystallised by the Legislature in s 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which provides that:

"Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on the account of the nature of the offence." (footnotes included.)

The State's case

- [8] The complainant, who was the first State witness, was six-years-old at the time when she testified in camera in terms of s 170 of the CPA. She testified in great detail that she had been raped and sexually assaulted by the appellant on many occasions. She also demonstrated same by using the dolls in the court a quo. She testified that she reported same to the social worker and to her grandmother. According to the complainant's paternal grandmother, she became aware that there were problems after the complainant had been removed from the house of her maternal grandmother and of the appellant to stay with her. The complainant would scream in her sleep. As a result, her grandmother took her to the doctor.
- [9] The court a quo did allow the defence to continue questioning the complainant, which is evident from the trial transcript. The further questioning of the complainant included the denial by the appellant that he used his finger and his private part (buli) in her private part, the complainant's response was that his denial was not true.
- [10] In her response to the further cross-examination by the defence counsel, the complainant revealed that she had been admonished by the appellant not to share what had happened to her with anyone else. Inevitably this had led to the delayed reporting. The complainant's version was well presented and any discrepancies raised therein were cured when other witnesses testified, including the appellant's evidence which corroborated her evidence materially as mentioned in this judgment.
- [11] The next witness was the paternal grandmother. She testified that the complainant looked neglected and sick when the complainant was brought to her house by the social worker, Ms Mthembu in June or July 2018 from the appellant's house. The complainant was also scared, in a state of shock and she was teary. The social worker informed her that the version given to her (the paternal grandmother), was the same as what the complainant had told her in private in the absence of the paternal grandmother. The complainant was taken for a medical examination by the doctor at the R.K. Khan Hospital. The doctor informed the paternal grandmother that the complainant had been tampered with sexually. The

grandmother opened a case against the appellant and he was later arrested. As part of the investigation the complainant showed the police the sofas where the molestation had taken place. This was in the presence of the paternal grandmother.

- [12] Under cross-examination the paternal grandmother confirmed that she asked the complainant why she screamed at night in her sleep. The complainant explained what the appellant did to her. There was no mention about the wendy house but she said all these things happened on the sofas. The paternal grandmother said that sometimes the appellant would be at his house with no one else, as she would come to deliver food items for the complainant's maintenance. This would be sometimes at midday or in the morning. She confirmed also that the complainant said that the appellant penetrated her with his penis many times.
- [13] When this witness went to the appellant's house with the police and the complainant, the paternal grandmother confirmed having seen other family members but she insisted that the appellant's wife would not be there whenever she came to deliver the food. She further confirmed her evidence of medical issues in respect of the complainant and the treatments given to her at home and by doctors for same. All of these medical issues had developed whilst the complainant resided at the appellant's house, according to information received from the complainant. She said she had a problem with recollection of the dates when the complainant had come to her house and given her the information of what the appellant did to her. She also could not recall the dates on which she had taken the complainant for medical treatment. She attributed this to her age. The relevant clinic medical card was handed in as an Exhibit at the trial.
- [14] The medical doctor, Dr S Govender, who examined the complainant testified next for the State. She explained her examination and her conclusions. She confirmed erosion of the complainant's hymen, minimal tissue not with normal thickness for a five-year-old child. Her opinion was that, the examination of the complainant, other than that, was basically a normal examination. Those were the only injuries she noted and her conclusion was that it was consistent with vaginal' penetration. The J88 medico-legal report was also handed in as an exhibit at the trial. Under cross- examination, the doctor confirmed that the complainant's injuries were old injuries.
- [15] The social worker, Ms Mthembu, testified next for the State. She worked with children in need of care and protection, and those who were sexually abused. She testified that she had received reports of abuse and neglect of the complainant from the school and the paternal grandmother of the complainant. She took steps to remedy the issues with the complainant by meeting her parents and speaking to her paternal grandmother. As a result of her intervention, the complainant was removed from the home of the appellant and his wife. She was officially placed with her father's family on 6 June 2018 since the social worker was of the view that she was not well cared for at her mother's family.

- [16] The social worker received reports from the paternal grandmother about the complainant's screaming in her sleep. The paternal grandmother told the social worker that the complainant had told her that she was traumatised from the incidents at the appellant's house. The various incidents of rape and sexual assault were reported later to the said social worker. The information received was that the complainant had not told anyone of the incidents at the time they happened as she was scared because the appellant had told her not to tell anyone. Thereafter, the social worker referred her for medical examination which confirmed that the complainant had a history of sexual abuse. Her school teacher also reported signs of neglect on the complainant.
- [17] Under cross-examination, the social worker confirmed the complainant's report of the of the sexual abuse by the appellant which took place in the wendy house, and that it was not the first time that it happened there. According to Ms Mthembu, the complainant had memory issues so she never reported what happened on the other days nor did she specify the wendy house as the place where the sexual abuse took place. No medical proof was produced at the trial to sustain the complainant's allegations of sexual abuse on the other children. There is, however, other evidence led at the trial, of the appellant hugging, grabbing and kissing his grandchildren. The exact

examination of the children was not revealed in court. The complainant was very scared, very withdrawn and not speaking. As per

Ms Mthembu, the complainant's removal from the house of the appellant enabled her to report the incident albeit late. That was the State's case.

The appellant's case

- [18] The appellant testified as the first defence witness. His version was that the complainant was his great granddaughter who he brought up from the time she was a baby until she was removed from his house. He testified that he is employed at Nev's Pest control since 2015, which was the position even when the allegations against him surfaced. He gave contradictory versions of whether the children went to school or not. First, he said none of the children did go to school, then he later changed this version to indicate that one child did go to school. He explained his work routine. He denied the allegations by the complainant against him. He said that the wendy house was not separate but was part of his house. He then stated that there are lots of sofas in the house. He also confirmed that 'grandchildren' includes his reference to the complainant.
- [19] Under cross-examination, the appellant contradicted his evidence-in-chief in material respects and materially corroborated in part the evidence of the complainant. He did not have any company records nor did he sign a register for his various work activities as alleged by him. His evidence that his place of work is in Newlands was contradicted by his defence witnesses as being in other areas. He used the company vehicle, the bus as well as the taxi to commute between his house and his place of employment. His evidence was that, even when sick he would go to the hospital but return to work thereafter. He stated further that

even though the complainant's grandmother would see him on certain days at his home, this would only be after 18h30. He contradicted this later by saying that he came home straight from the hospital. He again changed that version by saying he would go to work from the hospital.

- [20] The appellant blamed the paternal grandmother for allegedly having forcefully taken the complainant to her house against the complainant's wishes. This version was never put to the complainant or to her paternal grandmother. He maintained that the complainant lied and was schooled to implicate him. He contradicted his version of not giving the social worker information of his work by later saying he cannot remember. He admitted that he plays with the children all the time and had, on occasion, been seen by the social worker doing that. After admitting he was seen on two occasions by the social worker, he contradicted that by saying it was only once. His denial that he was never alone with the children was contradicted by him when he said that if he happened to be alone at home, the children would be with him. He said there were sofas also in the wendy house. He insisted that the paternal grandmother, the social worker, and the medical doctor were also liars who gave false evidence in court. Of importance is his evidence that the complainant "knows who did it to her". This version contradicts his evidence that the complainant is lying, and corroborates her evidence in so far as the identity of the perpetrator is concerned.
- [21] Raksha Ramsunder, the appellant's daughter, testified next as his defence witness. She gave materially contradictory evidence, including that she was certain of the days he would be at home. She then said he worked every day and maybe took Sundays off. She later said he worked seven days a week which contradicts the appellant's version. Another contradictory version was that one day in 2018 the appellant came home after going to the hospital. Raksha later changed this version by saying the appellant on that day went to work directly from the hospital. She also said that she did not know the name of the company that the appellant worked for. She insisted that she was the only one who fetched the children and took them to school. She later changed to say that her mother also took the children to school and fetched them when she was not available. In contradiction to her version that the complainant's maternal grandmother was never absent from home, she then testified that the maternal grandmother would be absent when she would have gone to hospital in the morning and would return when the children had arrived from school. She further contradicted the appellant's version of never speaking to the social worker. She introduced new evidence that the appellant and the social worker had actually talked to each other. On the issue of the appellant not watching television with the complainant, she testified that the appellant indeed watched television with the complainant and that the complainant would always wait for the appellant before going to sleep.
- [22] Under cross-examination the appellant's daughter also contradicted his evidence in the following material respects: She contradicted earlier versions of his movements between work, hospital and home. She kept silent when confronted by the State on this. She also remained silent when confronted by the State on contradictory versions of being absent

from home only when going to the clinic in 2018. She later changed her earlier version by saying she took her eldest daughter, not the baby to the clinic. She gave further contradictory evidence on the bathing of the complainant, the appellant's playing with the children in the presence of the social

worker Ms Mthembu by saying that the social worker lied. But, she did not say that the appellant, who agreed with the social worker's evidence, was also a liar. She said further, in contradiction to her evidence-in-chief, that the appellant was not at the house sometimes when groceries were brought by the child's paternal grandmother, which is a further contradiction to her several previous contradictions on this issue.

[23] Krishna Veni Chetty-Varandan, a co-employee of the appellant testified as the last defence witness. In contradiction to the appellant, she said he worked in Westville. She had no recollection of his work activities in 2018 because the company has no records. She further said she took him to hospital once or twice and she had never seen him thereafter on that day. She contradicted the appellant's version in regards to the days she had taken him to hospital. She remained silent when questioned about appellant's different versions thereof but later said that the appellant is not being truthful. She further said that they work on Saturdays and no work is done on Sundays, nor do they have days off. She disputed Raksha's version about the appellants movements between hospital, home and work.

The legal position

[24] A court of appeal does not interfere with the factual findings of the trial court unless such findings are misdirected, and clearly

incorrect. It is trite that the guilt of the appellant must be proved beyond a reasonable doubt for a conviction by the trial court. In *S v Francis* 1991 (1) SACR 198 (A) at 198J

- 199A, the Supreme Court of Appeal held:

'The powers of a court of appeal to interfere with the findings of a trial court are limited. In the absence of any misdirection the trial courts conclusion, including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the Court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony.'

- [25] Having considered the evidence, this court finds no misdirection on the court a quo's findings that the State had proved the allegations against the appellant beyond reasonable doubt. Though being a single witness in so far as the rape and sexual abuse is concerned, the complainant came across as a credible witness. The court a quo had no reason to reject her evidence. She withstood extensive cross-examination and she was not broken under same.
- [26] To a certain extent the evidence of the other State witnesses, to wit the social worker Ms Mthembu, the complainant's paternal grandmother and especially the medical doctor's evidence all go to corroborate the complaint's version of the incidents. The appellant's version that the complainant was schooled to testify against him and that she and her witnesses lied in their evidence against him has no basis as it was not supported by any factual evidence.
- [27] The appellant came across as an evasive witness whose defence at the end of the day amounted to a bare denial. His own witnesses contradicted him on material aspects of his work arrangements. At the end of the day what was clear was that all he did was try and disassociate himself from ever having been alone in the house with the complainant.

Order

[28] Consequently, I make the following order:

S SINGHAJ

I agree

HADEBE J

Appearances:

For the Appellant: Adv L. Barnard

Instructed by: R.K. Nathalal & Company (Verulam)

For the Respondent: Adv C Nel

Instructed by: Director of Public Prosecutions, Pietermaritzburg

Date of Hearing: 13 October 2023

Date of Judgment: 10 January 2024

- [1] Section 208 provides: 'An accused may be convicted of an offence on the single evidence of any competent witness'.
- [2] 'Woji v Santam Insurance Co Ltd. 1981
- (1) SA 1020 (A) at 102 8- D. Note the caution courts are advised to take note of when they consider the reliability of a child witness in rape cases.

[3] See *Vi/akazi v S* [2016] ZASCA 103; 2016 (2) SACR 365 (SCA) and cases cited therein.

[4] *S v Hadebe and Others* 1998

(1) SACR 422 (SCA).

[5] *Ibid* at 426F-H.

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