

SOUTH AFRICA / JUDGMENT

Haupt v S (A651/2016) [2017] ZAGPPHC 454; 2018 (1) SACR 12 (GP) (31 July 2017)

[2017] ZAGPPHC 454

COURT

North Gauteng High Court, Pretoria

BEFORE

Baqwa, M. A. Hawyes

CASE / FILE NUMBER

A651/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: A651/2016

DATE: 2017-07-31

Reportable: YES
Of
interest to other judges: YES
Revised.
In

the matter between: CHARL
KAREL
HAUPT Applicant
and
THE
STATE Respondent

JUDGMENT

Baqwa J

- [1] The appellant was convicted by the Regional Magistrate, Klerksdorp on two counts of attempted rape and sexual assault and sentenced to twelve years in respect of the charge of attempted rape and six years imprisonment regarding the charge of sexual assault. The sentences were ordered to run concurrently in terms of section 280 (2) of the Criminal Procedure Act 51 of 1977. The appellant was also declared unfit to possess a firearm and his name was entered into the register of sex offenders.
- [2] The appellant applied for leave to appeal against the convictions and sentences and the application for leave was refused. He was subsequently granted leave to appeal against conviction and sentence when he petitioned the High Court on 8 August 2016.
- [3] The main witness from the State was Y S regarding the two charges against the appellant. Medical evidence was given by Dr Rawat who conducted a gynaecological examination on her and recorded his findings on the J88 medical form.
- [4] The appellant and his father testified for the defence and the appellant's version was a bare denial of the allegations against him.
- [5] To contextualise the evidence tendered by the State it is necessary to re-state the charges against the appellant.

"Count 1

The accused is guilty of the crime of rape in that on or during the 2008 -2009 and at or near Stilfontein Regional Division of North West, the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, Y S by inserting his finger into her vagina without the consent of the said complainant.

Count2

That the accused is guilty of the crime of sexual assault in that on or about the 2008 - 2009 and at or near Stilfontein in the Regional Division of North West, the said accused did unlawfully and intentionally sexually violate the complainant, to wit, Y S by sucking her breast and her private part, without the consent of the said complainant."

The Evidence

- [6] The complainant was born on 8 August 1996 and she was about twelve years old at the time of the alleged incident. She was fifteen years old when the case was heard by the trial court. According to the complainant's testimony she knew the appellant as her mother's

boyfriend. The appellant resided with the complainant, her younger siblings and her mother in the same house.

[7] The complainant further testified that on certain occasions the family of five would lie on the bed and watch DVD movies on

television in their mother's bedroom. On those occasions she would lie next to the appellant whilst her siblings would lie next to the mother. The appellant would then touch her with his finger between her thighs on her vagina whilst she had her panty on.

[8] The alleged touching incidents all occurred inside her mother's bedroom except one occasion which allegedly took place while they were inside her sister's bedroom. The complainant stated that on that occasion, the appellant called her to the bedroom whilst she was in the sitting room. She initially refused to go and join the appellant but when called the third time she went in and the appellant again touched her on her private part.

[9] The complainant also testified that whilst they were in the mother's bedroom, the appellant, on another occasion, touched her under her t-shirt on her breasts.

[10] The complainant stated that she did not tell anyone about what the appellant was doing to her as she was afraid that the appellant would leave her family and as the apparent breadwinner they would be left destitute.

[11] The State also led the evidence of Dr Iqbal Rawat who testified that the complainant's external genitalia were red, swollen and tender but the hymen was intact.

[12] The appellant testified in his defence and denied the allegations against him. He stated that he had had a quarrel with the

complainant's mother about finances and that it was subsequent to the said quarrel that charges were falsely laid against him.

[13] The appellant submits that the trial court erred in returning a guilty verdict in that the State had failed to prove its case beyond a reasonable doubt. This submission is based on the fact that the complainant was not only a single witness but also a minor child whose evidence ought to be treated with extra caution. The appellant also submits that the complainant's evidence was neither clear nor reliable on material respects due to contradictions therein.

[14] It is quite evident that the onus that the State had to discharge was in regard to whether the alleged incidents did take place and who the perpetrator was.

[15] The respondent submits that the evidence of Dr Rawat does corroborate the complainant regarding the allegations that she was touched on her private parts. The respondent further submits that the complainant identified the appellant as the perpetrator and that that constituted proof beyond a reasonable doubt.

[16] It is trite that a proper approach to evidence is in the ultimate analysis to look at the evidence holistically in order to determine

whether the guilt of the accused has been proved beyond a reasonable doubt. In *S v Shilakwe* 2012 SACR 16 SCA (SCA) at 20 para [11] the following was stated:

"But in doing so, (breaking the evidence in its component parts) one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in the trial may arise when that aspect is viewed in isolation. Those doubts maybe set at rest when it is evaluated again together with all other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical

examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done one may fail to see the wood from the trees."

See *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426 F - H and *S v Mbuli* 2003 (1) SACR 97 (SCA) at 110, para (57).

[17] In light of the quoted dictum it therefore becomes necessary to examine the mosaic presented in the present case:

17.1 The complainant was about twelve years old at the time of the incidents referred to in her testimony which she gave in 2010 when she was about fifteen years old.

17.2 This scenario called upon a child to recollect and testify regarding incidents which had allegedly taken place about three years earlier.

17.3 This resulted in her inability to respond to some questions under cross examination or replies to the effect that she would prefer not to respond to a particular question. For example, she was asked why she continued to lie next to the appellant if the latter was behaving in an inappropriate manner towards her over a period of time. She could not respond adequately to this question which was in my view very pertinent to establishing the guilt or innocence of the appellant. The Court a quo did not seem to attach any weight to these inadequate responses by the complainant .In my view this was a misdirection on the part of the trial court.

[18] It is common cause that the complainant was a minor child testifying in a case of a sexual nature in which she was a single witness. The State relied on her evidence and it was accordingly imperative for her to respond to answer all questions put to her. In light of the inadequate responses to which I have already referred to it cannot be said that her evidence was clear and reliable in all material respects. The trial court did not therefore apply the cautionary rules adequately in evaluating her evidence thereby constituting another misdirection.

[19] In *Woji v Santam Insurance Co. Ltd* 1981 (1) SA 1021 (A) the evidence of a minor witness was commented upon as follows:

"Trustworthiness of a child depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. His capacity of observation will depend on whether he appears intelligent enough to observe. Whether he had the capacity of recollection will depend again on whether he has sufficient years of discretion to remember what occurs while the capacity of narration and communication raises the question whether the child has the capacity to understand the questions put, and to frame and express intelligent answers."

[20] In casu, whilst the complainant was quite clearly an intelligent child, her powers of recollection, narration and capacity to frame and express appropriate answers was found wanting in some instances. This manifested in periods of silence or sheer inability to respond to some questions referred to above. When asked what the appellant did after putting a hand in her pants she said she does not want to answer the question. Given the charges that were referred to in full (supra) the relevant testimony was inadequate to say the least and instead creates more questions than answers regarding the case presented by the State. The evidence is at variance with the charges put in material respects. For example putting a hand into breasts is totally not reconcilable with "sucking breasts and private parts of the complainant".

[21] One of those questions is how it can be said that the appellant attempted to rape the complainant at the time she was allegedly

touched on her private parts with her clothes on without an explanation as to what the appellant did with his finger.

[22] The State conceded during its address concerning the section 174 application that there were contradictions in the complainant's evidence when it stated as follows:

"Your Worship the State has to concede that there are certain contradictions in the complainant's evidence and I know at the end of her cross-examination by the defence there were several times when she elected not to answer the questions that was posed to her."

Yet the trial court found that the State had proved its case beyond a reasonable doubt.

[23] Another startling aspect is the one that was conceded by the complainant herself. She admitted that even though the appellant allegedly

committed several indecent acts over time she told nobody about it. Coupled with this omission she did not tell her mother even though it was clear that the relationship between her mother and the appellant was disintegrating. She was asked by her mother if she would be happy if she (the mother) told the appellant that it was over between them. The complainant said that she kept quiet and only responded after her mother asked her if the appellant had touched her. She then answered in the affirmative.

[24] Until she was prompted by her mother, the complainant did not voluntarily inform her mother that the appellant had touched her. It had to be suggested by her mother that the appellant had touched her. In *S v S* 1995 (1) SACR 0 (25) the question of suggestibility was dealt with as follows:

"Among the most important is a child's propensity to give an answer other than the one he knows to be correct because it suits him to do so. There are numerous reasons for doing so: the child, for example may want to be finished with the examination. Or he may wish to please the questioner, or he may agree with the suggested answer because he assumes that the questioner being the adult, is correct."

[25] No basis was laid as to how the complainant's mother conjured up the magic question regarding the appellant touching the complainant. Yet out of that question the present case evolved. If it had not been asked the present charges would never have been laid. In *S v Chabalala* 2003 SACR 134 SCA 140 a - b the approach to a criminal trial is summarised as follows:

"When dealing with a criminal trial, the correct approach is to weigh up all the elements which point towards the guilt of the accused against all those that are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any doubt to the accused's guilt."

[26] In casu, having weighed the strengths, weaknesses, probabilities and improbabilities, I am not persuaded that the State proved its case beyond a reasonable doubt.

[27] In the result, I propose that the following order be made:

ORDER

- 1) The appeal succeeds.
- 2) Both conviction and sentence handed down by the Regional Court, Klerksdorp on 28 March 2014 is set aside.

It is so ordered.

S.A.M Baqwa

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

I agree.

M. A. Hawyes

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Heard on: 31 July 2017

Delivered on: 31 July 2017

For the Applicant: Mr M. B. Kgagara

(Attorney with right of appearance)

Instructed by: Legal Aid

For the First Respondent: Advocate C. Mnisi

Instructed by: The Director of Public Prosecutions, Pretoria

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