

SOUTH AFRICA / JUDGMENT

Mavimbela v S (AR696/17P) [2020] ZAKZPHC 42 (21 August 2020)

[2020] ZAKZPHC 42

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mngadi, Bezuidenhout

CASE / FILE NUMBER

AR696/17P

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

AR

No: 696/17P

In

the matter between:

HALALISANI
MUZIWENHLANHLA MAVIMBELA
APPELLANT
and
THE
STATE
RESPONDENT
ORDER
On appeal from: Vryheid

Regional Court (sitting as
court of first instance):

1. The
appeal against conviction is upheld, and the conviction and sentence
of the appellant is set aside.
2. The

order of the trial court is
replaced with:

'Not
guilty and discharged'.

JUDGMENT

Delivered on: 21 Aug 2020

MNGADI J:

- [1] The appellant, with leave of the trial court, appeals against his conviction. He was charged before the regional court with and convicted of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) , and sentenced to eighteen (18) years' imprisonment.
- [2] The appellant, who was legally represented, pleaded not guilty to the charge. The regional court after hearing the matter convicted the appellant as charged. The charge of rape alleged that the appellant was guilty of contravening the- provisions of section 3 read with sections 1, 56(1), 57, 58, 59 and 61 of the Act, further read with the provisions of section 51 and/or 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the CLAA) , in that upon or about 7 May 2014, and at or near Mondlo in the regional division of KwaZulu-Natal, the accused did unlawfully and intentionally commit an act of sexual penetration with complainant Z.M. by placing his genital organ in the genital organ of the said complainant without the consent of the said complainant. Section 51 and Part I of Schedule 2 of the CLAA was applicable, in that at the time of the commission of the offence, the complainant was younger than 16 years old, to wit, 13 years of age.
- [3] The main witness for the State was the complainant. She testified in camera;' through a video link and through an intermediary. After an enquiry, she was found by the regional magistrate to be unable to appreciate the nature and import of an oath, and was admonished to speak the truth. She thereafter testified as follows. She was fifteen years' old and in grade 8. She was staying at home with her father, mother, grandmother and her siblings since the date of the incident.
- [4] The complainant testified that she knew the appellant. He was the son of her father but had a different mother. In 2014 the appellant was staying at their home as he was· visiting. In 2014 she was using her mother's house to sleep in. It was a two-roomed house, and four of them shared the house. The appellant used a separate rondavel.
- [5] She testified that on 7 May 2014 she went to bed at about 8 pm. All four of them went to sleep in her mother's house. That night, the appellant knocked on the door, and the complainant opened for him. He asked her why she went to sleep without having washed the dishes. She told him that she would wash the dishes in the morning. The appellant left and she locked the door. She then decided to wash the dishes, and went to the kitchen. After washing the dishes, she waited for the appellant to open the door for her. She had found the appellant in the kitchen, and he left her washing the dishes. He had locked the door and told her that he will come and open the door when she had finished washing the dishes.

[6] She testified that after a short period, the appellant had returned. He opened the door for her, and told her that he was happy because she had washed the dishes, but that she was not going to leave. She was wearing a towel which was wrapped around her waist over a short pair of pants. The towel fell off, and the appellant grabbed her and pushed her into a corner. She tried to scream. He put a dirty sock, which he took from the washing, into her mouth. He pushed her when she tried to pick up the towel, and she

fell to the ground whereafter she lay on her side. He turned her over to face up. He removed her panty by pulling it down to her knees. He pulled down his pants and removed them completely. He then forcefully had sexual intercourse with her. It was the first time that a man had inserted his penis into her vagina, and it hurt. He finished and warned her that if should she say something to her parents, he was going to kill her. When he was inserting his penis into her vagina, she was fighting and resisting. She was trying to stop him by using her hands. The appellant tied her arm using a rope, which he obtained from under the table . He told her after he had finished to get up and to put her panty on. She felt a wetness on her thighs, and saw that she was bleeding from her vagina and there was a lot of blood. The appellant got off her and went out.

[7] The complainant testified that before the appellant raped her, she was bleeding from her vagina. At that stage, she had not started menstruating. The bleeding from her vagina was not menstruation, and she did not know what was taking place. She was bleeding earlier that day before she was raped. She took a cloth and wiped off the blood, and then went to sleep. In the homestead , the adults present were her aunt and her grandmother. She did not go to them because the appellant had threatened to kill her if she told anyone. She woke up the following morning, and took the cloth she used to wipe off blood and burnt it. She did not want the adults to see the blood and ask her what had happened. At that stage , she was still bleeding from her vagina. She asked her mother why she was bleeding because she had recently menstruated. Her mother told her that it sometimes happens that she can menstruate for the second time .

[8] The complainant testified that after two weeks, she noticed swelling between her thighs. Her mother asked her what was happening, and she told her that she does not know what was causing the swelling. Her mother enquired from a nurse what was happening . On 1 June 2014, the complainant went to the clinic. The nurse wanted her to explain exactly what had happened. She then explained to the nurse, Sister Shoba, that her brother had raped her. She was the first person the complainant had told that she had been

raped. Sister Shoba phoned her mother and told her to talk politely to the complainant, and not to reprimand her. Her mother came back from town and she asked her what had happened. She told her mother that the appellant had raped her. Her mother thereafter asked the appellant what had happened. The appellant at first denied that he raped her. Her mother asked him why was he denying it, because he did it. The appellant thereafter admitted to the incident, and said that the complainant was the one who seduced him. The police were called , and upon their arrival, arrested the appellant.

[9] The complainant further testified that the appellant did this twice. What happened on 7 May 2014 was the second time. She said it was the first time because she was confused. Two months before 7 May 2014, the appellant sent the other children to the shop. He told her to remain behind, and then asked her for her cell phone. The children thereafter returned from the shop. The appellant took the items the children brought from the shop, and went to his rondavel. He telephoned her and said she must quickly come to

him to see something. She went to his room, and saw that a CD was playing on TV and it was playing a sex video. She turned back at the door. She told the appellant that if he wanted her he would find her at her mother's house, and thereafter went to her grandmother's

house. The appellant arrived and entered, and stated that he was looking for her. Her grandmother and her aunt were present. He waited for her outside, and she went to him. He told her to wait for him, and that he would come back. She waited for him in her mother's house. He thereafter returned with three friends. Her mother was not present. She tried to walk out and the appellant said no. They took out dagga and she also rolled it. She told them that the dagga smelt and went out; they however went to fetch her again. She talked a language she could not understand. She told them that she wanted to sleep and they went out. She fell asleep quickly. She woke up and found the appellant on top of her. He had inserted his penis into her vagina, and was making up and down movements. The following afternoon, she asked her mother whether she could go to the shop. Her mother allowed her. She found the appellant in a motor vehicle at the shop. They showed her firearms and said they will kill her if she told anyone. She did not tell anyone.

[10] She stated that when she found the appellant on top of her, she was not menstruating and she noticed blood. She pushed him away to the sofa next to her. He said she was pushing him away, and he went to fetch a sjambok. He hit her on her back twice. She was not injured except for some bruises. He threw the sjambok under the coffee table, and went out. She continued to sleep. She did not tell anyone about the incident. From the date of the first incident to the second incident, the appellant was staying in her home. Her schoolwork was affected, and she had failed term one and two, but did not fail the year.

[11] Under cross-examination the complainant testified as follows. The appellant was not attending school. The first incident took place in February 2015. It is not correct that the appellant visited her home only during December time. The first incident in fact took place in 2014. She could not provide a reason why she did not report the first incident to the police. She did not tell her grandmother or aunt that the appellant called her to watch a sex video because she thought they would say that she was lying, as

they believed the appellant a lot. The appellant raped her and hit her with a sjambok. He did not threaten her but she did not have the courage to report him. When she was raped in February 2014, she was not sleeping alone and did not tell her siblings. It was only after the second occasion that she told Jabulisiwe that the appellant did something to her. In the police statement she stated that she was raped whilst standing in the kitchen, and cannot explain why she said

that. She agreed that there was no TV set in the rondavel, which was used by the appellant. Sister Shoba had told her that she would not assist her with her problem if she did not tell the truth. The complainant testified that Jabulisiwe saw her crying and asked her what was wrong, and she told her that the appellant did something to her.

[12] The next witness for the State was Ms Jabulisiwe Lungisile Mavimbela. She testified that she was fifteen years old and she was in grade 7. The complainant was her sister. During 2014 the appellant sometimes stayed with them. He treated them well. On a certain day the complainant was sitting on her mother's bed and was crying. The complainant told her that there is something that the appellant did to her. She told the complainant to tell their mother. The complainant explained happened to their mother. The complainant, thereafter was sent to the clinic.

[13] The third State witness was Ms Thabisile Patience Mkhize. She testified that she was 41 years old, with standard 8 level of education, and is the mother of the complainant. On 31 May 2014, she was at her home when she noticed that the complainant was not walking normally. She was walking while keeping her legs apart. The complainant informed her that she had a rash around her vagina. She saw the rash when she examined the complainant, and it looked like blisters. She gave the complainant an ointment to use and advised her to go to the clinic. She phoned Sister Shoba and she agreed to attend to the complainant. On 1 June 2014 the complainant went to the clinic. Sister Shoba phoned her and told her that the complainant had a sexually transmitted disease. She advised her not to be harsh on the complainant so that the complainant will tell her what happened. Ms Mkhize then phoned the appellant and asked him to make sure that the complainant ate her meal and took the tablets she got from the clinic. The appellant came and met her as she was coming from town. She sat down with the complainant and asked her whether she was dating somebody. The complainant said no and started to cry. She had pleaded with the complainant to tell her what had happened.

She asked her who had sexual intercourse with her. The complainant said that she was afraid to tell her and kept crying. She pleaded with the complainant to tell her, and the complainant answered that it is the appellant. The complainant thereafter explained what had happened . It was summertime and it was during the day. The appellant had rolled out a Zulu mat in the dining room. Jabulisiwe and Ntando, her sisters, were playing at the Zwane's place. The complainant told her that he had again slept with her on 7 May

2014. It was at night, the day of national elections, and the complainant's mother was a party agent at Gudu School. The complainant told her that the appellant had woken her up by knocking on the door. It was only the complainant that he woke up, and he had asked her why she had not washed the dishes. The complainant eventually woke up. In the kitchen, there is a double bed, and he pushed her on top of the bed. She said that she did not want that, and he pushed by force, and slept with her.

- [14] Ms Mkhize testified that during the morning after 7 May 2014, she arrived from the elections and found everything normal. She then noticed that the complainant was walking in an abnormal manner. The complainant told her that she did not report the rape as the appellant threatened her that if she reports the rape, he will find a hitman to kill her. She asked the appellant whether he knew anything about what the complainant had told her. He denied any knowledge of that. She asked him whether the complainant was making up the story, choosing him out of all the males in the area. The appellant eventually admitted and apologised, saying Satan tempted him. He claimed that the complainant seduced him.
- [15] Ms Thabisile Shoba testified as follows. She was a professional nurse and is qualified in midwifery. On 1 June 2004 she examined the complainant at the request of her mother. The complainant said that she was not suffering from anything. She did not examine the vagina, however noticed a discharge with an offensive smell. She told the complainant that the discharge was due to an infection from a sexually transmitted disease. She asked her if somebody had sexually abused her and the complainant said nobody sexually abused her. She said that complainant must not be afraid to tell her, as she will not tell the complainant's mother. The complainant admitted that had somebody sexually abused her and that it was her brother from a different mother. She did not tell her mother because the appellant had threatened her. She prescribed treatment for her. She then phoned the complainant's mother and reported to her but she did not tell her of the sexual abuse of the complainant. The complainant told her that the sexual abuse was only for those three days. She admitted that she told the complainant that if she did not tell the truth, she would continue to suffer without being given treatment.
- [16] Dr Jack Enzybowski testified that he was a medical doctor. He examined the complainant on 3 June 2014 for an alleged sexual assault that took place on 8 May 2014. He found a swollen reddish area in the vagina, a swollen hymen and a yellowish vaginal discharge. The following was noted as an abnormality : red clitoris, red labia majora, and red labia minora. With regard to the posterior fourchette, it was noted as follows: no scarring, no tears, no bleeding, but increased friability. The fossa navicularis was red. The hymen had an opening diameter of 5 mm vertical, the hymen was swollen, and there were no tears, no bumps, no clefts, no bruising, no bleeding and no tears on the vagina. The doctor testified that after 30 days, it was difficult to confirm or deny sexual assault. The infection can be because of poor hygiene or manipulation of the sexual organ.
- [17] The appellant testified for the defence. On 7 May 2014 he was at the voting station. He left at 21h00 and he went home. He found his brother, and did not see the complainant. He went to sleep. He denied that he raped the complainant. The complainant usually complained that she was given less money for school treats than her siblings. He denied that he admitted to having had sexual relations with the complainant.

- [18] The regional magistrate made the following observations regarding the complainant: the complainant testified in a clear and straightforward manner; she answered all the questions put to her; her answers were concise and not evasive; she conceded to the difference between her evidence that sexual intercourse took place on the floor whilst in her police statement she said it took place while standing up; she gave a detailed account of how the accused got her from her bedroom to the kitchen and what ensued thereafter. Further, the regional magistrate noted the discrepancies in the State's case but found that the State witnesses corroborated each other on all material respects. He found that in the general conspectus of the evidence, the State witnesses were credible, reliable and honest witnesses. The learned regional magistrate concluded that the probabilities of the complainant's version, and corroboration of the complainant's evidence together with the inherent improbabilities in the accused's version, provided sufficient guarantees that were required to accept the evidence of the complainant who is a single witness to the actual offence perpetrated on her.
- [19] 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. As a child, her evidence is required to be approached with caution. 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 *R v Manda* 1951 (3) SA 158 (A) at 163B-E. No other evidence directly corroborated the evidence of the complainant was presented. The medical evidence was neutral on the issue of whether sexual intercourse took place. The regional magistrate's view that, save for minor discrepancies, the State witnesses corroborated each other on material facts, is in my view, a misdirection. It is based on a failure to properly take note of the unsatisfactory features in the evidence of the complainant. Further, the regional magistrate overlooked that the State was relying on the evidence of a single witness which resulted in a failure to approach the evidence of the complainant with the required caution as evidence of a single witness.
- [20] The State bore the onus to prove the guilt of the appellant beyond reasonable doubt. In terms of section 208 of the Criminal Procedure Act 51 of 1977, an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution. It is required to be clear and satisfactory in every material respect. It is not the labels that are given to the evidence by a judicial officer that count. Evidence as it appears on record must be clear and satisfactory in all material respects. The exercise of caution entails scrutiny of the evidence, noting discrepancies and attaching due weight to the discrepancies that are found. See *R v Mokoena* 1932 OPD 79 at 80; *R v Mokoena* 1956 (3) SA 81 (A) at 85-86; S

v Webber 1971

- (3) SA 754 (A) at 757-759; Stevens v S [2005] 1 All SA 1 (SCA) para 17; S v Artman & another 1968
- (3) SA 339 (A) at 340H. The evidence of the complainant exhibited material unsatisfactory aspects , inter alia:
- (a) The appellant was charged with one count of rape but the complainant testified that he had raped her on two different occasions. The complainant was not able to explain her failure to tell Sister Shoba, the doctor and the police about the first incident of rape .
 - (b) The complainant, when asked by her mother why she was walking with her legs apart, did not tell her of the alleged rape. Again when asked by Sister Shoba, she first denied that any person sexually abused her.
 - (c) The complainant accused the appellant of having sexually assaulted her in order to be treated for her condition, and on the understanding that her mother would not be told anything about the alleged sexual abuse which factors might have caused the complainant to make a false accusation expecting no consequences from it.
 - (d) The complainant told Sister Shoba of sexual abuse occurring on three days, which is inconsistent with her evidence.
 - (e) The complainant told her mother that she was raped during the day on a Zulu mat, but she gave no such evidence. In her evidence, she claimed to have been raped at night while she was sleeping.
 - (f) The complainant testified that in the kitchen she fell down and she was raped on the floor after she had fallen down, but she told the police that she was raped whilst standing, and she told her mother that she was raped on the double bed.
 - (g) The complainant told an incomprehensible story about the alleged first incident of rape.
- [21] In my view, the evidence of the complainant, approached with the necessary caution, indicates that it was risky to rely on it for a conviction. It falls short of proving the guilt of the appellant beyond reasonable doubt. It was not correct for Ms Mkhize to confront the appellant , and insist that he had committed the offence. The response of the appellant under those circumstances is of no legal significance .
- [22] I am of the view that the conviction of the appellant falls to be set aside.
- [23] I, accordingly , propose the following order:
1. The appeal against conviction is upheld, and the conviction and sentence of the appellant is set aside .
 2. The order of the trial court is replaced with:
- 'Not guilty and discharged'.

MNGADI, J

I agree and it is so ordered.

BEZUIDENHOUT, J

APPEARANCES

Case Number

:

AR696/17

For the Appellant

: Mr Eric Xolani Sindane

Instructed by

: Pietermaritzburg Justice Centre

Pietermaritzburg

For the respondent

: Mr F. Van Heerden

Instructed by

: Director of Public Prosecutions

PITERMARITZBURG

Date of hearing

: 06 July 2020

Judgement

delivered on : 21 August 2020

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