

SOUTH AFRICA / JUDGMENT

Mbotho v S (AR12/2023) [2024] ZAKZPHC 28 (28 March 2024)

[2024] ZAKZPHC 28

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Veerasamy, Chili

CASE / FILE NUMBER

AR12/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE

NO: AR12/2023

In

the matter between:

MDUDUZI

PETROS LUNGUSANI MBOTHO

Appellant

and

THE

STATE

Respondent

ORDER

On

appeal from: Durban Regional Court (sitting as court of first

instance):

1. The

appeal is upheld.

2. The

conviction and sentence are set aside.

JUDGMENT

Veerasamy AJ (Chili J concurring)

- [1] On 25 November 2020, the appellant was convicted of contravening the provisions of section 3 read with sections 1, 56(1), 57, 59, 60, 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the provisions of section 51, and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.
- [2] The appellant had been charged with unlawfully and intentionally committing an act of sexual penetration with a minor female child, who at the time was 10 years old, by inserting 'his genital organ into her genital organ on diverse occasions'. He was subsequently sentenced to 20 years imprisonment.
- [3] The appellant appeals both his conviction and sentence.
- [4] During the trial, the State called four witnesses. The first witness was the complainant, the minor child. She testified that at the time of the alleged incident she lived with her mother, her four-year-old brother, and the appellant, who she called her step-father.
- [5] She could not recall the exact date when the incident had occurred but could recall that it had happened in 2019 at the beginning of the year, since she was already going to school. She testified that she lived together with her family and the appellant in a one-roomed house where the appellant and her mother slept on a bed, and she slept on the floor on a sponge mattress.
- [6] On the day of the alleged incident, her mother had gone to Emalangeni, and it was just the appellant and her at home. She testified that, during the night, while she was asleep on her sponge mattress, the appellant woke up and came down off his bed. She did not see him do so but saw a person standing up. The person who was standing up climbed on top of her and thereafter inserted his penis into her vagina. She testified that when she woke up, he ran away.
- [7] Under examination in chief, she stated that once the alleged rape had occurred, she moved as she wanted to talk the person who had run back to the bed. She then testified that she spoke to the appellant who advised that no-one had entered the room. He then woke up and proceeded to leave for work.
- [8] She testified that the room in which they all slept was locked and she saw the appellant opening the door with a key before leaving the room. All of the windows in the room were closed. After the appellant had left for work, she bathed herself and went to school. When she came back home, she attended to her chores and then went out to play with her friends.

- [9] She thereafter testified that on day following the incident (which was a Saturday) she was in the room watching TV with her younger brother and the appellant. When her younger brother left the room to go and play with his friends, the appellant requested that she have intercourse with him. She testified that the appellant locked the door and took her to the bed. He undid his belt and took off her underwear. She was able to push him off and tried to run out of the room. The complainant then testified that the appellant threatened her, but she eventually was able to get out of the room and only returned when her mother came back home.
- [10] She testified that the appellant had inserted his penis into her vagina either one or two times, and only on one occasion. She did not tell her mother of the incident because she was afraid.
- [11] The complainant finally told her aunt, Ms Z[...] P[...] M[...], about the incident. Ms M[...] had enquired from the complainant as to why she was walking peculiarly when the complainant came out of the toilet. On inspection, her aunt found that there were 'worms' in and around the complainant's vagina. When her aunt saw the 'worms' and enquired as to what had happened, the complainant advised her of the rape.
- [12] The complainant's aunt took her to the Mshiyeni Hospital where she was examined and given medication.
- [13] Under cross-examination, the complainant testified that the only time she woke up (during the rape) was when she felt the movement of her assailant on top of her. When her assailant ran away, she testified that she enquired from the appellant as to who had been in the room.
- [14] The next witness called by the State was the complainant's aunt, Ms M[...]. Ms M[...] was unable to contribute to the evidence as she had merely been told by complainant that she had been raped and had escorted her to hospital. None of her testimony established any elements of the charge proffered against the appellant.
- [15] The third witness called by the State was Dr Zaheed Aziz Khan. Dr Khan had conducted the examination of the complainant at hospital. Dr Khan examined the complainant on 4 May 2019.
- [16] Dr Khan testified that during his general observation, he did not notice any extra genital injuries on the complainant. On the gynaecological examination, the only finding he could make was of a yellow offensive discharge emanating from the complainant's genitalia. Dr Khan advised that offensive is a term used to demonstrate an infectious aetiology, being an infection causing the discharge. If the discharge was in-offensive it would not be related to an infection.

- [17] Dr Khan testified that such discharge was more commonly related to a fungal infection but it also could be bacterial infection. He further testified that such a discharge was normal for children of the complainant's age in circumstances where they did not clean their genitalia properly or did not wipe properly when they used the latrine.
- [18] During his examination in chief, Dr Khan's evidence was that there were no genital injuries to the complainant. He treated the complainant for the infection which she was suffering from.
- [19] Under cross-examination, Dr Khan confirmed that there was no penetration according to his examination. He further confirmed that he did not notice any worms coming out of the complainant's genitalia and if he had seen same, he would have documented same. He treated the complainant for vaginitis. He further confirmed that the discharge, which the complainant was experiencing, was not related to any sexually transmitted infection.
- [20] The fourth witness to testify was the complainant's mother. Equally, her evidence could cast no light on the alleged incident, as she was not present. She could merely inform the court that she had been advised that the complainant had been raped.
- [21] Upon the closing of the State's case, the appellant testified.
- [22] His evidence quite simply was that he had not raped the complainant and that she had been coerced into alleging same by her aunt, Ms M[...].
- [23] In order to succeed in an appeal, the appellant must convince this court, on adequate grounds, that the trial court was wrong in accepting the evidence of the State and rejecting his version as being reasonably possibly true. The court a quo was confronted with a single witness, being the complainant. None of the evidence of the further witnesses could lend any value to proving the charge proffered against the appellant.
- [24] A court of appeal will not interfere with a trial court's decision regarding conviction unless it finds that the court misdirected

itself as regards its findings or on fact or law.[1]

- [25] The headnote in *S v Francis* summarises the above as follows:

'In the absence of any misdirection the trial Court's 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 cases that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony.'

- [26] The court a quo found that the room in which the complainant and the appellant were in was locked at the time of the alleged rape and that they were the only two people in the room. The court accepted the evidence of the complainant that there was a man who committed the rape and ran to the bed where the appellant was lying. The court a quo rationalised that the complainant had to have been raped by the appellant, being the only other person in the room. Thus, the court a quo found that the State had proved its case beyond a reasonable doubt.
- [27] The complainant's evidence is somewhat problematic in that, despite the appellant being known to her, she could not identify him as the person who was allegedly on top of her at the time of the rape. In fact, the complainant gave no descriptive commonalities between the appellant and the person who raped her.
- [28] At the time that the alleged rape occurred, the complainant did not harbour any notion that she had been allegedly raped by the appellant. In fact, she went to the appellant who was sleeping on the bed to enquire who else was in the room.
- [29] No explanation was given by the complainant as to why she did not or could not identify the appellant as the person who was on top of her at the time of the incident. From her evidence, the complainant saw the person standing up and saw the person who had climbed on top of her. She saw the naked person insert his penis into her vagina. However, there is no explanation as to why, whilst looking at this person, she did not recognise this individual as being the appellant.
- [30] Further, there was no evidence of penetration. The evidence of Dr Khan was that no penetration had in fact occurred. This contradicts the complainant's version that a penis had been inserted into her vagina, not only once, but on three diverse occasions according to the report she made to her aunt, Ms M[...].
- [31] When assessing the evidence, it is imperative to evaluate all of the evidence and not be selective in determining what evidence to consider. The State's case was wholly reliant on the evidence of the complainant.
- [32] In *S v Stevens*,^[3] the Supreme Court of Appeal held:
- 'As indicated above, each of the complainants was a single witness in respect of the alleged indecent assault upon her. In terms of s 208 of the Criminal Procedure Act, 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, his or her merits as a witness being weighed against factors which militate against his or her credibility (see, for example, *S v Webber* 1971 (3) SA 754 (A) at 758G-H). The correct approach to the application of this so-called "cautionary rule" was set out by Diemont JA in *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G as follows:

“There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Webber. . .). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in R v Mokoena 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean ‘that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence were well-founded’ (per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.”

[33] In order to rely on the evidence of the complainant, the court must be satisfied that their evidence is trustworthy. In *Maila v S*[4] the Supreme Court of Appeal held the following:

‘The evidence in this case was based on the evidence of a single witness, the complainant. Apart from being a single witness to the act of rape, the complainant was a girl child, aged 9 years at the time of the incident. For many years, the evidence of a child witness, particularly as a single witness, was treated with caution. This was because cases prior to the advent of the Constitution (which provides in s 9 for equality of all before the law) stated inter alia that a child witness could be manipulated to falsely implicate a particular person as the perpetrator (thereby substituting the accused person for the real perpetrator). To ensure that the evidence of a child witness can be relied upon as provided in s 208 of the CPA, this Court stated in *Woji v Santam Insurance Co Ltd*, that a court must be satisfied that their evidence is trustworthy. It noted factors which courts must take into account to come to the conclusion that the evidence is trustworthy, without creating a closed list. In this regard, the court held:

“Trustworthiness . . . 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 has the capacity of recollection will depend again on whether he has sufficient years of discretion ‘to remember what occurs’ while the capacity of narration or communication raises the question whether the child has the ‘capacity to understand the questions put, and to frame and express intelligent answers.’” (Emphasis in original, footnotes omitted)

[34] The evidence of the complainant could not be considered as being trustworthy, which was held as being necessary by the Supreme Court of Appeal in both *Stevens* and *Maila*. She could not observe her assailant and had no manner of describing the appellant as being the assailant, notwithstanding looking at the person who is alleged to have committed the offence.

[35] The Supreme Court of Appeal has held that

‘A 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. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably

possibly true but whether one subjectively believes him is not the test.’[5]

[36] The appellant’s version in these proceedings is simple – he did not rape the complainant. He believes that she was coerced into laying this complaint against him.

[37] The complainant’s evidence is significantly undermined by the fact that she had looked at her assailant and could not identify him as the appellant. Further to the above, there was no evidence of rape of the complainant during her gynaecological examination.

[38] Having given proper and due consideration to all circumstances, this court finds that the trial court misdirected itself in convicting the appellant for the offence of rape.

[39] We are of the view that the State has not succeeded in proving its case beyond a reasonable doubt, especially in light of the probabilities and inherent circumstances of this case.

[40] Accordingly, we are of the view that the State did not discharge its onus of proving beyond a reasonable doubt that the appellant raped the complainant.

[41] In the circumstances, the appeal should succeed, and the conviction and sentence accordingly set aside.

Order

[42] I therefore make the following order:

Veerasamy AJ

I concur, and it is so ordered.

Chili J

HEARD ON: 22 March 2024

JUDGMENT

DATE: 28 March 2024 FOR THE APPELLANT TP Pillay INSTRUCTED BY: Local Office – Legal Aid South Africa FOR THE RESPONDENT: Adv SM Miloszewski INSTRUCTED BY: Director of Public Prosecutions

[1] R v Dhlumayo and another 1948 (2) SA 677 (A).

[2] S v Francis 1991

(1) SACR 198 (A) at 198j-199a.

[3] S v Stevens [2005] 1 All SA 1 (SCA) para 17.

[4] Maila v S [2023] ZASCA 3 para 17.

[5] S v V 2000

(1) SACR 453 (SCA) para 3(i) at 455a-b.

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Prepared on 9 October 2026 · Esheria