

SOUTH AFRICA / JUDGMENT

Mgxabhayi v S (CA&R05/2017) [2017] ZAECMHC 8 (12 May 2017) [2017] ZAECMHC 8

COURT

Eastern Cape High Court, Mthatha

BEFORE

M.S. Jolwana, B. Majiki

CASE / FILE NUMBER

CA&R05/2017

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. CA&R 05/2017

MGXABHAYI ANDILE

Appellant

And

THE STATE

Respondent

JUDGMENT

JOLWANA AJ:

- [1] This is an appeal by the Appellant Andile Mgxabhayi against both conviction and sentence, it came before this court in terms of Section 309 (1) of the Criminal procedure Act 51 of 1977 which provides for an automatic right of appeal against conviction and sentence to any person who has been sentenced to life imprisonment by a regional court.
- [2] The appellant was convicted by the regional court in Mthatha on the 14 November 2016 following a charge of rape, subject to the provisions of section 51(1) of Act 105 of 1997, of Z. M. who was fifteen (15) years old at the time the alleged rape took place.

The appellant entered a plea of not guilty to the charge and upon conviction was sentenced to life imprisonment on the 16 November

2016. The main ground of appeal is that the state did not prove its case beyond reasonable doubt.

- [3] The complainant testified that at the time the alleged rape took place she was staying with her grandparents as well as two uncles including the appellant and other children the same age as herself in Slovo Park in Mthatha. The incident occurred in February 2015, even though she could not remember the date. She would borrow the appellant's keys to the appellant's room to watch TV from the appellant's room. On the day in question she, as usual had borrowed the appellant's keys and was watching TV in the appellant's room while the appellant was at work. The complainant was alone in the appellant's room when the appellant came back from work, entered the room and closed the door to his room. He then closed the complainant's mouth and raped her after undressing her and himself. After raping the complainant he threatened to kill her if she told anyone about the rape.
- [4] About three days after she had been raped she developed warts in her vagina. She did not tell anyone about the warts. She was later told by her grandparents to go and stay at Sibangweni in Mthatha where she stayed with her paternal grandmother. This is where the rape incident became known. One Friday afternoon the complainant was coming back from school and was feeling pains in the vaginal area. When asked by her grandmother why she was crying she showed her, her vagina and the grandmother decided to take her to the clinic where she was examined by a doctor. Her grandmother was made to wait outside during her consultation. The doctor discovered that she had warts and told her that such are only sexually transmitted. She then told the doctor that she was raped by the appellant. This examination by the doctor happened in June 2015.
- [5] During this examination it was also discovered that she was HIV [...]. This is more or less the evidence of the complainant.

The other evidence by the state was a medical report and testimony of the complainant's grandmother.

- [6] The other witness was her grandmother who just confirmed the incident leading to the discovery of the rape. Otherwise she could not recall if the complainant arrived at her place in March as she alleges or later than that.
- [7] Counsel for the respondent, Mr Mpepanduku conceded that the medical report does not assist in corroborating the complainant's

evidence. All that the doctor recorded was "penetration occurred as warts are sexually transmitted". The doctor also recorded that she had consensual sexual intercourse in 2013. There is no evidence of what the life span of warts was, after how long from the time of sexual intercourse do they show etc.

- [8] The fact that she is a single witness is not, on its own, a bar to the conviction of the appellant. Section 208 of the Criminal Procedure Act provides for the conviction of an accused on the evidence of a single competent witness. However, our courts have developed what has become known as the cautionary rule that must be applied in evaluating evidence of a single witness. In *R v Mokoena*[1] the court formulated the cautionary rule as follows:

“Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by Section 284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect”.

Almost fifty (50) years later the Appellate division in the case of *Woji vs Santam*[2] per Diemant JA confirmed the cautionary rule as stipulated in the *Mokoena* judgment above. The Court, as in this matter, was

dealing with a single witness who is a child and the court put it as follows:

“trustworthiness... depends on factors such as the child’s power of observation and his power of recollection and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. 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 question put, and to frame and express intelligent answers...there are other factors...does he appear honest-is there a consciousness of the duty to speak the truth”.

The court further cautioned against the danger of believing the child where the evidence stands alone being underrated.

- [9] This evidence of the complainant is fraught with problems in terms of its credibility and sufficiency for purposes of conviction bearing in that the evidence that is required is of a standard of proof that is beyond reasonable doubt. The warts appeared on the complainant’s vagina about three days after the alleged incident, which took place in February 2015. The examination by the doctor took place on the 15 June 2015, according to the Medical Report. There is no evidence by the state accounting for the period of March, April and May 2015. The doctor was not called to testify as to whether it is possible or not that the rape having occurred in February 2015 and the warts having started showing in about 3 days of the alleged rape, the warts could have hibernated for so long and only start being painful in or during the 4th month. There is no evidence at all that the complainant ever received any form of treatment for the warts from February until June 2015, when she was examined by the doctor. The evidence of the doctor, if she had been called would have clarified a number of things including hibernation period, if any, and most importantly whether it would have been possible for the complainant to only feel strong pain on the 4th month from infection. This evidence would have helped to dispel any inference that there was a possibility of the warts being

transmitted at any time after the rape or having been dormant since the last consensual sexual intercourse. The importance of this evidence lies in the fact that the complainant testified that other than the 2013 consensual sexual activity, she never had sex with anyone other than the rape incident and she did not have sex with anyone after the rape incident.

- [10] Mention was made of the Appellant being HIV [...] and the complainant having tested positive for HIV. It seems that this was a strong persuasion for the magistrate to conclude that the appellant infected the complainant with HIV virus. The magistrate erred in this regard. The results of the complainant having been tested and the results having been negative before she was raped were not submitted as evidence. The question is, when was the test done in the first place or was she in fact negative, other than the mere ipse dixit of the complainant. Furthermore, to exclude the possibility of the test having been done during the waiting period, before the virus could be detected.
- [11] Furthermore, the court a quo erred in its application of section 208 of the Criminal Procedure Act which makes provisions for the conviction of the accused on the evidence of a single competent witness. In the process the court a quo misdirected itself in applying, if it did apply at all, the cautionary rule. The only thing that is clear about the complainant's evidence is that she says she was raped by the appellant and that is where clarity begins and ends. Despite the fact that the evidence about the warts creates a doubt as to the timing of the sexual transmission, there was no attempt at all to investigate the truthfulness of this evidence. The fact that the appellant is HIV [...] and the complainant tested HIV [...] and the fact that the complainant alleges to have developed warts appear to have been accepted as corroboration without any further investigation. If this evidence was to be considered at all for the purposes of conviction, it goes without saying that it ought to have been tested both for relevance and credibility and this the court a quo failed to do.
- [12] The Magistrate did not even try to test this child's, evidence for trustworthiness to exclude suggestibility, for instance. We know that the child named the appellant after the doctor told her that her kind of sickness is only sexually transmitted. The child could be substituting the person who had sexual intercourse with her, consensual or not, with the appellant.
- [13] Because of what my view of the complainant's evidence is I need not comment about the evidence of the Appellant. Nevertheless,
- he denied raping complainant, he denied ever giving her keys to watch TV and that all rooms had TV and DVD players at their home. In any event the appellant is entitled to remain silent and does not have to prove his innocence, which seems to have been the
- magistrate's approach herein. Did the state prove its case beyond the reasonable doubt? In my view the state failed to prove its case beyond reasonable doubt, this being the question to be answered in this appeal.
- [14] As the result I am of the view that the appeal must be upheld.

[15] I therefore make the following order:

1. The conviction and sentence are hereby set aside.

M.S. JOLWANA AJ

ACTING JUDGE OF THE HIGH COURT

I agree:

B. MAJIKI

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellant: Mr. T. Noah

For the Appellant: T. NOAH & SONS

Appellant's Attorney

No. 56 Sprigg Street

MTHATHA

Counsel for Respondent: Mr. LH Mpepanduku

For the Respondents: National Director of Public Prosecution

Respondents' Attorneys

BROADCAST HOUSE

SISSON STREET, FORTGALE

Matter heard on:

05 May 2017

Judgment

delivered on:

12 May 2017

[1] S v Mokoena 1932 OPD 79 of 80

[2] Woji v Santam Insurance (PTY) LTD 1981(1) SA 1020(A) at 1028 A-E

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECMHC/2017/8.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mgxabhayi-v-s-unknown-topic-aecmhc-2017>

Prepared on 25 October 2026 · Esheria