

SOUTH AFRICA / JUDGMENT

M.J.M v S (A13/2023) [2024]

ZALMPPHC 4 (16 January 2024)

[2024] ZALMPPHC 4

COURT

Limpopo High Court, Polokwane

BEFORE

Semenya, Manzini

CASE / FILE NUMBER

A13/2023

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REPUBLIC

OF SOUTH

AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA;

LIMPOPO

DIVISION; POLOKWANE.

CASE

NO: A13/2023

REPORTABLE:

YES

OF

INTEREST TO OTHER JUDGES: YES

REVISED

DATE:

16 January 2024

AJ

MANZINI

In

the matter between: M[...]
J[...] M[...]
:
APPELLANT
And
THE
STATE
:
RESPONDENT

JUDGMENT

HEARD ON: 24 NOVEMBER 2023

CORAM: SEMENYA ADJP AND MANZINI AJ

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and publication and release to SAFLII. The date and time for hand-down is deemed to be 16 January 2024 at 16:00.

MANZINI AJ:

- [1] This matter came before the High Court as an appeal against the conviction and sentence of the appellant who was arraigned in the Regional court of Modimolle of one count of contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment[1] Act (hereinafter referred to as "Sexual Offences Act"). He was convicted as charged by the learned Regional magistrate Mr P Manthata on 15 March 2022. Following his conviction, the appellant was sentenced to twelve years imprisonment on 21 July 2022. It was further ordered in terms section 50(2) of the Sexual Offences Act that his name be recorded in the National Register for Sexual Offenders. He was also declared unfit to possess a firearm.
- [2] The appellant brought an application for leave to appeal against the conviction only. The application was granted by the trial court on 08 March 2023 to this court. When granting the application, the court a quo remarked that with the facts of this case another court may come to a different conclusion.
- [3] The facts of this matter are briefly that the appellant is the stepfather of the complainant in this matter, and they were staying together with the complainant's mother. One evening the complainant was in the living room with the appellant and her mother. She asked for the appellant's cell phone so that she can watch videos. He gave it to her and she went to her bedroom to watch those videos. After watching the videos, she put the cell phone on the pillow. The appellant entered her bedroom and pulled off her panties. He then inserted his finger inside her private part.

- [4] The complainant's mother, who was sleeping in her bedroom at that time, woke up to go to the bathroom and she noticed that the complainant's

bedroom door was opened. As she went to investigate, she saw the appellant coming out of the complainant's bedroom. She inquired from both the appellant and the complainant what the former was doing in the latter's bedroom. She was told by both of them that the appellant went in there to fetch his cell phone. The mother later went to complainant's bedroom and inquired again what was happening. The complainant repeated her previous answer that the appellant was there to fetch his cell phone. She lifted the blanket from the complainant to inspect her and noticed that she was not wearing her panties. She probed again why the appellant was in her bedroom and the complainant finally informed her that the appellant inserted his finger in her private parts. The complainant was 11 years old and in Grade 7 during the incident. When she was testifying in court, she was 12 years old and in Grade 8.

- [5] Following the incident, criminal charges were laid against the appellant and the complainant was taken for medical examination. She was examined by Dr Chioma Blessing Uzokwe, a medical practitioner at the government hospital. According to the doctor's observations, the complainant's private part had a fresh superficial laceration at 06:00 position. The area was mildly tender. Her conclusion was that 'there appears to be a case of a sexual assault with fingers as a possible penetrating organ'. The appellant, who also testified in his defence, denied that he inserted his finger in his stepdaughter's private part. He insisted that he was merely in her bedroom to fetch his cell phone.

- [6] It is imperative that the well-established principles that are applicable in matters of this nature where the appeal court deals

with the findings of fact by the trial court are set out. It is a trite principle that the findings of fact of the trial court are presumed to be correct unless there are demonstrable and material misdirection on its part. Those findings will only be disregarded if the recorded evidence shows them to be clearly wrong. In the same vein, the credibility findings of the trial court cannot be disturbed unless the recorded evidence shows them to be clearly wrong.[2]

- [7] Equally trite, is the principle that the onus rests on the state to prove the guilt of an accused person beyond reasonable doubt and there is no onus on the accused to prove his or her innocence. [3] A mere preponderance of probabilities is not enough. The court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. The court can test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.[4]

[8] I am mindful of the fact that the complainant in this matter is a child of 11 years old during the incident and she is a single witness, in as far as the incident of rape is concerned. Therefore, cautionary rule does apply.[5] Although what Nugent JA stated in *S v Vilakazi*[6] was in the context of sentencing, it is equally relevant here and it sounds an appropriate warning even where the correctness of the finding of guilt is determined:

"The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. "

The correct approach in a case of this nature was summed up by Plasket J in *S v Mdiniso*[7] as he quoted with approval the following passage from *S v Dyira*[8]:

"In our law it is possible for an accused person to be convicted on the single evidence of a competent witness (section 208 of the Criminal Procedure Act No 51 of 1977). The requirement in such a case is, as always, proof of guilt beyond reasonable doubt, and to assist the courts in determining whether the onus is discharged they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution (*Rex v Mokoena*, 1956

- (3) SA 81 (AD) 85, 86). This means that the courts must be alive to the danger of relying on the evidence of only one witness because it cannot be checked against other evidence. Similarly, the courts have developed a cautionary rule which is to be applied to the evidence of small children (*R v Manda*, 1951
- (3) SA 158 (AD) at 162E to 163E). The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity (*Viveiros v S*

[2000] 2 All SA 86 (SCA) para 2). Here, more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness "

[9] Coming back to the facts of this matter, the appellant and the mother of the complainant, together with their children, were all staying together for some time. The complainant indicated that she had no problems with the appellant and he had never done what he did to her in the past. It is inconceivable that the complainant can suddenly accuse the appellant of

something that he did not do where there is no history of animosity between them. In fact, she was even trying to protect the appellant by hiding from her mother about what he did to her. She denied, at least, twice that the appellant violated her until when the mother saw what may seem to be the proof of something wrong, i.e., that she was lying in bed without wearing her panties, something unusual of her. The fact that he gave her his cell phone to watch videos indicates that the two were getting along well like father and daughter. It does not matter that he is not her biological father but a stepfather. She considers him to be her father. The conduct of the mother of the complainant indicated that she did not have any problems with the appellant until on the fateful night when she received the report from the complainant. She acted in a manner that every parent would have reacted when confronted with the similar situation. She had a responsibility to protect her daughter, like any caring and loving mother.

- [10] The version of the appellant, which he maintained throughout the proceedings, that the mother of the complainant screamed at the complainant, interrogated her for over thirty minutes and instilled fear in her to falsely implicate him on something he did not do, is without merits. The court a quo correctly rejected that version. There is no indication of any collusion and/or conspiracy on the part of the state witnesses to trumped up charges against him. No one disputes that he went into the complainant's bedroom to fetch his cell phones that he gave to the complainant for temporary use. However, taking advantage of the fact that the mother is sleeping in their bedroom and seize the opportunity to sexually violate the child is one of the most horrendous things a child of that age may experience from her father who should protect her against such things.
- [11] The next issue that should be explored is the issue of penetration. If this offence was committed before 16 December 2007[9] the appellant would have no doubt been convicted of a different offence other than rape. Probably indecent assault.[10] Since then, the definition of rape, which is now a statutory offence, has developed. Sexual penetration is part of the definition of rape and it is described in section 1 of the Sexual Offences Act as follows:

"includes any act which causes penetration to any extent whatsoever by-

- (a) the genital organs of one person into or beyond the genital organs, anus or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person ..."

It is clear that any form of penetration, even if it is slight, is sufficient to fall under this definition. [11] Further, it is clear that penetration by 'any object' falls under the definition of sexual penetration, which includes penetration by a finger, and therefore constitutes rape. There is no doubt that the conduct of the appellant falls squarely within the definition of penetration aforementioned and it is rape.

[12] It is also clear that there was no consent from the side of the complainant. Even if there was it would not make the appellant's conduct less reprehensible because she was 11 years old during the incident.[12] The Sexual Offences Act defines consent as 'voluntary and un-coerced agreement.' As in any other offence, it is the state that must prove lack of consent by the victim. In *Otto v S*[13] the SCA held that:

"The onus rests on the State to prove all of the elements of the offence of rape, including the absence of consent and intention. That is so even where, as in this case, the version put to the complainant by the appellant's legal representative was a denial of any sexual contact with her."

The complainant testified that the appellant pulled off her panties and inserted his finger in her private part. The issue of consent is out of question. The state has proven beyond reasonable doubt that that the appellant's intention was very clear on that night, being to penetrate the complainant's sexual organ with his finger without her consent.

[13] When the learned Regional magistrate granted the appellant leave to appeal and remarked that another court may come to a different conclusion and that there are reasonable prospects of success, in my view, he was just trying to be fair to the appellant and give him the opportunity to have his case be reconsidered by another person. This is more in particular on the aspect of whether the mother of the complainant might have caused the injuries observed by the doctor on the complainant's genitalia. Unfortunately, that should not be the reason to grant leave to appeal. There was no compelling reason to grant leave to appeal as the facts are very clear. There is no basis for the submission of the appellant that the mother of the complainant might have caused the injuries on her genitalia. She did approach the issue sensibly and examined her daughter as she had a reasonable suspicion of wrongdoing. Neither her nor the complainant testified that she touched the complainant inappropriately and in a manner that may cause the noted injuries. Therefore, the court a quo quite correctly rejected any contrary suggestion to that effect. I cannot find any misdirection on the part of the learned magistrate.

[14] In conclusion, I am of the view that the appellant's appeal against conviction stands to fail as there is no basis to find any fault on the findings of the court a quo, including the conviction. In the premises, the following order should accordingly be made:

- (i) The appellant's appeal against the conviction is dismissed.
- (ii) The conviction on rape in contravention of section 3 of the Criminal

LM MANZINI

ACTING JUDGE OF THE HIGH

COURT LIMPOPO DIVISION:

POLOKWANE

I concur

MV SEMENYA

ACTING JUDGE PRESIDENT OF THE

HIGH COURT LIMPOPO DIVISION:

APPEARANCE:

For the Appellant: MR R Machovani

Legal Aid South Africa, Polokwane

For the Respondent: Adv. Mohale

Director of Public Prosecutions' Office Limpopo, Polokwane

[1] Act 32 of 2007

[2] See *S v Hadebe & others* 1998 (1) SACR 422 (SCA) p 645E - 6461; *S v V* 2000 (1) SACR 453 (SCA) p 4558; and *Y v S* (Case no 537/2018) [2020] ZASCA 42 para 45.

[3] See *S v Mhlongo* 1991 (2) SACR 207 (A) p 210D-Ff; *R v Hlongwane* 1959 (3) SA 337 (A) p 340H.

[4] See *S v Shackell* 2001 (2) SACR 185 (SCA) p 194 G-1.

[5] In this regard, see *Nedzamba v S* (911/2012) [2013] ZASCA 69; 2013

(2) SACR 333 (SCA) (27 May 2013) para 29; *S v MM* 2012 (2) SACR 18 (SCA) para 9.

[6] 2009

(1) SACR 552 (SCA) ([2008] 4 All SA 396) para 21.

[7] [2010] ZAECHGHC 18 (3 March

2010) paras 17 and 18.

[8] 2010

(1) SACR 78 (E) para 6.

[9] This is the date of commencement of the Sexual Offences Act. Since 16 December 2007 rape is now a statutory offence. Section 68(1)(b) specifically repealed common law rape. Section 3 of the Sexual Offences Act defines rape as follows: 'Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of "B", is guilty of the offence of rape.'

[9] This is the date of commencement of the Sexual Offences Act. Since 16 December 2007 rape is now a statutory offence. Section 68(1)(b) specifically repealed common law rape. Section 3 of the Sexual Offences Act defines rape as follows:

'Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of "B", is guilty of the offence of rape.'

- [10] Which is now a statutory offence and is provided by section 5 of the Sexual Offences Act and it is known as sexual assault.
- [11] See *S v MM* 2012 (2) SACR 18 (SCA) paras 21, 29, 31 and 32; In *S v Carter* 2014 (1) SACR 517 (NCK) paras 16 and 17, the court remarked about the misdirection regarding lack of appreciation that even slightest penetration was sufficient to constitute the crime of rape. This misdirection resulted in conviction of attempted rape and not of rape.
- [12] Note that section 57 of the Sexual Offences Act states thus: 'Inability of children under 12 years and persons who are mentally disabled to consent to sexual acts (1) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12 years is incapable of consenting to a sexual act. (2) Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act'.
- [12] Note that section 57 of the Sexual Offences Act states thus:
- 'Inability of children under 12 years and persons who are mentally disabled to consent to sexual acts
- (1) Notwithstanding anything to the contrary in any law contained, a male or female person under the age of 12
- years is incapable of consenting to a sexual act.
- (2) Notwithstanding anything to the contrary in any law contained, a person who is mentally disabled is incapable of consenting to a sexual act'.
- [13] [2017] ZASCA 114 para 16.

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