

SOUTH AFRICA / JUDGMENT

Moloi v S (CA45/2023) [2024]

ZANWHC 242 (18 September 2024)

[2024] ZANWHC 242

COURT

North West High Court, Mafikeng

BEFORE

Williams, Reddy

CASE / FILE NUMBER

CA45/2023

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IN

THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG

APPEAL CASE NO:

CA45/2023
REGIONAL COURT CASE
NO: RC2/22/2020

Reportable:

YES/NO
Circulate
to Judges: YES/NO
Circulate
to Magistrates: YES/NO
Circulate
to Regional Magistrates: YES/NO

In the matter between:

MOTLATSI PHILLIP
MOLOI
APPELLANT
and
THE
STATE
RESPONDENT

Coram:

Williams AJ & Reddy J
Date

heard:

21 June 2024
Date

handed down:

18 SEPTEMBER 2024

ORDER

On

appeal from: The

Regional Court Klerksdorp, North West Regional Division, (Regional

Magistrate Nzimande

sitting as court of first

instance):

1.

The appeal against conviction is dismissed.

JUDGMENT

WILLIAMS AJ

Introduction

- [1]

The appellant was tried in the Regional Court, Klerksdorp on a singular count of contravening section 3 read with sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007, in that it was alleged that the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant without her consent, who at the time was under the age of sixteen (16) years old. To this end, the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, (“the CLLA”) found application in that on conviction the court a quo was statutorily constrained to impose life imprisonment but for a finding that substantial and compelling circumstances existed in terms of section 51(3)(a) of the Criminal Law Amendment Act which made it permissible to deviate from same.
- [2]

On 14 September 2020, the appellant duly represented pleaded not guilty and denied the allegation proffered by the state. On 17 September 2020, the appellant was convicted and sentenced. The Regional Magistrate found that there existed substantial and compelling circumstances which warranted a deviation from the mandatory sentence of life imprisonment and imposed a sentence of twenty (20) years imprisonment. Two ancillary orders followed, firstly in terms of section 103(1) of the Firearms Control Act 60 of 2000, the appellant was declared unfit to possess a firearm, secondly, in terms of section 50(2) of SORMA, it was ordered that the particulars of the appellant be entered into the National Register of Sex Offenders. On 27 July 2023, the appellant was granted leave to appeal against the conviction and sentence. The appellant filed his notice of appeal with this court on 20 May 2024. The appellant constrains the appeal before this Court to his conviction.

The grounds of appeal

- [3]

The appellant advances the following grounds for assailing his conviction:
1.

The trial court erred in failing to apply the necessary cautionary measures when assessing the evidence provided by the complainant, who was both a single witness and a child witness at the age of 16.

2. The trial court erred in its evaluation of the evidence, resulting in a failure to properly assess whether the State had fulfilled its burden of proving the appellant's guilt beyond a reasonable

doubt.

- [4] The appellant's conviction and sentence arise from allegations that, on or about August 2019 and at or near Kanana, the appellant raped CM, who was born on 19 August 2004, and was 15 years old at the time of the incident.

- [5] The State Case

CM provided detailed testimony regarding the events that occurred, and her experiences related to the allegations.

The evidence of CM

- [6] At the time of the incident, CM was under sixteen years and was residing with her mother and stepfather. The appellant was known to CM as "Mabili" as they were staying in the same yard. The appellant was renting a room from her parents and lived next to them. There were other houses in the yard, but they were some distance from her and the appellant's house. Between June and August 2019, the appellant would come to her home when her parents were not there and ask her to come to his room to sleep with him. The appellant would come into her bedroom while she was sleeping. He

liked to touch her breasts. CM did not like the appellant due to his inappropriate behavior. The first time he requested her to sleep with him, he promised to give her money and a cell phone. She declined his advances and confided in her neighbour.

- [7] The appellant would usually call upon children to send them to the shop. It was a Saturday when the appellant called her and asked to send her to the shop. Her parents and siblings were not at home, and as far as she could remember, there was no one else in the yard. It was August, after her birthday, when the appellant called her into

his room to collect money in order for her to go to the shop. When she entered the room, she sat down on a chair that was positioned

about two steps from the appellant's bed. The appellant's room was an open-plan space divided into a kitchen and a bedroom. It had no windows and only one exit through the door. It was only the appellant and CM in the room. She was afraid of the appellant, but because he called her in a polite manner and said he wanted to send her to the shop, she went to him. She did not anticipate that the appellant intended to rape her. The appellant was near the pillows on the bed, either looking for money or pretending to. The next thing the appellant started pulling her by her t-shirt at her shoulders, saying that she had been avoiding him, but that he had finally got her. He then threw her onto the bed. As she attempted to get up, he pushed her back down and hurried to lock the door with a nail. She managed to stand up. He then started kissing her. The appellant removed her clothes while she was screaming and kicking. He threw her back onto the bed and

then got on top of her. She was crying, screaming and trying to push him off.

- [8] He applied Vaseline to her vagina and then pulled his pants and underwear down to his feet. She cried and she said no to the appellant. He inserted his penis in her vagina. The appellant then proceeded to rape her. The appellant was not using a condom. He raped her and told her not to tell, otherwise he would beat her. She then left to go to her friends. She did not tell anybody on that day because of the appellant's threat. A week after the incident, she eventually told her teachers that the appellant had raped her. Her teachers were the first people she talked to about the rape.

After telling her teachers her aunt was the next person she reported to. The teachers called the social worker and her aunt. The school principal reported the matter to the police. The police came some days after she reported the matter to her teachers and took her to the doctor. She decided to go and stay with her aunt. She did not tell her mother as she thought her mother would not believe her. She was raped before, when she was seven (7) years old, she reported to her mother about it, but her mother did not believe her.

Dr Mohapi

- [9] The doctor testified that she examined CM on 11 September 2019. She observed a healed scar on the posterior fourchette at 06h00. Her conclusion was that the scar was due to an assault to the genital area. The doctor confirmed a healed scar from 8 years ago would still be visible. This would depend on the object that was used to penetrate CM. If it was penetration by a male penis, she did not think one would still be able to see a scar. She confirmed that CM was vaginally penetrated and that the healed scar could be from the alleged penetration by the appellant. The doctor further confirmed that even with consensual intercourse a scar could be caused if there was no lubrication to the area prior to penetration.

Evidence by KM

- [10] According to her testimony, the appellant began renting a room in their yard on 26 December 2018, which was the day after Christmas. At that time her daughter, CM was still staying with them. During January 2019 her neighbour, who was living alone at the time, approached her and asked if CM would come and stay with her. CM was also eager to go and stay with the neighbour, so she agreed to the arrangement. CM would come to their house during the day and occasionally spend the night with them. CM was at school when her sister, CM's aunt told her on a Monday in August 2019 that CM was raped. CM moved to the aunt's house after the rape. When the aunt told her about the rape incident the matter was already reported to the police. Out of all the children in the yard the appellant would more frequently call on CM to send to the shop. CM did not have a cell phone and she never had unaccounted for money. CM never told her about the incident because according to her she was afraid to tell her. After speaking to CM about the incident, she went to confront the appellant. The appellant denied the allegations, but

she believed CM. She did not want to terminate the appellant's lease agreement because she feared that he might flee from the police. When CM told them about the appellant's advances towards her, they confronted him. She saw the appellant as a father figure to her and her children, trusted him and never had a problem when he sent her children to the shop.

Evidence of LM

[11] The aunt testified that CM is her niece and that she resides at a distance from CM's parental home. CM came to stay with her in August 2019. On 30 August 2019, while they were sitting and talking, the aunt observed that CM was unusually quiet, which was contrary to her normal talkative nature. When the aunt inquired about her sudden silence, CM revealed that she was experiencing a problem. It was then that CM disclosed that the appellant had raped her and that she was afraid to tell her mother. The aunt then suggested that they report the incident to CM's school and seek assistance. The following morning, they went to the school where CM explained the incident to her teacher. Following this, the aunt recommended that CM stay at her place.

The Defence case

[12] The appellant was the only witness in the defence case. He confirmed that he is known as Mabili. He stated that in August 2019, he was renting a room from CM's mother, which he shared with his brother. There were also two other shacks on the premises, which were rented by five other male individuals. CM is known to him; when he first began renting the room, CM was staying with the neighbours and would visit her parental home intermittently.

[13] The appellant testified that he and CM had a generally amicable relationship. However, he noticed a sudden change in her behaviour, observing that she became distant and moody. He mentioned that there were other children living on the premises, whom he would send to the shops, and that they occasionally entered his room.

[14] The appellant denied making any advances towards CM or engaging in any inappropriate behaviour. He specifically denied the allegation that, in August 2019, he called CM to his room under the pretext of sending her to the shop. He also stated that he never visited CM's house when she was alone; he only entered her home when it was necessary and when at least one of her parents was present.

[15] He explained that when CM and her mother did their laundry, he would ask them to do his as well. The only instances in which he gave CM money were for paying her to do his laundry or for sending her to the shop. CM would enter his room only when sent by her mother or when he called her to send her to the shop, at which time he would look for money to give her.

[16] The appellant denied having any conversation with CM about promising to buy her a cell phone or giving her cash. He was aware that CM did not have a cell phone. In September 2019, CM's mother informed him that he was being sought by the police in connection with

allegations that he and another individual had raped CM. Although he considered moving out of the rented room, CM's mother advised him to wait for further communication from the police. He also denied that prior to the alleged rape, CM's mother had complained to him about any advances that he made towards CM.

- [17] The appellant confirmed that when the allegations surfaced, CM was staying in Z Section and that she later moved to stay with her aunt. He denied all allegations of raping CM. He recalled that a neighbour had once expressed suspicion about a relationship between him and CM and suggested that he was sleeping with her. He also mentioned that there was a prior allegation of rape made by CM against another male individual.

Discussion

- [18] The findings of fact and credibility made by the trial court are accorded a presumption of correctness. This is because the trial court, unlike the appellate court, had the advantage of observing the witnesses directly and is thus in the best position to determine where the truth lies.

- [19] It is well established that an appeal court will be slow to interfere with the trial court's findings unless such findings are clearly wrong. In *S v Francis* 1991(1) SACR 198 (A) at paragraph [198 j - 199 a] it was held:

"The powers of the court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including the 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 a court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony."

- [20] In a criminal trial, the state bears the onus to prove the guilt beyond a reasonable doubt. An accused version cannot be rejected solely on the basis that it is improbable, but only once the trial court has found on credible evidence that the explanation is false beyond a reasonable doubt. See: *S v Van der Meyden* 1999(1) 447 (W) at 448 F-G. The corollary is that if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. See: *S v V* 2000 (1) SACR 453 (SCA) at 455B.

- [21] In *S v Hadebe Marais and others* 1997 (2) SACR 641 (SCA) at 645 e-f, Marais JA stated the following:

“Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that

restatement is unnecessary.”

[22] In respect of the rape, CM was a single witness. In addition, she was a child witness who was fifteen (15) years old at the time of the incident.

[23] In *Rex v Manda* 1951 (3) SA 158 (A), Schreiner JA explained that there is no rule of law that the evidence of a child must be corroborated, but that ‘[n]evertheless the principle has properly been acted upon that the evidence of young children should be accepted with great caution’.

[24] In *S v Stevens* (417/03) [2004] ZASCA 70; [2005] 1 All SA 1 (SCA) (2 September 2004) the Supreme Court of Appeal reiterated the law on single witnesses:

“[1] Courts in civil or criminal cases faced with the legitimate complaints of persons who are victims of sexually inappropriate

behaviour are obliged in terms of the Constitution to respond in a manner that affords the appropriate redress and protection.

Vulnerable sections of the community, who often fall prey to such behaviour, are entitled to expect no less from the judiciary.

However, in considering whether or not claims are justified, care should be taken to ensure that evidentiary rules and procedural

safeguards are properly applied and adhered to...

[17] 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.”

[25] To ensure that the evidence of a child witness can be relied upon as provided in s 208 of the CPA, it was posited in *Woji v Santam Insurance Co Ltd*, 1981

(1) SA 1020 (A) at 1028 B-D that a court must be satisfied that their evidence is trustworthy. It delineated factors which courts must consider when concluding that the evidence is trustworthy. These factors are guidelines and by no means an exhaustive category. In expounding on the concept of trustworthiness in the assessment of a child’s evidence the following was contended:

‘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 added).

[26] CM provided a detailed and coherent account of the events that occurred inside the appellant’s room. When questioned about why she entered the appellant’s room despite her fear of him, CM explained that she did not anticipate or expect that the appellant would rape her. Her decision to enter the room was thus based on a belief that no harm would come to her.

[27] CM only reported the incident after being prompted by her aunt. The precise timeline of CM’s report and the discrepancy between her claim that the teacher was the first person she informed and the aunt’s testimony that she was the initial confidant regarding the rape are not material issues in this case. The medical evidence, which confirmed that there was an assault to CM’s genital area, corroborated CM’s account that she was raped.

[28] In written heads of argument Counsel for the appellant placed much store on contradictions that existed in the evidence of CM when assessed individually and collectively in the case that was presented by the state. Our jurisprudence on the assessment of contradictions is

settled. "Contradictions per se do not lead to the rejection of witness' evidence; they may simply be indicative of an error. Not every error made by a witness affects his credibility; in each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness' evidence". *S v Mkhole* 1990 (1) SACR 95 (A).

- [29] In *S v Chabalala* 2003 (1) SACR 134 (SCA), the Supreme Court of Appeal pointed out that the correct approach in evaluating evidence is the following "to weigh up all the elements that point towards the guilt of the accused against all those elements that are indicative of his or her innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance is so heavily in favour of the state that it excludes any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party was decisive, but that can be only an ex post facto determination and a trial court should avoid the temptation to latch onto one obvious aspect without assessing it in the context of the full picture presented in evidence."
- [30] In evaluating CM's testimony, it was essential to view her evidence holistically. Notwithstanding minor contradictions, the overall evidence presented by CM was found to be satisfactory in all material aspects. The appellant's defence was primarily a bare denial of the allegation. He admitted to asking children to go to the shop and acknowledged that they would occasionally enter his room while he retrieved money for them. The appellant confirmed CM's account that she moved to stay with the neighbour after he began residing on the premises.
- [31] What must be borne in mind, however, is that the conclusion which is reached whether it be to convict or to acquit must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored. See: *S V Van Den Meyden* 1999 (1) SACR 447 (W) at 450.
- [32] The preponderance of evidence overwhelmingly supports CM's version of events over the appellant's bare denial. The assertion that the trial court disregarded the cautionary rule is unfounded. The trial court correctly applied the cautionary rules, referencing relevant legal authorities and applying same to the case.
- [33] In conclusion, I can find no fault in the trial court's acceptance of CM's testimony as credible and satisfactory. The appellant's case was characterized by a mere denial and attempts to exploit minor inconsistencies in CM's account. Therefore, the trial court's decision to reject the appellant's version as false and not reasonably possibly true was justified. The court a quo's findings of fact are clearly correct and are born out by the record.

Order

- [34] In the result, the following order is made:

Z WILLIAMS

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

I agree.

A REDDY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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