

SOUTH AFRICA / JUDGMENT

S v M.S (CC07/2025) [2025] ZAECKMKHC 32 (27 March 2025)

[2025] ZAECKMKHC 32**COURT**

Eastern Cape High Court, Makhandla

BEFORE

Cengani-Mbakaza

CASE / FILE NUMBER

CC07/2025

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****(EASTERN CAPE****DIVISION, MAKHANDA)****Case****No.: CC07/2025****Reportable:**

YES/NO

In the matter between:

THE
STATE
versus
M[...]
S[...]
ACCUSED

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] On 13 October 2024, a mother whose identity is being concealed to safeguard the best interests of her child summoned the police. This occurred after her 11-year-old daughter (the complainant) disclosed that she had been sexually abused by her paternal uncle who is also her mother's brother-in-law. The child reported that she was

sexually abused on multiple occasions.

[2] The family resided in a two-roomed house at Tambo village in the magisterial district of Chris Hani Municipality in Komani. As explained and depicted in the photographs (Exhibit "B"), the premises consisted of three structures namely, the main house with one bedroom and two separate flats. All the houses were built parallel to each other. At the time, the family members comprised of the complainant, the mother and her two siblings who were minors at the time. In the premises, there were two other male persons who were closely related to the family including the complainant's paternal uncle.

The charge

[3] As a consequence of this event, the Director of Public Prosecutions for the area of jurisdiction of the Eastern Cape in Makhanda, instituted criminal proceedings against the accused. The charge is in contravention of s 3 read with ss 1, 56 (1), 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (SORMA) and further read with the provisions of s 94 of the Criminal Procedure Act 51 of 1977 (CPA). The state alleges that on diverse occasions between June and 13 October 2024 the accused did unlawfully and intentionally commit acts of sexual penetration with an 11-year-old girl, by having intercourse with her per anum without her consent and against her will.

[4] The accused pleaded not guilty and through his legal representative Mr Solani from legal Aid-SA reserved the basis of his defence.

The evidence

[5] In their testimonies, both the complainant and her mother described the accused as a very helpful person who would assist the children with their homework specifically the complainant. Due to the mother's disability, the family relied on the support of the accused while her husband was away working in Cape Town. He would cook, clean the houses and do the laundry for the entire family. On occasions when the complainant's mother attended church or other community meetings, she would leave the children in the accused's care. The complainant's mother trusted the accused unconditionally due to his perceived reliability and trustworthiness within the family. The accused loved her children, so she

testified.

- [6] On a particular day, the accused drove the mother to church and later returned to pick her up, as she had a community meeting to attend. Following the meeting, the complainant approached her mother in a visibly distraught stage and begged her not to leave her in accused's care again. This is the stage the complainant disclosed that she had been raped by the accused more than once in her anus. Asked to explain the details of the alleged sexual assault, the complainant's mother testified that she did not ask how the incidents unfolded. Instead, she heard the complainant narrating the story to the police.
- [7] During cross-examination, it was suggested to her that the quarrel between the accused and the complainant on 13 October 2024, was the motive for the complainant to falsely implicate the accused. The complainant's mother confirmed that there was a stage where the accused had a quarrel with the complainant over who should wash the dishes. She explained, however that according to her observations, this was not a serious uproar.
- [8] Following the accused's arrest by the police, the complainant was taken to Doctor Ntombikayise Mangquzana (the Dr) for examination. It is common cause that the Dr possesses MBCHB which she completed at the University of Pretoria in 2022. In addition, she holds Medical Clinic Certificate which she obtained at Walter Sisulu University in
2012. Further to her qualifications, she did her internship at Livingstone hospital. Between January to December 2024, she did her community service in Komani. The Dr gave account of how she examined the complainant on 13 October 2024. As a motivation for her testimony, she submitted a medico-legal examination report (Exhibit "A") which she authored after the complainant's examination. The medical report reveals that the complainant's vaginal area was normal but her anal sphincter was dilated. The complainant's anus, so she explained, was opened as a result of penetration. She further noted the dilatation of the orifice. The orifice, so she testified, is allocated inside the anus. The Dr explained that her findings were consistent with a history of sexual assault which she obtained from the complainant.
- [9] Prior to the complainant's testimony, the state brought three unopposed applications. These were substantiated by a report (Exhibit "D") compiled by Ms Nomonde Stamper (Ms Stamper), a clinical psychologist. In summary, Ms Stamper reported that while the complainant is competent to testify, her observations suggest that the proceedings should not be conducted in an open court. The truth and correctness of Ms Stamper's report was never placed in dispute by the defence.
- [10] Consequently, I considered in the interests of justice to issue the following orders:
- (a) That, the proceedings be held in camera throughout the duration of the complainant's testimony.[1]
- (b) That, a close circuit television be used.[2]

- (c) Furthermore, I formally appointed Ms Luleka Mbenya, a qualified social worker to act as an intermediary and assist the child for the duration of the presentation of her testimony.[3]
- [11] As alleged by the complainant, the specificities of the rape incidents are as follows: On a certain day prior to the school's re-opening, she was left under the accused's care. Her mother and siblings had gone to buy food. The accused instructed her to sit on his lap, but she refused. She then proceeded to her mother's room to take a bath. While bathing, the accused entered the room. Despite the complainant's request for him to leave the room, he resisted. He only did so after a moment. The complainant finished bathing and got dressed. While she was brushing her teeth, the accused grabbed the toothbrush, pushed her onto to the bed and raped her. The complainant then cried out in pain.
- [12] On another incident, she was coming from school. Her mother and the siblings were not at home. She found the accused in one of the unused flats as she went to check the keys to the main house. After she found the keys, she went to the main house to undress the school uniform. Because she was tired, she decided to sleep on the bed. After waking up, she found the accused lying beside her. Despite resistance, he removed her underwear and forcefully engaged in anal intercourse causing her an excruciating pain.
- [13] The complainant testified that in both incidents the accused threatened her not to disclose the incidents to anyone. His intimidating demeanour and a scary face, so she explained, prevented her from reporting the abuse to her mother. Asked to explain what rape is, the complainant testified that it is when a male organ is inserted in the vagina or even anus. When asked to explain how she knew about the definition of rape, she testified that she learnt it from school.
- [14] Furthermore, in her testimony, the complainant informed the court that on 13 October 2024, prior to her mother's return from church, the accused approached her while she was bathing. Although no incident occurred on that specific day, she felt encouraged to disclose the encounter to her mother, in addition to the previous incidents.
- [15] After the closure of the state's case, the accused testified in his defence. He denied the allegations against him. According to his version, on 13 October 2024 he had a quarrel with the complainant over who should wash the dishes. In her anger state, the complainant said she would get him. After that incident, he accompanied the driver to take the complainant's mother to church. Thereafter he went to watch the proceedings of a soccer tournament.
- [16] Later that day, he returned home and saw the complainant and her mother leaving the premises. Unexpectedly, the police entered the premises and informed him that he was under arrest. The accused suggested a motive for the complainant to falsely implicate him, stating that the quarrel he had with the complainant that morning might be one of them.

[17] When questioned about the Dr's findings in the medical report, the accused testified that without DNA analysis, it cannot be concluded that he raped the complainant. He further pointed out that although the Dr documented the complainant's injuries, the Dr's report did not directly implicate him in the commission of the rape crimes. With this evidence, the defence closed its case.

The issues

[18] Considering the fact that the rape incidents are not in dispute, the focal issue for determination is the identity of the perpetrator.

The legal principles

[19] In our law, the basic principle is that the state must prove the guilt of the accused beyond reasonable doubt. In order to be acquitted, the version of the accused need only be reasonably possible true.

[20] One should acknowledge that the complainant is a single witness to the rape incidents. She is also a child and therefore her evidence must be approached with caution. Fortified by the provisions of s 208 of the CPA, our courts had on many occasions convicted the accused on the evidence of a single witness. The section reads as follows:

'An accused may be convicted of any offence on the single evidence of a competent witness.'

[21] Although there is no standardised test or formula to apply for evaluating the credibility of a single witness's evidence, the Appellate Division[4] provided guidance. According to the guidance, the court is required to examine the evidence, weighing its strengths and weaknesses, then establish whether it is reliable and trustworthy, despite its flaws and contradictions, if any. Furthermore, the exercise of caution cannot replace the exercise of common sense. It is noteworthy that the evidence of a single witness must be clear and precise in all material aspects.[5]

[22] To test the reliability of the evidence of a child witness, as stipulated in terms of s 208 of the CPA, the SCA established a legal precedent in *Woji v Santam Insurance Co Ltd (Woji)*. [6] In terms of *Woji*, the court must be satisfied that the evidence of a child is trustworthy. In establishing a guiding principle, 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.'*[italics added]*.

[23] Although our courts have established the law for evaluating the evidence of a single witness and a child, it has never been a standing rule that the evidence of a child witness must be corroborated.[7] The Supreme Court of Appeal in *ICM v The State*[8] referred to *Vilakazi v S*[9], and cautioned against what is commonly known as the double cautionary rule. The SCA held that the double cautionary rule should not be used to disadvantage the child, the evidence of a child must be evaluated in totality.

[24] In the past, the courts applied cautionary rules more stringently in sexual offence cases, often viewing victim's testimony with undue scepticism. However, the SORMA aims to change this narrative, deeming it improper for the courts to be overly doubtful or sceptical when evaluating the evidence merely because of the sensitive nature of the crime. Section 60 of SORMA which is framed in discretionary terms provides that:

'The court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court with caution, on account of the nature of the offence.'

Therefore, the facts presented should be considered as a whole without any prejudice to either of the parties involved. The ultimate test being proof beyond reasonable doubt.

Discussion

[25] With these principles in mind, I now turn to evaluate the evidence that has been presented in the proceedings. To begin with, I am obligated to weigh up all the elements that point towards the guilt of the accused against all those which are indicative of his innocence. In addition, I must take a proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides. Having done all of that, it is significant decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.[10]

[26] Although Mr Solani was very brief in his closing remarks, he bemoaned the complainant's failure to timely report the incidents to her mother. This reminds me of what JR Milton[11] says in his body of work. At page 461, the learned author says, it is a well-recognised fact that many survivors of rape exhibit reluctance to report the incident at a first available opportunity. Research on the impact of violence including rape on women has consistently shown that victims exhibit unique emotional response to the trauma.[12] The common immediate reactions include frozen fright, dissociation, shock, numbness and disbelief.[13]

[27] In this instance, it is crucial to consider the uncontested evidence of the complainant where she stated that the accused exhibited an intimidating and a scary face after the incidents, warning her that if she disclosed what had happened, he would never assist at home again. In any event s 59 of SORMA cautions against drawing of a negative inference from a complainant's delayed reporting. This section which is also couched in discretionary terms states that no inference can be drawn solely based on the delay between the alleged incident and its reporting. Considering these principles and the

facts

of this particular case, the complainant's actions and her explanation after the rape incidents is plausible and cannot be

faulted.

- [28] Despite the accused's suggestion that the absence of DNA evidence linking him to the crimes is critical, it is remarkable to recognise that the facts of this case are distinguishable from the principles of identification that are encapsulated in *S v Mthethwa*.^[14] Although caution is imperative, the accused is well-known to the complainant. They stayed under the same roof and the incidents occurred during the day.
- [29] Upon examination of the evidence before me, I find the complainant to be a credible and reliable witness. Her narration of events was clear and precise. Despite being subjected to cross-examination, she remained steadfast in her account. Throughout the criminal justice process, she consistently maintained that the accused was the perpetrator of the rape crimes. Moreover, the undisputed facts of the case further enhance her credibility as a witness. Notably, when she felt compelled to reveal the accused's actions, she did so with honesty.
- [30] The suggestion by the accused that the complainant's accusations are as a result of the quarrel he had with her on 13 October 2024 are not supported by the facts. The complainant honestly testified that on 13 October 2024, despite the accused's attempts to repeat the offence, nothing happened. Therefore, the quarrel over who should wash the dishes is separate and distinct from the rape incidents.
- [31] I acknowledge that the absence of a motive to lie should not be used to intensify the complainant's credibility and prejudice the accused.^[15] However, each case is judged on its own facts. In instances where the accused has spontaneously suggested a motive for the complainant to falsely implicate him, as in the present case, it is significant to make a finding.
- [32] Considering her age, the complainant demonstrated a remarkable maturity in her description of the accused. She classified him as a very helpful person at home often assisting her with her homework and other tasks. This suggests that she did not hold any pre-existing grudges against him. After consideration of the facts presented, I find no reason for the complainant to shield the real culprit and falsely implicate the accused. The evidence and probabilities overwhelmingly point to the accused as the perpetrator of the rape crimes. Therefore, the state has proved the guilt of the accused beyond reasonable doubt. In the result, the accused's bare denial of the allegations is not reasonably possibly true.

Verdict

- [33] The verdict is pronounced as follows:

1. The accused is found guilty to the crime of rape in contravention of s 3 read with ss 1, 56(1), 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters Amendment Act, 32 of 2007, read with s 94 of the Criminal Procedure Act 51 of 1977 and further read with the provisions of s 51(1), Part 1 of Schedule 2, of the Criminal Law Amendment Act 105 of 1997 as charged.

N CENGANI-MBAKAZA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the state :

Adv Van Rooyen

DPP, Grahamstown

For the accused : Adv Solani

Legal Aid-SA, Grahamstown

Date Heard : 24, 25, and 26 March 2025

Date Delivered : 27 March

2025

[1] Section 153 of the CPA.

[2] Section 158 of the CPA.

[3] Section 170A of the CPA provides, '(1) Whenever criminal proceedings are pending before any court and it appears to the court that it would expose any witness–

(a) under the biological or mental age of eighteen years;

(b) who suffers from a physical, psychological, mental or emotional condition; or

(c) ... to undue psychological, mental or emotional stress if he or she testifies at such proceedings, the court may, subject to subsection

(4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

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(4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

[4] S v Sauls 1981(4) 172 (A) at 180E-G.

[5] R v Mokoena 1932 OPD 79 at 80. “Satisfactory in all respects” should not mean the evidence line-by-line, but in the overall scheme of things ..., see McKenzie v S (A143/2023) [2025] ZAWCHC 132 (6 March 2025) at para. 16.

[6] 1981(1) SA 1020 (A) at 1028B-D, Maila v The State (429/2022) [2023] ZASCA 3 (23 January 2023) at para 17.

[7] R v Manda 1951(3) SA 158 (A) at 163, The law of South Africa vol 9 at 33 para 560.

[8] (692/2021) [2022] ZASCA 108 (15 July 2022 at para [22].

[9]

[2016] ZASCA 103.

[10] Shiki v S [2020] ZASCA 92 (SCA).

[11] JR Milton South African Criminal Law and Procedure Vol ii 3 ed at 461.

[12] S Bollen et al ‘Violence Against Women in Metropolitan South Africa: A study on impact and service delivery’ Institute for Security Studies (1999) Monograph No.41.

[13] S Ullman & R Knight ‘Women’s Resistance Strategies to Different Rapist Types’ (1995) 22 No 3 Criminal Justice & Behavior 263,280.

[14] 1972(3) SA 766 AD.

[15] ICM fn.7 above at para 35.

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