

SOUTH AFRICA / JUDGMENT

S.M.M v S (A209/2019) [2021] ZAFSHC 190 (26 July 2021)

[2021] ZAFSHC 190

COURT

Free State High Court, Bloemfontein

BEFORE

N.M. Mbhele, C. Reinders

CASE / FILE NUMBER

A209/2019

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case No: A209/2019

In the matter between:

S.M.M Applicant

And

THE STATE Respondent

CORAM:

MBHELE J et REINDERS J

JUDGMENT BY: MBHELE J

HEARD ON: 19 APRIL 2021

DELIVERED ON: 26 JULY 2021

- [1] The appellant was convicted by the Regional Magistrate, Bloemfontein, of raping a 12-year-old complainant. He was sentenced to life imprisonment on 26 August 2019. Aggrieved by the sentence, the appellant exercised his right to automatic appeal, due to the sentence of life imprisonment imposed, and approached this court on appeal. In the notice of appeal, heads of argument as well as submissions before us, the appellant's attack on the conviction returned by the learned regional magistrate in the trial court is premised upon the following

main contentions: (1) that the learned regional magistrate failed to take adequate cognisance of the cautionary rule applicable in evaluating the evidence of complainants who are minors and single witnesses;

- (2) more pertinently that the learned regional magistrate failed to accord due weight to alleged shortcomings in the evidence of the complainant. It is the appellant's contention that the court erred in accepting the state's evidence that was marred with contradictions and rejecting the appellant's

version which, in his view, was reasonably possibly true.

- [2] The complainant who was wheel chair bound and unable to speak, was admitted at P[.....] Hospital [(.....)] following a stroke attack. The appellant was employed as a health worker at Pasteur.
- [3] J.H.V.P, a Clinical Psychologist employed at P[.....] hospital, testified that the complainant was admitted to the hospital for rehabilitation on 03 December 2014. He assessed her for the first time on 4 December 2014. The procedure is that newly admitted patients must be assessed within 24 hours of their admission into the institution. He came back for follow up assessment on 08 December
2014. During both consultations the complainant was unable to communicate verbally, she could not walk and was confined to a wheelchair. She could hear but was unable to express herself verbally because of complications associated with stroke. She responded to verbal communication in writing. The purpose of the second visit was to build a rapport with the complainant and to assess the impact the stroke had on her cognitive ability. While asking questions to test the complainant's cognitive function, the complainant wrote on a piece of paper that she was raped. The complainant thereafter became emotional and cried uncontrollably that it caught the attention of other workers in the unit. He then called for the intervention of a social worker and a speech therapist. The speech therapist asked her who raped her and she wrote Steven on a piece of paper. He thereafter withdrew from the scene and handed it over to the Social Worker, S.L and the speech therapist, Lientjie Aranda.
- [4] The complainant tendered her testimony in writing through an intermediary. She confirmed that she was admitted at P[....] Hospital. She testified that she was raped by S.M.M who was employed to bathe and feed males at the hospital. She identified him by his nametag. When asked what rape is, she responded that she does not know but explained that S.M.M hurt her in her vagina with his finger and penis. In cross examination she explained that S.M.M inserted his finger and penis in her vagina when in the room and in the toilet. According to her, this incident happened on 05 December 2014 at around 15h00.
- [5] Johanna Christina Fourie testified that she was employed as the hospital manager at P[.....] since

2007. P[...] is a physical rehabilitation institution for patients with spinal cord injuries, stroke and other neurologically related diseases. The appellant, S.M.M, was employed as hospitality attendant whose responsibility was to attend to patients' basic activities like bathing, eating and wheeling them to the dining hall. He was on duty on the date of the alleged incident, 05 December 2014. He was on a shift that started at 07h00 and ended at 19h00. He was posted on beds 1 – 15 on the second floor. There were 3 male hospitality attendants on 05 December 2014 viz. Welcome Shuping, who was posted on the first floor, P.M who was working at the gym and the appellant. The complainant was on bed 18 which was situated on the second floor, in the same corridor as beds 1-15. Although female patients are attended to by female nursing staff there are times when male hospitality attendants are asked to help attend to female patients. Their assistance is limited to brushing their teeth, feeding them and taking them to the dining hall. She received a report from K.V, therapy manager that the complainant reported that she was raped. She followed up on the complainant and she confirmed in writing that she was raped by S.M.M. When it was put to her that the complainant had history of confusion and emotional instability she responded that at the time of the report the complainant gave a clear account of what happened and did not look confused.

[6] P.V.K started working at P [.....] hospital in 2013 as a health care worker. The appellant was also a health care worker. They were both employed through an employment agency called Carisma. On the date of the incident she was posted on beds 16-34 while the appellant was posted on beds 1- 15. The complainant was in a room where beds 18 -19 are placed. She was in charge of the complainant on the date in question. The appellant assisted her to take the complainant to the dining hall and back. When the appellant brought the complainant back from breakfast at around 08h00 she was crying and emotional. When asked what was wrong she wrote on a paper that she wanted to see her mother. Ellen took her away for a few minutes to comfort her. Later she was taken by the appellant to the dining hall for lunch. When she came back she was still in an emotional state. The appellant took her away and they came back after a few minutes. She was still crying when the appellant brought her back to

the room. This witness was not cross examined.

[7] The appellant denies that he raped the complainant. His version is that he saw the complainant in the dining hall in the morning during breakfast. She was being fed by a dietician. The complainant waived her hand at him when she saw him. It was not the first time that the complainant was admitted at the hospital. He went to greet the complainant and proceeded to his ward. A few minutes later they heard the complainant screaming in the dining hall. They rushed to the dining hall where they found her crying. When they asked her what was wrong she wrote mother on a piece of paper. They all assumed that she was missing her mother. She was then taken to a physiotherapist for her daily exercise. In the afternoon he saw the complainant sitting with Khoarai in the passage crying. He then offered to push her out of the building for fresh air. He took her out for a few minutes and

returned her back to Khoarai. In the evening just before they knocked off he pushed the complainant's wheel chair to a nursing station to give a report on her condition for the day. That was the last time he was in contact with the complainant. He later on received a report from the night shift staff that the complainant was crying and emotional for the whole night.

- [8] On the 07th and 08th December he was not at work because it was the weekend of his wedding. He admits that the complainant identified him at the Identification parade as the person who raped her.
- [9] E.K was called on behalf of the appellant. She basically could not remember what happened on the date of the incident. She was not even certain whether she was at work on the date in question.
- [10] The medical report shows that the complainant sustained genital injuries which are consistent with traumatic vaginal penetration. Physical examination indicates that the complainant was still a virgin before the vaginal penetration. The report, further, shows that the penetration occurred within 3 days of the date of examination of the complainant.
- [11] The trial court evaluated the evidence and came to the conclusion that the state witnesses were truthful and rejected the version of the appellant as improbable. It is trite that factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. The acceptance by the trial court of oral evidence and conclusions thereon are presumed to be correct, absent misdirection. (See *S v Francis* 1991 (1) SACR 198 (SCA) at 204 e-d.) A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong. (See *R v Dhlumayo & another* 1948
- (2) SA 677 (A) at 705-706).
- [12] It is well established that where a trial judge makes findings on credibility of a witness, the court of appeal will take into account

that the judge had the advantage of seeing the witnesses whilst testifying, which benefit is not available to the court of appeal. The powers to evaluate and appraise evidence belong to a trial court and its conclusions cannot be interfered with simply because a court of appeal would have come to a different finding or conclusion. The trial court's advantage of seeing and hearing witnesses places it in a better position to assess the evidence than a court of appeal, and such assessment must take precedence unless there is a clear and demonstrable misdirection. The Supreme Court of Appeal held as follows in *S v Pistorius* 2014 (2) SACR 315 (SCA) par 30:

'It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another* 1948

- (2) SA 677 (A) at 706; *S v Kebana* 2010

- (1) All SA 310 (SCA) para 12.... As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings.'
- [13] Mr. Khoelenya, on behalf of the appellant submitted that the trial court failed to exercise the necessary caution when dealing with the evidence of the complainant. The court in *S v Dyira* (2010
- (1) SACR 78 (ECG) at para [6]) remarked as follows when it dealt with the need to approach the evidence of a single child witness with caution:

"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 (A) at 162E – 163E). The courts should be aware of the danger of accepting the evidence of a little child because of potential

unreliability or trustworthiness, 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 a 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 (*S v Viveiros* [2000] 2 All SA 86 (SCA) para2). 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 (Schmidt Law of Evidence 4 -7)."

- [14] Diemont JA in *Woji v Santam Insurance Co. Ltd*, 1981(1) SA 1020(A) at 1028A-E, laid down the following guidelines when dealing with the evidence of child witnesses:

"The question which the trial court must ask itself is whether the young witness's evidence is trustworthy. 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. 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 questions put, and to frame and express intelligent answers' There are other factors ... Does he appear to be honest – is there a consciousness of the duty to speak the truth?"

- [15] Section 208 of The Criminal Procedure Act permits the conviction of the accused on the evidence of a single witness. The conviction may follow once it has been established that such evidence is satisfactory in material respect See *R v Mokoena* 1956(3) SA 81 (AD). It should also be reliable and trustworthy.
- [16] Application of caution is necessary in assisting the court to decide whether the guilt of the accused has been established beyond reasonable doubt. It has been established that caution must not be allowed to displace the exercise of common sense.
- [17] In *S v Sauls and Others* 1981 (3) SA 170(A) Diedmont JA explained how the cautionary rule should be applied by trial courts. The learned Judge said (at 180E):
- ‘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 Pumpff JA in *S v Webber* 1971 (3) SA 754(A) at 758). 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.’
- [18] The trial court warned itself of all the dangers involved in the evidence of a single witness and applied the cautionary rule accordingly.
- [19] The complainant’s evidence finds corroboration in the evidence of Dr. Van Zyl whose examination revealed history of sexual assault within 72 hours of examination and found that the injuries sustained by the complainant are consistent with traumatic vaginal examination. The evidence of Van Der Poel, Fourie and Khoarai revealed that there is only one S.M.M in the hospital’s employ. Although there were 3 male attendants on duty on the date in question the appellant was the only male posted on the floor where the complainant was. The complainant identified her attacker as the appellant whom he pointed out at the identification parade.
- [20] The medical evidence proves that the rape occurred after the complainant was admitted at P[.....]. I am unable to find any demonstrable or clear error on the part of the trial court to justify interference with its credibility findings. The trial court was correct in its assessment of evidence and credibility findings. I cannot find that the trial court erred in finding that the appellant’s version is inherently improbable and fell to be rejected.
- [21] I have noted that the trial court convicted the appellant of two charges of rape. The appellant was charged of one count of rape. Although the evidence shows that the complainant was penetrated with a finger and a penis, the appellant pleaded to only once count of rape of a minor. It was wrong for the learned Regional Magistrate to convict him of a second charge which he never pleaded to. The conviction on one count of rape ought to be upheld.

- [22] The sentencing powers are pre-eminently within the judicial discretion of the trial court; the court of appeal should be careful not to erode such discretion. The court sitting on appeal will interfere if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate. See *S v Rabie* 1975 (4) SA 855 (A) at 857 D-E; also *S v De Jager and Another* 1965 (2) SA 616 (A).
- [23] When sentencing, the court must consider the main objectives of punishment, being the prevention of crime, retribution, the deterrence of criminals, and the reformation of the offender. Simultaneously, the court must strike a balance between the crime, the offender and the interest of society.
- [24] The offence committed by the appellant is undoubtedly a serious one. The complainant spent time in hospital previously and got comfortable around the appellant. The complainant trusted him and he, in turn, took advantage of her fragile state. The complainant was violated in a place she considered her sanctuary and was supposed to feel safe at.
- [25] It has been generally accepted that rape is not about sexual pleasure but it is used as a tool to exert power over the victim. See (*Masiya v Director of Public Prosecutions Pretoria and Another* CCT54/06)
- [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (10 May 2007) 13 where the following was said:
- 'Today rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy. In the words of the International Criminal Tribunal for Rwanda the "essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.'
- [26] The fact that the Constitution regards a child's best interests as of paramount importance must be emphasized. It is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children unless unjustifiable. Whilst children have a right to *inter alia*, protection from maltreatment, neglect, abuse or degradation, there is a reciprocal duty to afford them such protection. Such a duty falls not only on law enforcement agencies but also on right thinking people and, ultimately the court, which is the upper guardian of all children. See *De Reuck v DPP* WLD 2003 (1) SACR 448 (WLD) at 457 par 10
- [27] In *S v Abrahams* 2002 (1) SACR 116 (SCA) Cameron JA remarked as follows with regards to sexual violation of minor children in the domestic sphere.

“of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter’s

best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his

daughter’s body constitutes a deflowering in the most grievous and brutal sense.”

[28] It is clear from the above dicta that the rape of minor children must be viewed in a serious light, worse if committed by those entrusted with the care and safety of the child. P[....] hospital had become a home for the complainant

who needed help to turn her life around. This is a place where the complainant was supposed to be cared for protected and supported to full recovery. The appellant took advantage of the complainant’s vulnerability and dependency. It is apparent that he bargained on the complainant’s health status and her inability to speak for indefinite silence. The complainant was, however, clever enough to call for help timeously and put a stop on the appellant’s conduct.

[29] It is clear that rape is the ultimate degradation of another human being. The effects of sexual violence go far beyond individual survivors, it affects their loved ones as well as impacts on communities and the society at large. Sexual violence against children evokes communities’ indignation and often prompts them to resort to self-help to keep their children safe. The courts have to serve as a buffer between the society and their tormentors. The sentences imposed must send a clear and unambiguous message that sexual violence has no place in a civilized society.

[30] The appellant was 30 years at the time of the commission of the offence and 32 years old during sentencing. He was a first offender and married with three children. He was not employed at the time of sentencing having lost his job after the commission of the offence. His wife is employed as a nurse.

[31] It is so that sentence must be tailored to suit the offender, the crime and the circumstances surrounding the case. Punishment must be proportionate to the offence. The appellant brutally took away the innocence of a young child who was dependent on the services he offered for her daily survival. There are no exact words to express the brutality of the appellant’s actions. The offence calls for a lengthy jail sentence.

[32] When weighing up the mitigating factors against the aggravating circumstances, this matter as well as the interest of community, I am not persuaded that there is a just cause to interfere with the sentence imposed by the trial court. The appeal ought to fail.

[33] Order

1. The appeal against conviction succeeds only to the extent that the appellant is convicted as charged and the appeal against sentence is dismissed.

2. The sentence is upheld

N.M. MBHELE, J

I concur

C. REINDERS, J

On behalf of the appellant: Mr. T.J Kgoelenya

Instructed by

Kgoelenya Attorneys

BLOEMFONTEIN

On behalf of the respondent: Adv. Sekhonyane

Instructed by:

Director: Public Prosecution

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