IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION PIETERMARITZBURG

CASE NO:AR363/17

In the matter between:

HAILE ANTIONEW GUTEBO **APPELLANT**

and

THE STATE **RESPONDENT**

DRAFT JUDGMENT

Background

[1] The appellant was charged with one count of rape read with the minimum sentencing provisions contained in sections 51, 52 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997. It was alleged that on 25 March 2013 at or near Manzana, he unlawfully and intentionally inserted his genital organs into the genital organs of the complainant, Ms. Nokukhanya Mtshali. According to the charge sheet, the minimum sentencing provisions were applicable because the complainant at the time of the commission of the offence was suffering from a mental disability. The appellant pleaded not guilty. After a trial in the Regional Court at Madadeni, the appellant was convicted of rape as charged and sentenced to 18 (eighteen) years imprisonment. Leave to appeal against conviction and sentence was refused by the presiding magistrate. However, the High Court, on petition, granted leave to appeal against both the conviction and sentence.

[2] It was common cause that the appellant was at the home of the complainant on 25 March 2013. The complainant knew the appellant from his previous visits to her house and therefore no issues about mistaken identification arise. The allegation of rape rests almost entirely on the testimony of the complainant. No male DNA was obtained from the samples taken from the complainant.

[3] In essence the appellant acknowledges that he was alone with the complainant at the latter's home on 25 March 2013. He asserts that he went there in order to negotiate with the complainant's parents to allow him to leave his container on their property. He had previously approached the complainant's parents with this request. The appellant is of Ethiopian descent and sells bed sheets and bedding covers. He denies having sexual intercourse with the complainant.

The issues

[4] The learned magistrate correctly identified that issues as follows:

1. Did the appellant have sexual intercourse with the complainant?
2. Is the complainant suffering from a mental disability as defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007?

[5] The court *a quo* accepted that it was obliged to approach the evidence of a single witness with caution and recognized that it could only convict if the evidence of the witness was clear and satisfactory in every material respect. It was clear that either the complainant or the appellant was lying as their versions were irreconcilable.

A brief overview of the evidence led and the reasoning of the court *a quo*

[6] The complainant testified that the appellant had sex with her without her consent on the 25 March 2013. The complainant's version was that the appellant used a condom when raping her on the 25 March 2013 and then tied it and put it into his pocket. She testified that while this was occurring, the neighbour, Ms JD Zulu came and knocked on the door. According to the complainant, she was instructed by the appellant not to open the door. Her evidence was that after the rape she left the appellant in the house and went to the home of Ms Zulu to return a comforter. She returned to the house with Ms Zulu. She also stated that she had also been previously raped by the appellant a day or so earlier.

[7] The court *a quo* accepted the version of the complainant largely because of the corroboration provided by the evidence of Ms. Zulu. Ms Zulu testified that she became suspicious of a vehicle parked outside the complainant's house which she claimed was parked there for more than an hour. She went to the house of the complainant, knocked on the door and left after not receiving a response. When the complainant came to see her, she enquired about the identity of the driver of the vehicle and then went with the complainant and other members of the community back to the house. The appellant when confronted about the purpose of the visit stated that he was there to see the complainant's mother and denied that he had raped the complainant.

[8] One of the State's witnesses, Mr SM Biyela, a psychologist, who has a master's degree in clinical psychology, testified that he assessed the complainant on the 2 August 2013. He testified that while her biological age at the time of the examination was 20 years, her mental age was between 10 and 13 years months. According to Mr Biyela, the complainant functioned within a borderline IQ range of between 70 to 79. [1]His conclusion was that the complainant was not intellectually disabled nor mentally retarded. However Dr Magubane, a psychiatrist, took a different view. She also examined the complainant who was a known patient. She testified that the complainant's brain was not functioning as that of a normal adult of her age. She also confirmed that the complainant had an IQ of between 70 and 79 and described this as 'dull normal'.[2] Her testimony was that the complainant was mildly retarded. When questioned by the Court, Dr Magubane confirmed that in her opinion, the complainant was mentally disabled as defined in section 1 of Act 32 of 2007.

[9] The appellant testified that on 23 March 2013, he went to the complainant's home and asked to see her mother to follow up on a request that he had previously made to leave his container on their premises. According to the appellant, the complainant informed him that her mother was not home and he waited for about 5 minutes. He testified that while he was waiting he saw Ms Zulu peering through the window and that she then entered the house and an argument ensured. Ms Zulu accused him of having sex with the complainant which he denied. According to the appellant, the complainant was present and did not at that stage say anything. He

[1] . Page 80 of the Transcript
[2] . Page 85 of the Transcript.

denied having sex with the complainant and stated that he asked Ms Zulu to summon the police if she believed that he had committed a crime.

[10] In coming to its conclusion, the learned magistrate in the Court a quo noted that if the appellant had only been at the complainant's home for 5 minutes as he claimed, Ms. Zulu was unlikely to have become suspicious and her version that the appellant's vehicle was parked outside the house for more than one hour was more likely. The court appeared to take the view that the medical evidence of Dr. Kunene corroborated the complaint's version regarding penetration. Ms Zulu testified that she had seen the pajamas that the complainant alleged was torn when the appellant raped her. The court *a quo* was of the view that the testimony of the torn pajama was also crucial as it provided corroboration and the court took the view that the testimony of the torn pajama was not seriously challenged in cross-examination. The magistrate also questions why there was no response when Ms. Zulu knocked on the door and the court posed the question –what were the complainant and the appellant doing in the house when Ms. Zulu knocked on the door and received no response. The court took the view that the kitchen door must have been locked as Ms. Zulu knocked on it and found implausible the appellant's account that the kitchen door was open.

[11] The court *a quo* was also of the view that Ms. Zulu was an impressive witness and classified her as an independent witness. The magistrate appeared less impressed with the appellant as a witness but accepted that his being a foreigner and having to testify through a foreign interpreter may have contributed to his hesitant manner and to his requests for questions to be repeated. The magistrate was of the view that the appellant's version was 'hard to swallow'. The court a quo preferred the evidence of Dr Magubane over the testimony of Mr Biyela. It was primarily for these reasons that the court *a quo* convicted the appellant of raping a mentally disabled person.

Analysis and conclusion

[12] There are a number of issues of concern with the reasoning and conclusions reached by the presiding officer.

The medical evidence does not materially advance the case of the State. In *S v Ramulifho*[3], the SCA held:

> 'In every rape case the objective evidence provided by the medico legal examination of the complainant is essential to determine where the truth lies. The evidence must always be carefully scrutinized by the presiding judicial officer, as the examination and the injuries found will usually determine the outcome of the case trial. If the results of the examination show that a sexual assault has taken place, the accused's denial of intercourse will usually be rejected. If the results of the examination are inconsistent with the complainant's description of a sexual assault, the accused's denial of intercourse will usually be accepted as reasonably possibly true.'

On the version of the complainant, she was raped by a boy and indicated that this occurred before, on her version, the appellant raped her for the first time. Except for saying that the boy raped her before the appellant, she provided no further detail as to when this occurred. The most she could say was that it was weeks ago. She testified that the earlier rape by the appellant occurred on the previous day.

[13] The medical and gynecological examination conducted on the complainant by Dr. N Kunene indicated that there were some scratches on the urethral orifice and an abrasion on the *labia majora*. The final conclusion was that 'within normal limits can't exclude the possibility of sexual assault.' The medical examination was conducted and the report was compiled on 26 March 2013, a day after the rape was alleged to have occurred. The medical evidence does not state with a reasonable degree of certainty that the complainant was raped or sexually assaulted recently or close to the time of the examination.

[14] During Dr. N Kunene's testimony, when asked whether she could estimate when these abrasions were likely to have occurred, she replied, 'Well, now I cannot tell you because abrasions change, they start from pink, some they are very deep, they are green, they change to brown as it heals. So I cannot remember today what colour were they at that time, but I could see abrasions.'[4] It is clear she could provide no medical evidence as to when the abrasions occurred. The presiding officer concluded that 'the complainant's version regarding penetration is corroborated by Dr.

[3] *S v Ramulifho* 2013 (1) SACR 388 para 11.
[4] Page 69 of the transcript.

Kunene's findings'.[5] Given the lack of clarity as to when the abrasions occurred and the possibility that it could have been as the result of the previous rape by the unknown person, the most that could have been said was that the possibility of sexual assault at some stage could not be excluded. The medical evidence does not undermine the accused version that he did not rape the complainant on 25 March 2013. It certainly does not corroborate the complaint's version of events on what happened on 25 March 2013. This should have been recognized in the judgment of the court *a quo*. Just stating that the medical evidence corroborates the complainant's version regarding penetration does not convey the full and accurate picture.

[15] The court found that reference to the torn pajamas of the complainant provided corroboration. There was no reference to the torn pajamas in the testimony of the complainant and it surfaced only during the testimony of Ms. Zulu. The court thus relied on the impression that Ms. Zulu formed from the torn pajamas. Ms. Zulu was of the view that those were the pajamas that were torn by the appellant during the alleged rape. Importantly, no exhibit was handed to the court. Thus neither the court, the representatives of the state or those of the appellant examined the pajamas. The appellant was thus precluded from cross-examining Ms. Zulu meaningfully on whether the appellant tore the pajamas during the incident. Without the pajamas being produced as an exhibit, the impression formed by Ms. Zulu could not be taken to corroborate the version of the complainant. It is also incorrect to state that the aspect of the torn pajamas was not seriously challenged during cross-examination. During the cross-examination of Ms. Zulu,[6] it was put to her that the issue of the torn pajamas was not mentioned by the complainant and neither was there any exhibit of the pajamas taken by the police. The legal representative of the appellant referred to the issue of the pajamas as being lies. It was incorrect of the presiding officer to say that this aspect of the evidence was not seriously challenged in cross-examination. The mention of the torn pajamas by Ms. Zulu should not have been deemed to amount to corroboration and it was an error to do so.

[16] I now turn to whether the state has proved its case beyond reasonable doubt. It is clear that the only direct evidence came from a single witness, the complainant.

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[5] Page of the transcript.
[6] Pages 62 and 63 of the transcript.

In *R v Mokoena*,[7] De Villiers JP in a frequently cited dicta held:

> 'the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by s 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.'

It is apparent that this dicta is equally applicable to section 208 of the Criminal Procedure Act 5 of 1977 which is the current version of section 284.

In *S v Sauls and others*[8], the then Appellate Division amplified and clarified aspects of the test laid down in *Mokoena* when it held:

> 'The absence of the word 'credible' is of no significance; the single witness must still be credible, but there are … 'indefinite degrees in this character we call credibility'. There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of a single witness. 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.'

[17] While the presiding officer cautioned himself on the necessity of having to be satisfied that the evidence of the single witness was satisfactory in all material respects, the issue is whether he in fact applied the necessary caution when assessing the evidence. The complaint during her examination-in-chief[9] stated that she was raped on a previous occasion by the appellant and testified that on that occasion she was raped in the bedroom. Later in her cross-examination, she stated on the first occasion, the rape took place in the dinning room.[10] When the issue is one of the credibility of the single witness, as in this case, contradictions of this nature cannot just be ignored and it is necessary for the court to reflect on the contradiction and indicate why it is satisfied, despite the contradiction, that the complainant is telling the truth. Besides a general reference to contradictions in the testimony of the complainant, no specific reference is made in the judgment of the court *a quo* to this contradiction of where the first rape was alleged to have occurred.

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[7] *S v Mokoena* 1932 OPD 79 at 80.
[8] *S v Sauls and others* 1981(3) SA 171 (A) at 180.
[9] Para 10 of page 12 of the transcript.
[10] Para 10 to 15 of page 17 of the transcript.

[18] An improbability in the testimony of the complainant is that she claimed that she was raped on a day or before 25 March 2013, but did not notify her parents of this event even after the appellant had left. She lets the appellant into the house the next day and claims that he raped her again for the second time. After the rape, on the State's version she left the appellant in the house alone and walked to the house of Ms. Zulu to return the comforter, but once again makes no mention of the appellant just having raped her. She was away from the appellant and could easily have confided in Ms. Zulu who was an elder and member of the community policing forum in the area. The complainant accepted that the appellant had not threatened her but stated that she was afraid of him. It does not adequately explain why she did not mention the rape to either her parents in respect of the first alleged incident or to Ms. Zulu when she returned the comforter. This version is less than probable.

[19] Further, the complainant accepted during cross-examination that Ms. Zulu asked the appellant why he was in the house and whether he had slept (clearly meaning raped) with the complainant. From the cross-examination[11]of the complainant, it appeared that Ms. Zulu had asked whether the appellant had raped the complainant and that the complainant had not volunteered this information in the first instance. The complainant in response to this, stated that the appellant had raped her. The complainant also confirmed that the appellant said that Ms. Zulu should call the police if she thought that he had committed a crime.

[20] During her cross-examination,[12] Ms. Zulu denied suggesting to the complainant that she was raped and stated that the allegation first came from the complainant. There is thus a material and important contradiction between the evidence of Ms. Zulu and that of the complainant. It is also important in this context to point out that the uncontradicted evidence of Ms. Zulu that when she went to the house she was accompanied by Joyce and some young men who attempted to assault the appellant. Her evidence was that she had to intervene on his behalf to prevent these young men from assaulting the appellant. It is probable that Ms. Zulu, sensing that something was amiss at the home of the complainant, requested Joyce and other members of the community to accompany her. If the allegation made by the complainant was in response to the exhortation of Ms. Zulu, who was accompanied by other community

[11] Page 29 of the transcript.
[12] Page 59 of the transcript.

members, some of whom were aggressive towards the appellant, then the veracity of the allegation of rape must be open to doubt. This is further accentuated by the complainant not voluntarily reporting the allegations when she had ample opportunity to do so. She did not report the earlier allegation to her parents and neither did she mention the second allegation when she returned the comforter to Ms. Zulu when one would have expected her to do so. It is improbable that she would not make these allegations when she had ample opportunity to do so and then make it voluntarily to Ms. Zulu when she arrived at the complainant's house. It does appear much more probable that the complainant made the allegation after the suggestions to this effect were made by Ms. Zulu in the presence of members of her community.

[21] In *S v Hammond*[13], the SCA held:

> 'To sum up: The complainant did make a report to the fishermen that she had been raped, as one would have expected her to do. That is a factor which supports the consistency of her evidence and therefore supports her credibility.'

It must follow from this that if the complainant did not make the report when one would have expected her to do so, such would detract from her credibility. The effect of the complainant making the allegation only after being questioned and prompted by Ms. Zulu, and not making the complaints when one would have expected her to do so when she had the opportunity, appears not to have been considered by the presiding officer in the court *a quo*. This had to be considered when determining whether the complainant's evidence was satisfactory in all material respects and the failure to do so was a material omission.

[22] While the complainant accepted that the appellant had asked for the police to be called, Ms. Zulu denied this and stated it was she was the one who had suggested calling the police in order to placate the young men who were being violent and wanted to assault the appellant. This is a further material contradiction between the evidence of the complainant and Ms. Zulu. It is unlikely that the appellant, if he had a condom in his pocket and had just committed the crime of rape, would request that the police be called.

[23] Thus in two important respects, the evidence of the complainant was inconsistent with the testimony of Ms. Zulu. As found, it is much more probable that the allegation of rape was made in response to exhortations by Ms. Zulu. As Ms. Zulu

[13] *S v Hammond* 2004 (2) SACR 303 para 25 (SCA).

categorically denied this, questions must be asked as to whether she was as truthful and independent a witness as the court *a quo* found.

[24] The court *a quo* placed considerable emphasis on the evidence of Ms. Zulu, describing her as an impressive witness and finding that her evidence was reliable. It was for this reason that the court *a quo* concluded that Ms. Zulu's version of events provided the safeguard in so far as the cautionary rule was concerned. Ms. Zulu's evidence that the appellant's vehicle was parked outside the complainant's house for more than an hour and the fact that she went and knocked on the door earlier and received no response were deemed to particularly material. However, the learned magistrate does not specifically deal with the contradictions between the testimony of Ms. Zulu and the complainant and the impact that this may have on the veracity of the testimony of Ms. Zulu. If Ms. Zulu was less than candid about whether the allegation of rape was made in response to her questions and suggestions, then her evidence had to be approached with a greater measure of caution and circumspection than was the case in this matter.

[25] In *S v Shackell*[14], Brand AJA explained the standard of proof in criminal cases as follows:

> 'It is a trite principle that in criminal proceedings the prosecution must provide its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convince that every detail of an accused's version is true. If the accused's version is reasonably possibility true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to 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 the inherent probabilities if it can be said to be improbable that it cannot reasonably possibly be true.'

[26] We are of the view that it cannot be said that the evidence of the complainant is clear and satisfactory in every material respect. There were contradictions in her testimony about where the rapes occurred. No satisfactory explanation was provided as to the reason for her not reporting the allegations of rape when she had ample

[14] *S v Shackell* 2001(2) SACR 85 (SCA) para 30.

opportunity to do so. She neither reported the allegation of the first rape to her parents or the second rape to Ms. Zulu when she had the opportunity to do so. It is improbable that she would leave the appellant in her home, give back the comforter to Ms. Zulu and return to the house where the appellant was shortly after he had raped her as alleged. It is also important that she made the allegation after suggestions and questions from Ms. Zulu who at the time was accompanied by members of the community, some of whom were aggressive towards the appellant. The medical evidence does not indicate that penetration occurred within a day or so of the examination.

[27] The evidence of Ms. Zulu contradicted the evidence of the complainant in some respects. Importantly Ms. Zulu denied questioning the complainant and stated that she (the complainant) had on her own volition stated that the appellant had raped her. This we found to be improbable and if Ms. Zulu was less than candid on this issue then her evidence ought to have been assessed with a greater degree of the circumspection than occurred.

[28] Further material errors were made by the court *a quo* when it accepted the evidence of the torn pajamas as corroboration.

[29] In the light of all the above, I am of the view that we are not satisfied that the state has proved it case beyond reasonable doubt and I am of the opinion that it would be unsafe for the appellant to be convicted as charged. For these reasons I would allow the appeal.