THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 565/2011

In the matter between

VINCENT MATOME **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *S v Matome* (565/11) [2012] ZASCA 14 (16 March 2012)

Coram: FARLAM, VAN HEERDEN, CACHALIA, SNYDERS and MAJIEDT JJA

Heard: 17 FEBRUARY 2012

Delivered: 16 MARCH 2012

Summary: Criminal law – conviction - rape of a minor – complainant's testimony as a single witness regarding the alleged rape not satisfactory in all material respects – other evidence wrongly disregarded by trial court – accused's version reasonably possibly true.

ORDER

On appeal from: Gauteng North High Court Circuit Local Division for the Northern Circuit District, Polokwane (Legodi J sitting as court of first instance):

The appeal against conviction is upheld. The appellant's conviction and sentence are set aside.

JUDGMENT

MAJIEDT JA (FARLAM, VAN HEERDEN, CACHALIA and SNYDERS JJA concurring):

[1] On 18 August 2006, the appellant, Mr Vincent Matome, was convicted in the regional court on one count of rape, read with the provisions of section 51(1) and (2) of the Criminal Law Amendment Act, 105 of 1997. After the conviction was confirmed in terms of s 52(1)(*b*) of the said Act[1] by the Gauteng North High Court, Circuit Local Division for the Northern Circuit District (Legodi J), he was sentenced to life imprisonment . The appellant appeals against his conviction and sentence with the leave of this Court.

[2] The evidence led at the trial was briefly as follows. The complainant, who was 14 years of age at the time of the alleged rape, is the appellant's stepdaughter. She alleged that the appellant had raped her on three occasions while her mother had been away from home due to work

[1] Prior to the repeal of the said section by Act 38 of 2007.

commitments. The appellant's modus operandi on each occasion was to call the complainant into the kitchen late at night so that she could dish up food for him. The complainant and her two siblings slept in a room outside the main house, of which the kitchen was a part. After she had dished up the food, the appellant would force her into her mother's bedroom, beat and throttle her, undress her and then rape her. She reported these incidents to her mother, but when the latter confronted the appellant, he would beat her mother as well and threaten to kill both of them if they were to report the matter to the police. After the first such incident, her mother took her to a clinic where she was given certain tablets.

[3] The complainant's mother passed away on 30 June 2005 after the third alleged rape. A few weeks later, on 19 July 2005, the complainant reported the rape to her aunt. The following day a charge was laid with the police and the complainant underwent a medical examination. Her aunt, Ms Aisida Mahotla, confirmed this testimony as it related to her. She testified that the complainant had come to live with her on 19 July 2005. The doctor testified that her examination of the complainant revealed that sexual penetration might have occurred, since the hymen was not intact. The doctor alluded to other possible causes of the rupture of the hymen. The complainant had informed her that she had been a virgin before the incidents and that she was using contraceptives. The doctor did not question the complainant as to the reason for her use of contraceptives.

[4] The appellant denied raping the complainant. He stated that her allegations were a fabrication instigated by the complainant's aunt. He testified that the complainant's aunt harboured a grudge against him due to his refusal of her request to stay at his house for a short while after his wife's death to look after the children, as well as an unresolved dispute over certain assets.

[5] The trial court convicted the appellant on the sole evidence of the complainant. It completely disregarded the evidence of the complainant's aunt and that of the doctor. The appellant's evidence was not only rejected as false beyond reasonable doubt, but the regional magistrate also added the startling observation that the appellant's evidence was 'ridiculous'.

[6] For the reasons I will presently enumerate the complainant's evidence fell short of the legally required standard. Corroboration thereof as contemplated in *S v Gentle,*[2] ie on the issues in dispute, was consequently required. Neither her aunt's evidence nor the medical report (the so-called J88), amplified by the doctor's testimony, had a bearing on the central issue, namely, whether the appellant had had sexual intercourse with the complainant without her consent. But, as will presently appear, the regional magistrate erred in completely disregarding this evidence which would have redounded to the appellant's benefit. It would also have provided a fuller picture of the events, all of which had to be considered by the trial court.

[7] There were many shortcomings in the State's case, particularly in the complainant's evidence, some of which were material. Counsel for the State was eventually driven to concede as much in the course of her argument. Given this concession I mention only some of the more important shortcomings.

[8] There was no explanation advanced by either the complainant or her aunt regarding the reason for the delay in the reporting of the alleged rape to her aunt.[3] On their version, the rape was reported almost three weeks after

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[2] *S v Gentle* 2005 (1) SACR 420 (SCA) para 18.

[3] Contrary to the submissions contained in the heads of argument of counsel for the State, s 59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 does not apply since the Act was not in operation at the time of the trial. Section 59 provides that a court may not, in criminal proceedings involving the alleged commission of a sexual offence, draw any inference only from the length of any delay between the alleged commission of a sexual offence and the reporting thereof.

the complainant's mother's death. This appears, on the face of it, an unreasonably long delay which calls for an explanation, particularly when regard is had to the fact that the complainant was in contact with her aunt during that period. Moreover, the medical report reflects the date of the examination as 29 July 2005. This is in conflict with the aunt's evidence that the complainant had been examined the day after she had reported the rape, ie 20 July 2005. It can be accepted that the date on the medical report is in all likelihood correct, which would mean that, on the aunt's version, the rape had only been reported to her on the preceding day, ie 28 July 2005. This in turn would entail an even longer delay in the reporting of the rape. A related question is what, if anything, had prompted the complainant to pluck up the courage at that particular time (and not immediately after her mother's death) to make the report to her aunt. This aspect did not receive any consideration by the regional magistrate in his judgment. Evidence of a prompt complaint does not provide corroboration for the complainant's testimony regarding the alleged rape, but may lend support to her credibility.[4] The converse is also true.

[9] In her evidence-in-chief the complainant detailed the incidents of rape, but recounted only two such instances. She testified that her mother fell ill after the second alleged rape occurred and subsequently passed away. Later the complainant added a third incident and clarified it with regard to dates. While not conclusive, this initial contradiction is troubling. The regional magistrate appears to have simply accepted this as an oversight.

[10] As stated, the doctor did not explore with the complainant the reason why she was using contraceptives. It was submitted, during argument, that these may well have been the tablets given to the complainant when she had visited the clinic after the first of the alleged rape incidents. But it is at least equally probable that the complainant may have been using contraceptives

[4] *S v Hammond* 2004 (2) SACR 303 (SCA) paras 15 and 16

because she had been sexually active all along. In this context the absence of evidence by the clinic staff who had treated the complainant is of considerable importance. In his response to queries raised earlier by Mbha J (before whom the case initially came and who postponed it for later hearing) regarding the conviction, the regional magistrate conceded that that evidence had been necessary. Such evidence would also have shed light on, for example, any injuries that the complainant suffered and the extent thereof and, importantly, whether there had been any signs of forced penetration. The absence of this evidence creates a significant gap in the State's case.

[11] Another glaring shortcoming in the State's case is the lack of evidence from one or both of the complainant's siblings. On her version her sister had also been molested by the appellant and her brother had been assaulted by the appellant, prompting him to obtain a domestic violence interdict against the appellant. Their evidence would at the very least have established the veracity of the complainant's allegation that she was called from the outside room where they slept, by the appellant late at night. The complainant testified that her siblings had heard the appellant knocking on the door during these occasions. It appears from the regional magistrate's response to the queries raised by Mbha J that the complainant's sister was in court during one of the hearings and she was warned, at the State's request, that her presence would be required again. One can therefore safely assume that this witness had been available to testify.

[12] The abovementioned shortcomings in the State's case were exacerbated by the regional magistrate's complete disregard of the evidence of the complainant's aunt and the doctor. As stated, this evidence provided the context in respect of certain important aspects of the complainant's version, namely, the delay in the report of the rape by the complainant, the alleged motive for false incrimination as advanced by the appellant and, in respect of the doctor, the complainant's use of contraceptives. It is trite that a

court must have regard to all, and not just some, of the evidence before it.[5] This case provides a classic example of the pitfalls associated with the regional magistrate's flawed approach. Viewed on its own and without any regard to this other evidence, the complainant's evidence appears, on the face of it, credible. But when the other evidence is also considered, doubt emerges. This reasonable doubt should have weighed in favour of the appellant. It is to his version which I turn next.

[13] The appellant, as stated, denied the rape and averred that the complainant had been instigated by her aunt falsely to implicate him in order to settle old scores. The aunt laid claim to his late wife's house and furniture, a claim which he resisted. He rejected her request to live at the house after the appellant's wife had passed away. The aunt confirmed that there was an unresolved dispute over certain movables, but denied that she had laid claim to her late sister's house. It was therefore common cause that some degree of animosity existed between the aunt and the appellant, although the aunt initially denied that there was any animosity. When one considers with this the seemingly unreasonable delay in the complainant reporting the matter to her aunt after the death of the complainant's mother, it becomes incomprehensible how the regional magistrate was able to dismiss the appellant's version as being 'ridiculous'. I am of the view that, when all the evidence is considered, the appellant's version is reasonably possibly true. The considerable doubt in the State's case must redound to his benefit. In summary, on a conspectus of all the evidence the complainant's testimony was not satisfactory in all material respects and the appellant's version was reasonably possibly true. In the premises, the conviction cannot stand.

[14] The appeal is upheld. The appellant's conviction and sentence are set aside.

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[5] *S v Chabalala* 2003 (1) SACR 134 (SCA) para 15.

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES:

Counsel for appellants	:	W A KARAM
Instructed by	:	Pretoria Justice Centre Bloemfontein Justice Centre
Counsel for respondents	:	S A NGOBENI
Instructed by	:	Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein