



LESOTHO

**IN THE COURT OF APPEAL OF LESOTHO**

**HELD AT MASERU**

**C OF A (CRI) 07/2024**

**CRI/CPA/MSU/46/2022**

**CRI/A/0019/2022**

In the matter between:

**RANTSUTSU MONOKOA**

**APPELLANT**

AND

**DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**CORAM:** P T DAMASEB AJA  
P MUSONDA AJA  
M CHINHENGO AJA

**HEARD:** 16 OCTOBER 2024

**DELIVERED:** 01 NOVEMBER 2024

## **SUMMARY**

*Criminal Procedure – Child witness giving two stories on how she sustained vaginal injury – The imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care. A child witness of five years needs no corroboration if her evidence is tested by rigorous cross-examination – Appellate Court will disturb the findings of fact where the trial court makes a clear misdirection. Inspection in loco trial magistrate failing to invite the accused a fatal procedural mistake – appeal allowed.*

## **JUDGMENT**

### **MUSONDA AJA**

[1] The appellant was convicted of committing an unlawful sexual act in contravention of Section 8(1) of the Sexual Offences Act<sup>1</sup>, read together with Section 32 thereof. He was sentenced to eight years imprisonment by Her Worship Magistrate P. Macpherson. The appellant appealed unsuccessfully to the High Court. He then appealed to this Court with the leave of the High Court, as this was the second appeal in terms of Section 8 of the Appeal Act No. 10 of 1978.

[2] Upon hearing the appeal, we unanimously concluded that it must succeed. We allowed the appeal and issued the following order:

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<sup>1</sup> Act No. 3 of 2003

*'1. The appeal succeeds, and the Judgment and Order of the High Court is set aside and replaced by the following:*

*2. The appeal succeeds, and the order of the Children's Court Division of the Maseru Magistrate Court in case NO. CRI/CPA/MSU/46/22 is set aside and replaced with the following order:*

*3. The accused is acquitted.*

*4. The appellant is to be released immediately.*

*5. Reasons for this order to follow'.*

[3] We now provide those reasons.

## **Background**

[4] The appellant was employed as a driver at the school which the complainant attended. He had been driving the complainant and other children to and from the International School for about two years. The appellant was subsequently arrested and charged with a sexual offence under Section 8(1) of the Sexual Offence Act.

## **Case History: The Children's Court**

[5] The appellant appeared before the Maseru Magistrate's Court Children's Division and pleaded not guilty to the charge. The prosecution called three witnesses: the complainant (PW1), her mother (PW2), and her father (PW3).

[6] A summary of their testimony is as follows: When the complainant was dropped off at home by the appellant on 27th May 2022, she went inside with her father (PW3). It was her routine to ask for her potty to defecate shortly after arriving home. On this occasion, she screamed, and when her mother asked what was wrong, she said her vagina was tickling. Her mother checked and found blood on her panties and in her vagina. She tried to contact her husband, but he was not available.

[7] The complainant told her mother that Bohlokoa had hit her with a stone. The mother called the father and a neighbor, who did not believe the stone story. They took the child to Roma Hospital and later to the police. Blood continued to ooze from the child's vagina. The doctor interviewed the child, who again said that Bohlokoa had hit her with a stone. The father attempted to confront Bohlokoa but instead encountered his father. In court, the complainant testified that the appellant had inserted his fingers into her vagina. This occurred when she was playing with Bohlokoa Mokoena, Lebohang Ntlama, and Mota.

[8] The complainant also told her father that the appellant had instructed her not to tell anyone, including the police. When the father inquired from the appellant asking about Bohlokoa's home, the appellant denied knowing its location, despite having been picking up and dropping off the complainant since 2020.

[9] Police Officer Qhobosheane (P5) found two blood-stained panties belonging to the complainant, which were admitted as exhibits “B” and “C”. The statements of the arresting officer and PW7 (the complainant’s teacher) were admitted into evidence. The teacher expressed surprise, noting that the complainant had seemed fine throughout the school day.

[10] In his defense, the appellant testified that he had taken the complainant and other children to school on the day in question. After dropping them off, he left Sir Dan, another teacher, in his car, while he went to buy bread. He later returned to his room on the school premises and went to visit Relebohile, a friend who lived near the church. They spent the day together until it was time to collect the children in the afternoon.

[11] The appellant drove the children home, including the complainant, whom he handed over to her father. Later that evening, the father contacted him to ask about Bohlokoa's home. The next day, a pastor named Polile approached the appellant, informing him that he was a suspect in the sexual assault of Tumelo Nalana. The appellant was subsequently charged and arrested.

[12] **DW2**, Rethabile Daniel Lekhooa, a teacher, corroborated the appellant’s testimony, stating that he saw the appellant while the children were in class and that the appellant was not present during the time when the alleged incident occurred.

[13] **DW3** further reinforced the appellant's evidence, confirming that the appellant was with him from 11:00 AM until 3:00 PM, the time when the appellant left to pick up the children.

### **Trial Court's Evaluation of the Evidence**

[14] The trial court found that under the Sexual Offences Act No. 3 of 2003, any sexual act involving a child constitutes an offence. The central issue for determination was whether the complainant's bleeding was caused by a stone thrown by Bohlokoa or by the appellant inserting his finger into her vagina.

[15] The learned magistrate rejected the complainant's claim that the bleeding was caused by a stone and also dismissed the suggestion that the complainant had been coached by her mother to implicate the appellant. The magistrate noted that the complainant consistently maintained that the appellant had put his finger in her vagina.

[16] The magistrate referenced Sir Daniel's testimony, which confirmed that the complainant was the second child to leave the classroom on the day in question. According to the magistrate, this timeline aligned with the opportunity the appellant had to assault the complainant while other children were still in class.

[17] The issue of mistaken identity was dismissed, as the complainant had known the appellant for two years. The magistrate

concluded that the appellant had indeed inserted his finger into the complainant's vagina, causing the bleeding. The magistrate also discounted the argument that the complainant's failure to immediately report the incident to her teachers or parents weakened her credibility.

[18] Upon conviction, the magistrate considered aggravating factors, noting that the complainant, a five-year-old child, had lost her virginity as a result of the assault. I need not deal further with sentence because of the conclusion we came to that the appeal must succeed against the conviction, save to record that the appellant was sentenced to 8 years direct imprisonment.

### **The High Court**

[19] Dissatisfied with the conviction and sentence, the appellant appealed to the High Court on the following grounds:

- a) The learned magistrate presided over a matter in which she had no jurisdiction, as the appellant was a major at the time of conviction and sentencing. The appellant argued that he should have been tried under the Subordinate Court Order<sup>2</sup> of 1988, by the Magistrate Court in its ordinary jurisdiction, and not in the Children's Court, which is a specialized division.

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<sup>2</sup> Ordinance 9 of 1988.

- b) The appellant was convicted under Section 8(1) of the Sexual Offences Act 2003, despite there being insufficient evidence beyond a reasonable doubt that he had committed a sexual act with the complainant, a minor.
- c) The magistrate failed to properly caution herself when accepting the evidence of the five-year-old complainant. The appellant alleged that the child had been coached by her mother to implicate him and pointed out that the child had initially claimed to have been hit with a stone by another child.
- d) The magistrate called for an inspection in loco but failed to call the complainant to demonstrate where the incident occurred. The appellant argued that this omission rendered it difficult to assess whether the alleged offence could have been committed without being observed by teachers or other students.
- e) The magistrate disregarded evidence that would have absolved the appellant, which was presented by both the prosecution and the defense, and this evidence had not been discredited by either the court or the litigants.

### **High Court's Approach**



[20] In the High Court the appellant had raised the issue of jurisdiction which was abandoned in this Court. It is therefore unnecessary to deal with that ground of appeal.

[21] Regarding the second ground, the High Court found that the inconsistencies in the complainant's evidence were not material enough to negate her version of events. The totality of the evidence pointed to the appellant's guilt, and there was sufficient evidence linking him to the offence.

[22] On the third ground, concerning the inspection in loco, the court noted the decision in *Abdullar v S*<sup>3</sup>, which held:

*"An inspection in loco serves two purposes: enabling the court to follow the evidence and allowing it to observe real evidence that is additional to oral testimony."*

[23] The High Court agreed that the appellant should have been invited to the inspection in loco. However, it reasoned that the location of the incident was not crucial to the determination of guilt or innocence in a sexual offence case, and thus the procedural flaw did not invalidate the trial.

## **This Court**

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<sup>3</sup> 2022 SA SCA 33 at para 24.

[24] The High Court dismissed the appeal but granted leave for the appellant to appeal to this Court. Four grounds of appeal were raised:

- a) The learned judge erred in trying the appellant, a major, in the Children's Court, which is established under Section 133 of the Children's Protection and Welfare Act. The appellant should have been tried in the ordinary subordinate court under the Subordinate Court Act of 1988.
- b) The learned judge erred in convicting the appellant under Section 8(1) of the Sexual Offences Act No. 3 of 2003 when there was no evidence beyond a reasonable doubt that the appellant had committed a sexual act with the
- c) The learned judge failed to properly caution herself when accepting the evidence of the minor child, despite clear evidence that the child had been coached by her mother. The complainant's contradictory statements about being assaulted by a stone were also disregarded.
- d) The learned judge erred in failing to call the complainant during the inspection in loco, where the court's reasoning relied heavily on the layout of the school.

## Issues for Consideration

[25] The primary issues for determination are:

- a) Was the learned magistrate's assessment of the evidence correct?
- b) What effect did the learned magistrate's exclusion of the appellant and complainant from the inspection in loco have on the trial?

## The Law

[26] The Crown conceded that there were contradictions in the complainant's testimony, particularly regarding the identity of the perpetrator, which is a core issue in sexual offences. Courts generally assess whether contradictions in a witness's testimony are material enough to affect the credibility of the testimony. In cases such as *S v Mkohle*<sup>4</sup> and *S v Bruiners*<sup>5</sup>, South African courts have held that contradictions do not automatically disqualify a witness's evidence. The nature and context of inconsistencies must be weighed against the totality of the evidence.

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<sup>4</sup> 639/88 (1989) ZASCA 98 (7 September 1989).

<sup>5</sup> 1998 (2) SACR 432 SE at 435.

[27] In this case, the High Court found that the contradictions in the complainant's evidence were relatively minor. However, this Court disagrees with that assessment, as the identity of the perpetrator was central to the case, and the contradictions raised significant concerns about the reliability of the testimony and the resultant conviction.

[28] I am satisfied that the learned magistrate's findings were not supported by the evidence. The complainant initially claimed that another child, Bohlokoa, had thrown a stone at her, causing the injury. This version was later changed, implicating the appellant. The magistrate also found that the appellant had taken advantage of the complainant during a five-minute window when he left the other children in class, but this conclusion was speculative and not based on solid evidence.

### **Appellate Court's Approach**

[29] An appellate court is generally reluctant to interfere with the trial court's factual findings due to the trial court's advantage in observing witnesses first-hand. However, interference is warranted where the trial court has materially misdirected itself or drawn unreasonable conclusions from the facts, as outlined in *R v Dhumayo*<sup>6</sup> and reaffirmed in *S v Hadebe*<sup>7</sup> and *S v Monyane*<sup>8</sup>.

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<sup>6</sup> 1948 25A 677 (A) p 3.

<sup>7</sup> 298/94 (1977) ZASCA 86.

<sup>8</sup> 160/01 (2006) ZASCA 113 (23 November 2006).

## **Failure to Include the Appellant in the Inspection in Loco**

[30] The failure to include the appellant in the inspection in loco was a significant procedural flaw. As held in *Mashego Dumisani Promisa v Passenger Rail Agency of South Africa*<sup>9</sup> and *R v Sewpaul*<sup>10</sup>, an inspection in loco allows the court to make its own observations. This Court finds that the appellant's exclusion was a material irregularity that compromised his right to a fair trial.

## **Conclusion**

[31] The trial court failed to assess the evidence properly and made findings unsupported by the record. The inconsistencies in the complainant's evidence, particularly regarding the identity of the perpetrator, were critical and should have been given more weight. Additionally, the exclusion of the appellant from the inspection in loco was a fatal procedural error.

## **Order**

[32] It was for all these reasons that we made the order I referred to earlier.

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<sup>9</sup> Case No, 61756/2018 (20 January 2023).

<sup>10</sup> 1949(4) SA 975 (NJ).



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**P MUSONDA**  
**ACTING JUSTICE OF APPEAL**

I agree



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**P T DAMASEB**  
**ACTING JUSTICE OF APPEAL**

I agree



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**M H CHINHENGO**  
**ACTING JUSTICE OF APPEAL**

**FOR THE APPELLANT:** ADV. L D MOLAPO with  
Ms L MOKHATLANE

**FOR THE RESPONDENT:** ADV. R.S. THABA