


**IN THE HIGH COURT OF SOUTH AFRICA
MTHATHA**

Case No. 31/08

In the matter between:

THE STATE V ZWELETHU NJALAVU

27 May 2008 DATE	DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE YES/NO. (2) OF INTEREST TO OTHER JUDGES: YES/NO. (3) REVISED.
	SIGNATURE 

JUDGMENT

GREENLAND AJ:

[1] This is the judgement in a criminal trial in which the accused is charged with rape of a six (6) year old female.

Evidence of child complainant – (no aged 10)

[2] The child's evidence is that she was collected from a place where she was playing with two other children by two young boys sent by the accused and taken to a rondavel in which the accused lived. She noticed a knife on a table. The accused instructed her to take off her trousers and panties and then lay on top her and had sexual intercourse with her after inserting his penis in her vagina. It was extremely painful. However she says she did not cry. Upon completion, whilst displaying the knife, he gave her 50 cents to go and buy chips and warned her not to tell anyone about what he had done saying he would kill her if she did. Whilst

walking from the shop where she had bought the chips she met her aunt who questioned her. However she did not report that she had been raped on account of the warning that the accused had given her. At some stage thereafter she was examined by a doctor. The child has no idea as to the date of the incident.

Evidence of child's aunt

[3] The evidence of the aunt is that she met the child as she was walking in the area. The child was walking in an unusual manner and was crying. She was in possession of chips. Because the child would not answer her questions enquiring as to the cause of her condition she slapped her on the thigh. The child then reported that she had been raped by the accused and instructed not to report. She instructed the child to report to her grandmother. She, the aunt, did nothing further about the matter until April 2005 when, according to her, the accused also raped her four (4) year old child. It is then that she reported the rape of the child who is the complainant in this case. She states that the incident occurred at the end of 2004 which was some five (5) months before her report about the rape of her own child.

Medical evidence

[4] The doctor who examined the child was called. He confirms that his observations are consistent with sexual penetration having occurred at some date preceding the examination. The examination was conducted on 18 May 2005. He found no injuries apart from a ruptured hymen and internal distension consistent with sexual penetration. It is his evidence that vaginal injuries heal in about two weeks following infliction. In his opinion the sexual penetration by an adult male would have been extremely painful.

Evidence of the accused

[5] The accused gave evidence in which he denied all knowledge of the allegations. He states that he first heard of the allegation in 2007 only after he had been cleared on the charge of having raped the child of the aunt to the complainant. State counsel confirms that the charge of raping the child of the aunt had been withdrawn and prosecution has been declined. The accused says he has no idea why he is being falsely incriminated in this case as he and the aunt have always enjoyed good relations until her accusation of the rape of her child.

Submission of counsel

[6] State counsel submits that guilt beyond a reasonable doubt is proved. She contends that the complainant was a good witness and any flaws are understandable and attributable to the terrible experience she endured and the fact of her tender years. The submission includes the claim that corroboration has been furnished by the aunt and the medical evidence.

Defence counsel submits that there must be a doubt as to whether or not the accused is guilty taking into account all the evidence and if regard is had to problems in the state case which problems must be regarded as significant and cannot be glossed over.

Assessment of evidence and witnesses

[7] Witnesses and evidence is assessed as follows -

The child complainant

- a) This child was visibly in an extremely traumatised state and broke down twice whilst giving evidence despite the fact that the

court employed a mature female intermediary and did not expose her to the presence of the accused by use of television technology.

In my assessment, despite her tender years and state of trauma, she impressed as a good and truthful witness. She declined to answer questions when they were framed as – “*the accused alleges*” To my mind this is understandable. It is difficult for a child to understand that a reply is needed to a question put in rhetorical format. In addition her reticence to expressly dispute what is put as the accused’s version is understandable bearing in mind her experience.

She also states that she did not make a report to her aunt. Again this is understandable if one considers that indeed at first she did not make a report and only did so after being slapped.

My assessment is that she told the truth in terms of her recollection of the events which may be defective on peripheral issues but not on the central issue of whether or not she was raped by the accused.

The aunt

b) This witness was clear and direct. In terms of impression she was believable. However there is a glaring problem in her evidence. Her explanation for doing nothing about the report to her by the complainant does not stand up to scrutiny. She claimed to have been afraid on account of the fact that the accused had just been released on an allegation of having murdered the father of the complainant. She also claimed that the accused was feared in the area.

Certainly her fear is understandable. However she could have still taken action. It would have been simple enough for her to have taken the child to her grandmother and taken the stance that there appeared to be something wrong with the child. She could have quite truthfully explained that the child was declining to reveal the cause of her distress. In this way she could have very easily passed the matter onto the grandmother without having herself identified as the instigator of any subsequent accusation against the accused.

In addition her admission that it was only on account of the alleged rape of her own child that she then incriminated the accused means that she cannot be regarded as an independent witness aloof of the accusation being levelled by the child against the accused. She obviously harbours a grievance against the accused of extreme proportions and therefore must be categorised as a witness who has a very powerful motive to falsely incriminate the accused. That is the harsh reality of the matter.

Another difficulty is that the indictment alleges that the rape occurred in April 2005. Her evidence is that it was at the end of 2004. Without an explanation the contradiction must seriously undermine her credibility and reliability as a witness.

The accused

c) The accused gave his evidence in a confident and assertive manner. There was nothing about his performance which *per se* indicated mendacity. In particular his evidence dovetailed with that of the aunt that prior to this matter their relationship was good and regular. He made no great play of the fact that the aunt had apparently falsely accused him of raping her own daughter.

Summary of the evidence and conclusion

[8] In the final analyses the position is that this is a case of the word of the complainant against that of the accused with virtually no independent objective factor or evidence indicating that the child's evidence is, beyond reasonable doubt, true. Insofar as the aunt corroborates the child as to the circumstances that accrued immediately after the rape her evidence is badly tainted by the fact of her inaction. As said her reason for having done nothing about something that was so diabolical, on any test, does not stand up to scrutiny.

Historically the courts have always been faced with the difficulty of having to choose between accusations of rape on the one hand and protestations of innocence on the other. That the exercise is often fraught with difficulty and peril is now trite. Not surprisingly there is now a plethora of jurisprudential counselling as regards the approach to be adopted to resolve the issue.

To my mind is not necessary to tabulate the law of approach as enunciated in precedents but to simply articulate their effect. This can be stated as – guilt beyond a reasonable doubt is proved only when the court's own belief in the truthfulness of the accusation of rape is sufficiently supported in terms of an objective test. All the circumstances must be consistent with rape having been committed by the accused and exclude the proposition that his innocence is reasonable possible. It is not enough that the court believes the complainant. It must also be satisfied that factors exist that render it safe to do so. It is not enough that it disbelieves the accused. It must be satisfied that that factors exist that render it safe to do so.

In this case it is simply not possible to make the finding that it is safe to accept that it is the accused who raped the complainant as much as I am inclined to believe the complainant.

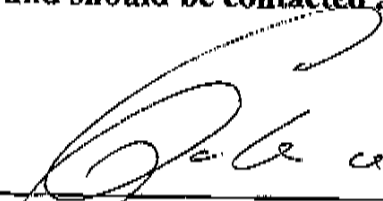
In the circumstances the court has little option but to find the accused Not Guilty and he is discharged.

Request

[9] As the upper guardian of the minor this court is very concerned about her condition. It is obvious that even though nearly four (4) years has elapsed since the incident she is still in a bad state of psychological and emotional trauma.

I am therefore requesting State counsel to use her good offices to ensure that the child receives managed care and counselling.

It is also the position that she is an orphan. As such it may be that the Nelson Mandela Children's Fund may be in a position to assist. The Fund should be contacted accordingly.



GREENLAND A.J.

FOR THE APPELLANT : **ADV T.J. QAKAZA**
FOR THE ACCUSED : **ADV T.S. KEKANA**
HEARD ON : **21 MAY 2008**
DELIVERED ON : **27 MAY 2008**