THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 636/2015

In the matter between:

VUSI SAMUEL VILAKAZI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Vilakazi v The State* (636/2015) [2015] ZASCA 103 (15 June 2016)

Coram: Mhlantla, Shongwe, Theron, Dambuza and Mathopo JJA

Heard: **5 November 2015**

Delivered: **15 June 2016**

Summary: Criminal Law – Evidence of young children in sexual assault cases – imperfections in evidence not necessarily fatal – evidence to be considered carefully and holistically to determine trustworthiness.

ORDER

On appeal from: North Gauteng Division of the High Court, Pretoria (Mavundla and Potterill JJ, majority, and Makgoka, minority, sitting as a court of appeal):

The appeal is dismissed.

JUDGMENT

Dambuza JA (Shongwe, Theron and Mathopo JJA concurring):

[1] On 10 May 2004 the 36 year old appellant was convicted by the Delmas Regional Court of raping the complainant, a 12 year old girl. The matter was then referred to the North Gauteng High Court (Delmas Circuit) for confirmation of conviction and for sentencing in terms of s 52(1)*(b)* of the Criminal Law Amendment Act 105 of 1997 (the Act) prior to its amendment. The high court, per Rabie J, confirmed the conviction. That court found that there were no substantial and compelling circumstances attendant in the case and it imposed the minimum sentence of life imprisonment. The appellant appealed to the full court of the North Gauteng High Court which confirmed the conviction (Mavundla and Potterill JJ, with (Makgoka J dissenting) and altered the sentence to one of 18 years' imprisonment. This appeal against the conviction is with the special leave of this court.

[2] At the trial it was common cause that the report about the rape was made by the complainant pursuant to her mother having confronted her and given her a hiding. The mother had noticed that the complainant was walking with discomfort. On inquiring from her as to what was wrong the complainant replied that she had a wound on her foot. On inspection the mother observed that the wound that the

complainant referred to was too small to cause the discomfort that she had observed. She then gave the complainant a hiding (*pakslae gegee*). The complainant then told her that the appellant had had sexual intercourse with her.

[3] The appellant and the complainant's mother had known each other for about four years prior to the incident. The appellant lived with a neighbour, Mr Nhleko, a religious leader. He and the complainant's mother were relatively close acquaintances or even friends. He often visited the complainant's home and he and the complainant's mother would smoke together. Sometimes they would 'go away' together and 'drink tea' together, as the complainant testified.

[4] On receiving the report of the rape from the complainant, the complainant's mother went to confront the appellant. The appellant and Mr and Mrs Nhleko then went to the complainant's home and the matter was discussed. During the discussions the appellant denied the allegations.

[5] The complainant was taken to the hospital and examined by a medical doctor. Although the J88 medico legal report is not part of the record before us, it was admitted into evidence and it was common cause at the trial that the complainant had indeed been sexually penetrated. The doctor had recorded in the report that the history given was that the last incident of rape was about four weeks prior to the medical examination.

[6] The complainant, who was still 12 years old at the time of the trial, gave evidence of both a general nature, relating to many incidents of rape, and of a specific incident of sexual intercourse between the appellant and herself. She testified that during March 2003 the appellant had had sexual intercourse with her ten times at her home. This would be either in the late afternoon after she came back from school, or in the evening when her mother would not be at home. Her four year old sister would be present in the house[1]. The appellant would tell the younger sister to go and sleep.

[1] In parts of the record the age of the younger sister is recorded as five years.

[7] On a specific occasion the appellant came to her home whilst the complainant and her younger sister were alone at home. They were sitting in the dining room. The appellant ordered the younger sister to go and sleep. He then told the complainant to switch off the lights; thereafter he started fondling the complainant while the latter was sitting on a sofa. He took off her underwear, told her to lie down, undressed himself and had sexual intercourse with her. He told her to go and have a bath which she did. He also gave her R2 and warned her not to tell anyone about what had happened, threatening to slaughter her and throw her body in a dark forest if she did.

[8] The complainant's younger sister also gave evidence. In her brief evidence she related an incident in which the complainant was made to lie on a sofa by the appellant. This was after the appellant had told her to go and sleep. From the other room she 'peeked' and saw the appellant 'lying on top of the complainant'. She heard the complainant cry.

[9] The appellant's defence was a bare denial. He testified that he had left the township in which he resided with the Nhleko family sometime in February 2003 and returned during March 2003 when he started working on a building project. Out of the blue he was accused of having raped the complainant.

[10] According to the appellant a discussion ensued between himself, the complainant's mother and Mr Nhleko following the accusations. During that discussion the complainant's mother told Mr Nhleko about a boy called Sam who had been visiting the complainant at her home in the mother's absence. She also revealed that she had told the complainant that she did not want to see Sam at her home. According to the appellant the complainant's mother also said that if the doctor found that Sam had raped her daughter, she would kill Sam with an axe.

[11] Mr Nhleko confirmed that the complainant's mother did report the rape to him. His evidence was that on hearing the allegation he asked the complainant's mother how the appellant could have raped the complainant as he (the appellant) had been at KwaThema during February. The mother's response was to tell him about Sam's suspicious visits to her house and her chasing him away from the house when she

returned from work. According to Mr Nhleko the mother told him that she intended to take the complainant to a doctor for examination to find out what Sam had done to her.

[12] In this appeal the appellant contended that the courts below erred in convicting him as the State had not proved beyond reasonable doubt that he had raped the complainant. The submission was that the cautionary rules were not applied when considering the evidence of the complainant. It was further contended that the complainant's cryptic evidence contained contradictions and improbabilities which rendered it unsatisfactory in material respects. It was also submitted on behalf of the appellant that his evidence was wrongly rejected. More specifically, the submission was that the magistrate misdirected himself in admitting the report of the rape which was elicited from the complainant by force and he (the magistrate) did not consider the complainant's evidence with the necessary caution. The contention was that the evidence of the complainant, her sister and her mother was unreliable; that their version was improbable and that they contradicted themselves and each other on material aspects. The complainant's 'dispassionate' demeanour belied the traumatic experience she claimed to have endured, so the argument went.

[13] This argument found favour with Makgoka J and forms the essence of his dissenting judgment in the court a quo. On the other hand, the majority view was that the contradictions were not material and that the magistrate's credibility findings were correct. The learned judges were satisfied that even though the complainant was a young single witness, her evidence found support in the medico legal report and the evidence of her sister.

[14] The submissions on the impropriety of admitting the complaint are based on *S v T* 1963 (1) 484 (A) at 487. In that case the complainant's mother had threatened the complainant with a stick as a result of which the complainant reported that her step father had had sexual intercourse with her. The court considered a number of English authorities and concluded that the inference to be drawn from them was that a complaint will not be admissible if it is made as a result of intimidation. However, the court held that the central question was whether a failure of justice has resulted from the wrongful admission of the complaint. Hoexter JA held (at 487F) that:

'The test to be applied is whether a trial court hearing all the evidence but refusing to admit the complaint, would inevitably have convicted the appellant'.

Put differently, where no voluntary report of rape was made the court must determine whether the evidence (excluding the report obtained by coercion) proves the charge of rape against an accused beyond reasonable doubt.

[15] It is my view that our courts have not considered the lack of evidence of a voluntary complaint (also referred to as a 'first report') to be fatal to a charge of rape. In this regard, Milton[2], in South African Criminal Law and Procedure, says:

'It is not mandatory that there should be evidence that the woman has complained that she has been raped. However, if she has, such complaint is admitted in evidence to show consistency and to negative a defence of consent, but not as proof of their contents nor to corroborate the complainant. But it is not essential that consent should be in issue; the complainant may, for instance, be a girl of under 12 years of age.

The purpose of admitting evidence of a complaint is that it serves to rebut any suspicion that the woman has lied about being raped. The corollary is, of course, that should a woman not complain, or not complain timeously, the conclusion may be drawn that she is lying in her evidence that she was raped. The conclusion may well be unfair to the victim, since women may hesitate to complain of rape for reasons of shame, embarrassment or fear.'

[16] Indeed where, such as in this case, the 'first report' of rape resulted from intimidation, it cannot constitute evidence of a voluntary or spontaneous first complaint. But that does not render incomplete or insufficient the evidence led at a consequent trial. And the fact that there was coercion is not, on its own, an indication that the allegation of rape is a fabrication. The court must consider whether the rest of the evidence proves the charge of rape beyond reasonable doubt.

[17] In this case I am satisfied that even if the evidence of the complaint is excluded, on a holistic consideration of the evidence, the appellant's guilt was proved beyond reasonable doubt. I agree that the evidence of the complainant had to be considered carefully. She was a young child and her complaint had not been made voluntarily. I am satisfied that both the trial court and the high court were alive

[2] Milton J R L *South African Criminal Law and Procedure* Vol II; 3 ed at 461.

to this fact. Medical evidence confirmed that the complainant had been sexually penetrated. According to her the last incident of sexual intercourse had taken place on the day before the medical examination. The doctor recorded that the gynaecological examination was painful. The contention, on behalf of the appellant, that she could have been 'malingering' (the pain) is without merit. Furthermore, the submission that she misled the doctor regarding the date of the last incident of sexual intercourse in order to avoid DNA-testing and to protect the true perpetrator, is farfetched.[3]

[18] The fact that there were contradictions in the evidence of the complainant does not necessarily mean that her evidence is unreliable. In *Woji v Sanlam Insurance Co Ltd* 1981 (1) SA 1020 (A) Diemont JA provided a helpful guide to approaching the evidence of young children. The guide highlights, as the focal point, the trustworthiness of the evidence. At 1028A-E of the judgment the learned judge said:

'The question which the trial Court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his *Code of Evidence* para 568 at 128, 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" (Wigmore on *Evidence* vol II para 506 at 596). There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box. Does he appear to be honest – is there a consciousness of the duty to speak the truth? Then also "the nature of the evidence given by the child may be of a simple kind and may relate to a subject-matter clearly within the field of its understanding and interest and the circumstances may be such as practically to exclude the risks arising from suggestibility" (*per* SCHREINER JA in *R v Manda* [1951 (3) SA 158 (A)]). At the same time the danger of believing a child where evidence stands alone must not be underrated.'

[3] It was recorded in the J88 medico legal report that the last incident was about three weeks prior to the examination. The complainant and her mother stated that that information did not come from them.

[19] The complainant's version was criticised because of her failure to report the sexual abuse at the first available opportunity or voluntarily, allowing the appellant to repeatedly come into her home although she claimed to be scared of him, and her sister's evidence that she peeked and saw what was going on, whereas, according to the complainant, the lights were usually switched off. Firstly, as Milton states, reluctance on the part of rape survivors, or some of them, to report the rape at the first opportunity is a firmly recognised fact. It is also generally accepted that with young children the reluctance is compounded. In this case the complainant testified that she was afraid of the appellant. I am persuaded that the prospect of accusing her mother's friend who used to assist her in her studies must have compounded the fear. In response to questions as to why he allowed the appellant to come into the house she explained: 'I wouldn't ask who was knocking'; 'it was during the day and my mother told us that we can only ask during the evening who was knocking' and 'I would only say "come in" and the person [would] come in' were spontaneous and have a ring in them. Further there is no basis for a finding that the complainant and her sister, who knew the appellant well, colluded to protect the perpetrator and falsely implicate the appellant. Both the complainant and her younger sister emphatically denied that Sam ever did anything to the complainant.

[20] The complainant did not exaggerate the appellant's conduct. When she was asked if the appellant had sexual intercourse with her every time he visited, her response was that sometimes he would find her mother at home and would just 'have tea' with the mother. The evidence of the younger sister was also simple and consistent with her age. She was persistent that the appellant had done 'silly things' to the complainant. She testified that she saw the appellant 'on top of [her] sister'. There is no basis for a finding that she had been coached into falsely implicating the appellant.

[21] A further leg on which the appeal stands is the failure by the state to set out, in the charge sheet, specific date(s) on which the incident(s) referred to happened. The charge sheet referred to sexual intercourse between the appellant and the complainant as having occurred in March 2003. Although the complaint's evidence related to both a general conduct and a specific incident it is clear from the charge sheet that the appellant was charged with rape of a 12 year old child that happened

in about March 2003. Section 84(1) of the Criminal Procedure Act 51 of 1977 (CPA) provides that a charge must set forth the relevant offence in such a manner and with such particulars as to the time and place at which the offence is alleged to have been committed as may be reasonably required to enable the accused to plead. But if the time when the offence occurred is not a material element of the offence, a failure to specify the time does not render the charge defective. In this case the appellant knew in no uncertain terms what case he had to respond to.[4] In the *Commentary on the Criminal Procedure Act* the writers Du Toit *et al* at 14-37, say:

'An accused who wishes to raise an alibi will not necessarily be prejudiced by the fact that the charge only mentions a period during which an offence was allegedly committed, nor by the State's inability to provide further particulars in respect of the dates. If such uncertainty will in fact hamper him in his defence, he may reserve his cross examination of State witnesses until after completion of the State case and then apply for an adjournment to prepare . . .'

[22] The appellant's version was inconsistent and not reasonably possibly true. In his plea-explanation he suggested that the false accusations were an act of revenge by the complainant because he had scolded her for having taken her younger sister to town, thus exposing her to the dangers of busy traffic. According to the appellant the allegations of rape surfaced a day after he had scolded the complainant. When this was put to the complainant, she disputed it. She admitted the incident in which her younger sister was nearly run over by a truck, but she said that the appellant was not present at that incident; her father was. Significantly, the appellant gave no evidence about the incident which, according to his plea explanation, resulted in the complainant's vengeful allegations. He also said nothing in his evidence about his suspicion that the charges were motivated by revenge. More significantly, this suggested motive for false accusation was never put to the complainant's mother; neither was it put to her that the appellant had been away from 'home' from February to March.

[23] Further, the detailed version that the complainant's mother suspected Sam and had threatened to kill him with an axe, were never put to her. It was also never put to the complainant. All that the complainant's mother was asked was whether her

[4] *S v Hugo* 1976 (4) SA 536 (SCA) at 540E.

daughter had ever told her about something that had happened with Sam. She replied that the complainant had told her that Sam had not done anything to her. The complainant was asked, during cross-examination, if Sam ever did 'silly things' to her. She replied in the negative. The younger sister's reply to a similar question was that Sam never did 'silly things' to her sister, and that it was the appellant who had done so. My view is that both the motive suggested in the plea-explanation and the detailed evidence relating to the mother's suspicion about Sam were a fabrication. A further instance of fabrication was the allegation by the appellant that the complainant's mother had asked Mr Nhleko for a bribe in exchange for withdrawal of the charge against the appellant. When Mr Nhleko testified the appellant tried to 'remind' him of the alleged demand for a bribe by the complainant's mother. However, Mr Nhleko denied knowledge of thereof. Yet again, the allegation of a bribe extortion was never put to the complainant's mother. The fact that Mr Nhleko, from whom the bribe was allegedly extorted, knew nothing about it, showed the extent to which the appellant was prepared to lie to refute the allegations against him. A court is entitled to take into account the falsity by the appellant to show that the child's evidence is unquestionably true, whilst the defence version, on the other hand, is false.[5]

[24] In the end the evidence of the complainant, that of her sister and the contents of the medical report proved the charge against the accused. I am satisfied that on a holistic evaluation of the evidence the guilt of the appellant was established beyond reasonable doubt. Consequently, the appeal is dismissed.

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N Dambuza
Judge of Appeal

[5] Zeffert & Paizes op cit at 973.

Mhlantla JA

[25] I have had the benefit of reading the judgment of Dambuza JA and regret that I cannot agree with her reasoning and conclusion that the appeal should be dismissed. My reasons for my disagreement are set out below.

[26] In considering the case of alleged sexual assault, it necessary to record that, persons, especially children, who allege that they were victims of sexual offence, should be treated with care and consideration. In *S* v *Vilakazi*[6], this court said the following:

'The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone.'

[27] In *Director of Public Prosecutions, Transvaal* v *Minister of Justice and Constitutional Development*[7], the Constitutional Court said:

'Courts are now obliged to give consideration to the effect that their decisions will have on the rights and interests of the child. The legal and judicial process must always be child-sensitive.'

[28] Having said that, it must be borne in mind that the fundamental principle of our law is that in a criminal trial, the State or prosecution has a duty to prove the guilt of an accused beyond reasonable doubt. The background facts in this matter have been set out by my colleague and I do not intend to repeat these. The difference between us lies with the manner in which the first report was dealt with and the treatment of the evidence as a whole including the medical evidence.

[29] A complaint is not admissible if it is made as a result of intimidation[8]. In *S* v *MG*[9], a complaint was held to be inadmissible because the complainant, who was 12

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[6] *S* v *Vilakazi* 2009 (1) SACR 552 (SCA) para 21.
[7] *Director of Public Prosecutions, Transvaal* v *Minister of Justice and Constitutional Development & Others* 2009 (4) SA 222 (CC) at para 74.

years old at the time, had made it after she had been intimidated and threatened by her mother. In *S* v *GS*[10], the complainant made a report after being confronted by her mother about her whereabouts. The court concluded that the complaint was inadmissible as there was a real suspicion that the complaint was made to deflect the anger of the complainant's mother. My colleague's view is that this principle should be revisited and that each case should be considered on its merits. Whilst there may be some merit in her concerns, I am of the view that where a complaint has been induced by intimidation, a court has a duty to consider that evidence and pronounce on the admissibility thereof.

[30] In this case, the circumstances in which the complaint was made are more serious than those mentioned in the cases referred to in para 5 above. In this case, the mother subjected the complainant to an interrogation and when the latter failed to provide a satisfactory report, the mother gave the child a hiding and insisted that she tells the truth. It was at that stage that the complainant provided the identification of the appellant as the person who had raped her. It seems to me that one cannot exclude a possibility that the complainant made the report of the identification of the person who raped her in an attempt to save herself from any further hiding. In the light of these factors, the report was wrongly admitted by the trial court and should have been ruled inadmissible.

[31] The question that has to be determined is: did the admission of this evidence bring about a failure of justice? The test to be applied was formulated in *S* v *T*[11] as follows:

'The question remains whether a failure of justice has resulted from the wrongful admission of the complaint. The test to be applied is whether a trial court hearing all the evidence but refusing to admit the complaint, would inevitably have convicted the appellant.'

[32] It is therefore necessary to consider the evidence in totality. The first aspect that I wish deal with relates to the formulation of the charge sheet which referred to the incident as having taken place during March 2003. I agree with my colleague that

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[8] *S* v *T* 1963 (1) SA 484 (A) at 486H to 487D.
[9] *S* v *MG* 2010 (2) SACR 66 (ECG) at 73.
[10] *S* v *GS* 2010 (2) SACR 467 (SCA) paras 23 and 24.
[11] *A*t 487F.

a failure to specify the time will not render the charge defective if the time of the offence is not a material element of the offence. However, the circumstances of this case are somewhat different and in my view, the State had a duty to provide a charge sheet that was more specific as to time to enable the accused to know what case he had to meet for the following reasons: First, the complainant initially testified that all the rapes occurred in March. When questioned by the regional magistrate, she testified that only five occurred in March but she did not remember the months when the others occurred. One has to contrast the complainant's testimony with the evidence of her mother who testified that it was on 25 March 2016 when she noticed that something was wrong with her daughter. She testified that the complainant had told her that the rapes began in February. Secondly the examination by the medical doctor was conducted on 26 March and it was noted in the report that the last rape incident occurred three weeks before the examination. The conclusion was that the complainant had been penetrated several times. The mother denied conveying this information to the doctor. In contrast, the complainant testified that the last incident occurred a day before the examination. Unfortunately the doctor did not testify to clarify the aspect relating to the source of the information in his report.

[33] Another unsettling feature is the conduct of the mother. My colleague has concluded that the mother's suspicion about Sam was fabrication by the defence. I disagree. The complainant's mother during her evidence admitted that she had asked the complainant whether 'a certain Sam' had committed the offences, to which the complainant had replied in the negative. It appears from the record that this person 'Sam' does exist and is known by all the parties. The question to be asked is why would she ask the complainant about Sam, if she did not harbour any suspicions about Sam's possible involvement? This aspect was crucial and the prosecutor did not pursue it.

[34] This then leaves the evidence of the complainant's younger sister who was either four or five years old at the time of the incident. She is supposed to have witnessed an incident that occurred at night, where she was instructed by the appellant to leave the dining room and where the complainant was instructed to switch off the light. According to her, she 'peeked' and saw the appellant on top of the complainant. The sister did not provide any particularity as to how she was able

to observe what transpired in the dark dining room from her position. It is not clear how she would have managed to see what was happening in that room whilst it was dark. This evidence was readily accepted by the trial court without any further interrogation.

[35] On the other hand, the appellant denied his guilt. In his plea explanation, he stated he was falsely accused because he had in the past scolded the complainant. During his testimony, he inter-alia, referred to an incident where he had scolded the complainant after she had taken the children to town. He also suggested that a certain person known as Sam was the perpetrator. In this regard, he testified that the complainant's mother also suspected this Sam. The appellant further raised an alibi defence. This defence was introduced during his testimony and was never put to the witnesses. Regarding his alibi, he testified that between 21 February until 16 March 2003 he had worked in Kwa-Thema, Springs. His testimony in this regard was corroborated by Mr Nhleko, the defence witness, who testified that when the complainant's mother advised him of the allegation, he had immediately enquired from her how it would have been possible for the appellant to commit these offences when he had been miles away from Delmas. It is so that his alibi was not put to the State witnesses. The State could have applied for the reopening of its case and recall the complainant to rebut that evidence. This was not done. The alibi as well as the other evidence was rejected by the trial court as a fabrication. In my view, there was nothing improbable in the alibi defence. I accept that there were some unsatisfactory aspects of the appellant's evidence and in particular, the allegation that the complainant's mother attempted to solicit a bribe from Mr Nhleko.

[36] There is one aspect that I am constrained to address and this relates to the conduct of the regional magistrate during the trial. He readily accepted the complainant's evidence notwithstanding the contradictions inherent in her testimony. Furthermore, he made complimentary remarks about the complainant's younger sister at the end of her testimony. He repeated this at the end of the mother's testimony. A judicial officer should avoid making remarks about a witness during the trial. That should be done at the end of the trial and during judgment.

[37] In the light of these factors, and having regard to the unsatisfactory aspects of the State's evidence referred to above, I am not persuaded that the State discharged the onus of proving the guilt of the appellant beyond any reasonable doubt.

[38] In the result, I would have upheld the appeal against conviction.

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NZ MHLANTLA
JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	H L Alberts
	Instructed by:
	Pretoria Justice Centre, Pretoria
	Bloemfontein Justice Centre, Bloemfontein
For the Respondent:	C P Harmzen
	Instructed by:
	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein