NOT REPORTABLE

CASE NO: SA 13/2007

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HD **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: SHIVUTE CJ, MARITZ JA and DAMASEB AJA

Heard: **25 June 2008**

Delivered: **1 March 2018**

Summary: The appellant appeared in the court *a quo* on two counts, namely rape and indecent assault. The first count alleged that the appellant unlawfully and intentionally had sexual intercourse with the complainant, a three-year-old girl. The second count alleged that the appellant wrongfully, unlawfully, indecently and lasciviously assaulted the same complainant, by having intercourse with her per anus. The appellant pleaded not guilty to both counts but was convicted on the first count and sentenced to 14 years' imprisonment. The trial court acquitted the appellant on the second count.

The appellant applied for leave to appeal against his conviction and sentence. The trial court refused, but this court on petition granted leave to appeal. However, during the hearing of the matter, the appellant abandoned his appeal against sentence and proceeded only against conviction.

On appeal, the appellant raised three principal grounds against his conviction: (a) he contended that the charge did not contain sufficient particulars of the date and time of the alleged offence; (b) that the extent of the injuries to the complainant makes it doubtful that he could have raped the complainant; and (c) that the cautionary rule relating to a single witness was not properly applied when the trial court considered the evidence of the complainant.

This court endorses the trial court's findings that it was not only alive to the risks associated with the evidence of a single and youthful witness, but also appropriately exercised caution in considering the evidence of the complainant. In relation to the ground that the charge sheet lacked particularity to the specific date(s) and time(s) on which the alleged incident(s) of the sexual intercourse occurred, this court finds that the alleged defect(s) were cured by evidence led during trial as contemplated by s 88 of the Criminal Procedure Act, 1977.

On a holistic evaluation of the state's evidence, this court is of the view that the trial court was correct in convicting the appellant on the evidence of the complainant, the corroborating evidence of the mother of the complainant and the older sister of the complainant. The appeal is accordingly dismissed.

APPEAL JUDGMENT

SHIVUTE CJ (DAMASEB AJA concurring):

[1] This is an appeal by the appellant in terms of section 316(7) of the Criminal Procedure Act 51 of 1977 (the CPA) against the conviction and sentence on a charge of rape by the High Court, Windhoek. The appeal was heard on 25 June 2008 by myself, Maritz JA (who has since retired) and Damaseb AJA (as he then was). In terms of section 13(4) of the Supreme Court Act 15 of 1990, in the event that a judge who sat on the appeal retires, the two remaining judges, provided that they form the majority, can still give a valid judgment.[1] In other words, provided that Damaseb AJA and I agree on the judgment in this matter, the appeal may validly be finalised. I now proceed to consider and decide the appeal.

[2] The appellant, as accused, appeared in the High Court on two counts, namely rape and indecent assault. On the first count, the State alleged that during 1998 and at the complainant's home village, the appellant unlawfully and intentionally had sexual intercourse with the complainant, a three-year-old girl. On the second count, it was alleged that during 1998 at or near the complainant's home village, the appellant wrongfully, unlawfully, indecently and lasciviously assaulted the complainant, a three-year-old girl, by having intercourse with her per anus.

[3] As is apparent, the complainant in this matter is a minor. I will hereafter refer

[1] See, for example, *Wirtz v Orford & another* 2015 NR 175 (SC).

to her as M.

[4] At the trial, the appellant represented by a legal practitioner instructed by the Directorate of Legal Aid, pleaded not guilty to both counts. Despite his plea of not guilty he was convicted and sentenced to an effective period of 14 years' imprisonment on the first count. The appellant was, however, acquitted on the second count.

[5] The appellant sought leave to appeal the conviction and sentence imposed by the trial court. The application was refused, but this court on petition granted leave to appeal. The appellant at the hearing in this court abandoned his appeal against the sentence and proceeded only against the conviction.

[6] The issue which has to be decided is whether the appellant was rightly convicted of rape.

[7] The appellant was convicted on the evidence of M, S[2] and the mother of the complainant. M, who was still three years old at the time of the trial, gave evidence of the nature and number of incidents of sexual intercourse between the appellant and herself. M testified that the appellant had sexual intercourse with her five times at home. M further testified that the appellant committed the alleged sexual intercourse with her in his hut when her mother was at school. M, when cross-examined by the appellant's counsel, was asked whether she had reported the sexual acts to S which

[2] M's sister who at the time of the alleged offence was 8 years of age.

she confirmed. M also testified that every time the appellant had sexual intercourse with her, she would report same to S.

[8] S, the older sister of M, also gave evidence and the gist of her evidence was that on three occasions M reported to her that the appellant had sexual intercourse with her in front and at the back. This witness testified that on the second occasion she heard M crying while she was in the appellant's room. She testified that when she asked the appellant why M was crying, the appellant responded that he was removing M's panties so that she could urinate. The witness testified that when she later asked M why she was crying, M told her that the appellant had had sexual intercourse with her. This witness further testified that on all three occasions she reported to her mother of what M had told her. However, her mother dismissed the reports stating that the appellant was not capable of such conduct as he was too old to have sexual intercourse with children and regarded the reports as 'child stories'.

[9] The mother of M also gave evidence. In her brief evidence she confirmed the report by S on her arrival home from Oshakati and corroborated her evidence in other material details. She also confirmed that her daughter (that is S) on three occasions reported to her that M had told her that the appellant had sexual intercourse with her. She testified that she ignored the first and second report as she regarded the allegations as 'child stories'. This witness testified that she only took the allegations seriously on the third time of reporting and examined the private parts of M. The witness testified that her finding was that M's private parts were red and enlarged. The witness further testified that she confronted the appellant about the allegations against him who in response promised not to do it again.

[10] M was taken to the hospital and examined by a medical doctor. The medicolegal report which was admitted into evidence revealed that M's labia minora was bruised on the right side. The report also revealed that her hymen was torn and tattered and the vaginal examination was painful. The medical doctor who conducted the gynaecological examination concluded that the injuries to M were consistent with penetration by a penis. However, the doctor could not find injuries to the anus of M.

[11] On appeal, the appellant contended that the trial court erred in convicting him, as the State had not proved beyond reasonable doubt that he had raped M. The appellant raised several grounds against the conviction. The appellant contended that the charge does not contain sufficient particulars of the date and time of the alleged offence. It was further contended that the extent of the injuries to M makes it doubtful that he could have raped M. The appellant also contended that the cautionary rule relating to a single witness was not properly applied when the trial court considered the evidence of M.

[12] The appellant during submissions in this court confirmed that at the time of the alleged incident(s), he was residing with his sister (the mother of M) and her three daughters, a worker and the children's care taker. The appellant submitted that his primary function at his sister's residence was to assist with house work and at times to take care of both M and S while their mother was at work.

[13] The appellant denied raping or indecently assaulting M. According to the appellant, he was only aware of the allegations against their neighbour's son, J (a

minor boy). The appellant's account was that her sister informed him that a certain boy called J always had sexual intercourse with M. The appellant submitted that on receiving the information about J's sexual acts towards M, they (his sister and appellant) confronted J's parents regarding their son's behaviour.

[14] The appellant's defence as presented during his evidence in chief and cross-examination raised an alibi. The appellant contended that it was practically impossible for him to have raped or sexually assaulted M on 10 October 1998, because on that day, he was with his sister (the mother of M) in Oshakati for the day and only returned home around 17h00. The appellant contended that the evidence by the State failed to disclose the exact date and time of the alleged offence in the charge. The appellant argued that in this case the date and time of the alleged offence is material and failure to set out same renders the charge defective. In support of this ground, the appellant referred to the decision in *S v Katari* 2006 (1) NR 205 (HC).

[15] The appellant further contended that the extent of the injuries sustained by M is inconsistent with what one would expect of a child of three years of age being raped by an adult male. In his explanation, the appellant suggested that if an adult male raped a girl who is three years old, one would not expect only a bruise on the right side of the labia minora, but rather extensive injuries to the private parts of a young girl.

[16] According to the appellant, the evidence by M that J only hurt her in her vagina corresponds with the medical evidence that the rectal examination was

normal. The appellant contended that the extent of injuries to M corroborates his version that M was sexually assaulted by a young boy rather than an adult person. The appellant also challenged the conviction on the basis that no semen was found on the shirt alleged to have been used by him to clean M after she was raped.

[17] The appellant also devoted argument on the application of the cautionary rule by the trial court. The appellant submitted that courts must approach the evidence of young children with caution as they can be easily influenced by other factors. It was contended that there must be corroboration of the evidence of the complainant particularly when the complainant is a single witness to the case. The appellant contended that in the present case, the complainant could have easily been influenced to place blame on him as she not only knew him but also because they both resided in the same house. In support of this ground of appeal, the appellant referred this court to the following decisions: *S v D & another* 1992 (1) SACR 143 (Nm); *S v Katamba* 1999 NR 348 (SC) and *S v Monday* 2002 NR 167 (SC).

[18] The fundamental principle of our law is that in a criminal trial, the prosecution has a duty to prove the guilt of an accused beyond reasonable doubt (See *S v Van Den Berg* 1996 (1) SACR 19 (Nm)). At this stage it would be convenient to deal with the findings of the trial court in determining whether or not the trial court erred in convicting the appellant.

[19] I agree with the appellant that the evidence of the complainant had to be considered carefully because of the age of the complainant and because she personally knew the appellant as they both resided in the same house.

[20] I find nothing in the reasoning of the trial court that discloses a misdirection on the application of the cautionary rule. When one has regard to the court's judgment, it becomes evident that the trial court was not only alive to the risks associated with the evidence of a single and youthful witness, but also appropriately exercised caution in considering the evidence of the complainant. The trial court in its judgment stated that the cautionary rule requires the recognition of the inherent danger and the existence of some safeguard that reduces the risk of a wrong conviction, for example corroboration of the complainant's version. According to the trial court, despite the age of the complainant it could not find any reason why the complainant's mother could have made a case against her own brother. In fact the appellant himself that testified there was no basis for the complainant or her older sister to falsely implicate him.

[21] I agree with the findings by the trial court that the fact that there is another person involved in the sexual assault on the complainant has nothing to do with the incident(s) that the appellant stood trial for. On a holistic evaluation of the state's evidence, I am of the view that the trial court was correct to convict the appellant on the evidence of M and the corroborating evidence of other witnesses called on behalf of the state, namely, S as well as her mother.

[22] The next ground of appeal is that the charge sheet lacked particularity to the specific date(s) and time(s) on which the incident(s) of the sexual intercourse occurred. The appellant contended that a mere mention that the alleged offence took place during 1998 was insufficient for a conviction of rape. This contention is based

on s 88 of the CPA.

[23] Section 84 of the CPA provides:

'84 Essentials of charge

(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.'

[24] In *S v Katari,* supra at 206J – 207A Maritz J had this to say:

'Section 84(1) of the Criminal Procedure Act, 1977, requires that a criminal charge - 'shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom ... in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge'.

[25] The learned judge at 207B-C went on to say:

'The purpose of this section is to inform an accused of the case which he or she will have to meet so that he or she knows which allegations to answer and to prepare a

> defence, if any. Unless the date or time is a material element of the offence as contemplated in ss 92 and 93 of the Act, it is unlikely that an accused will be prejudiced if those particulars are omitted from the charge, provided, of course, that the other particulars are sufficient to adequately inform him or her of the case he or she will be required to answer.'

[26] In this case it is common cause that no date(s) or time(s) were provided in the charge during which the alleged sexual intercourse(s) between the appellant and complainant had occurred, except to state that the sexual acts occurred during 1998. With the greatest respect, attacking what the appellant regards as a 'defect in the charge sheet' at this late stage is untenable. The answer to the point raised by the complaint regarding the correct formulation of the charge lies in s 88 of the CPA.

[27] Section 88 of the CPA provides that:

> '**88 Defect in charge cured by evidence**
>
> 'Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred.'

[28] As I have already noted, the appellant during the trial testified that on 10 October 1998, the mother of the complainant and himself went to Oshakati at 10h00 and only returned home at 17h00. Accordingly, it was practically impossible for him to have raped or sexually assaulted the complainant on that day as he was not there during the day. I pause here to consider the relevancy of the emphasis placed by the appellant on the date of '10 October 1998' and on his alibi.

[29] The evidence of the appellant of 10 October 1998, as I accept, only becomes

relevant as to the date on which the complainant's sister informed her mother of the rape perpetuated on the complainant by the appellant. What the appellant fails to appreciate is that the evidence led by the state of that specific date was not produced as a possible date during which the rape occurred, but rather the date on which the complainant's sister reported one of the alleged incidents to her mother. I therefore see no relevancy of his defence to other incidents alleged by the complainant.

[30] I must also note that the appellant was legally represented at the trial and the alleged defect was not raised, so whatever merit there might have been in this submission, it cannot assist the appellant who was legally represented by a legal practitioner. In light of the afore-going, I am of the view that the late challenge regarding a defective charge sheet cannot be visited at this stage. I further wish to note that in the absence of any prejudice to the appellant, this ground of appeal cannot be sustained. I wish to remark in passing that this court would not expect a child of three years old to remember the specific date(s) and time(s) of an event, more so, a year after the happening of the event.

[31] As I have already noted, on a holistic evaluation of the state's evidence, I am of the view that the trial court was correct in convicting the appellant on the evidence of M, the corroborating evidence of the mother of the complainant and the older sister of the complainant. I am also of the view that whatever defects as alleged by the appellant to the formulation of the charge, the evidence adduced by the state established the guilt of the appellant beyond reasonable doubt. For these reasons, I would uphold the conviction and accordingly dismiss the appeal.

[32] In the result I make the following order:

The appeal is dismissed.

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SHIVUTE CJ

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DAMASEB AJA

APPEARANCES

APPELLANT:	Z J Grobler Instructed by the Directorate of Legal Aid, Windhoek
RESPONDENT:	I M Nyoni Office of the Prosecutor-General, Windhoek