

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

APPEAL NUMBER: A135/2021

In the matter between:

P E J

APPELLANT

and

THE STATE

RESPONDENT

HEARD ON: 11 APRIL 2022

CORAM: NAIDOO, J et AFRICA, AJ

JUDGMENT BY: NAIDOO, J

DELIVERED ON: 1 SEPTEMBER 2022

[1] The appellant and his co-accused (accused 2) were convicted on 19 July 2017 and sentenced on 20 July 2017, in the Bloemfontein Regional Court, for the rape of a minor girl, who was 14 years old at the time. The charges related to contraventions of section 3 of the Criminal Law (Sexual and Related Matters) Act 32 of 2007 (the Sexual Offences Act), read with the relevant provisions of the Criminal Procedure Act 51 of 1977 (the CPA), the Criminal Law Amendment Act 105 of 1997 (Minimum Sentences Act) and the Children's Act 38 of 2005. The appellant and his co-accused were sentenced to life imprisonment. Only the appellant has lodged an appeal against his conviction and sentence, and approaches this court in terms of his automatic right of appeal. Adv. P Mokoena appeared for the appellant and Adv. (Ms) MM Moroka for the respondent.

[2] The Appellant's grounds of appeal against the conviction and sentence are, in essence, that the court *a quo* erred in:

- 2.1 finding that the state had proved its case;
- 2.2 finding that the state witnesses gave evidence in a satisfactory manner;
- 2.3 over-emphasising the seriousness of the offence (in respect of sentence);
- 2.4 not attaching adequate weight to the appellant's personal and mitigatory circumstances;
- 2.5 finding that no substantial and compelling circumstances existed for it to deviate from imposition of the minimum sentence.

[3] The background to this matter, briefly, is that the complainant, who was 14 years old at the time, was at a tavern and when the tavern

closed she and her friend left the tavern to go home. On the way, they met the appellant and accused 2. She testified that they wanted to “take” her friend. She reprimanded them, after which her friend ran away from them, leaving the vicinity with her boyfriend. She

continued to walk with the appellant and accused 2 when they said to her that because she had refused to let them take her friend they were going to take her. They dragged her to a shack while accused 2 was armed with a broken bottle. There they took turns to rape her. Thereafter they escorted her out of the shack and walked with her until they parted ways, threatening to kill her if she told anyone what had happened. Shortly thereafter she saw a police vehicle and explained to the policeman what had happened. She was thereafter taken to the police station and a few hours later to the hospital to be medically examined. The fact that she was raped and sustained the injuries reflected on the J88 form were not disputed. It was also not in dispute that the complainant knew the appellant and accused 2 prior to this incident. The policeman, Constable Majela was called as a witness for the state and confirmed the complainant’s version regarding her meeting and interactions with him.

- [4] The appellant tendered an alibi defence, alleging that he was at his home at the relevant time (between 11pm and 12 midnight) where he resides with his mother and younger brother. He denied being at the tavern, or in the company of accused 2 that evening and he also denied raping the complainant and alleged that she is “framing” him, which can be accepted to mean that she is falsely implicating him. He was extensively cross-examined, and

confirmed that he knew the complainant's ex-boyfriend as she had testified, and that he knew the complainant by sight. He further confirmed that there was no bad blood between them. He called his mother as a witness to confirm his alibi.

[5] The trial court bears the task of analysing and evaluating evidence. An appeal court is limited in its ability to interfere with the trial court's conclusions, and may not do so simply because it would have come to a different finding or conclusion. The trial court has the advantage of seeing and hearing witnesses, which places it in a better position than a court of appeal to assess the evidence, and such assessment must prevail, unless there is a clear and demonstrable misdirection. This is a principle that is well established in our law.

[6] In *R v Dhlumayo and Another 1948 (2) SA 677 (A)* at 705 the majority, per Greenberg JA and Davis AJA (Schreiner dissenting) said: "The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness and being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing their demeanour, but also their appearances and whole personality. This should not be overlooked." A similar view was adopted in *S v Pistorius 2014 (2) SACR 315 (SCA)* par 30, which cited, *inter alia Dhlumayo* with approval:

"It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another 1948 (2) SA 677 (A)* at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para 12. It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court.

As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, *this court* is not at liberty to interfere with his findings.”

Dhlumayo has been applied and cited with approval in a long line of cases since 1948. More recently, the SCA in *AM and Another v MEC for Health, Western Cape 2021 (3) SA 337 (SCA)* applied the dicta in Dhlumayo as set out above.

- [7] In the present matter, the trial court undertook a comprehensive analysis of the evidence for the state and the appellant, as well as the law applicable to the facts. The Court reminded itself extensively of the caution required when dealing with the evidence of children. In this case the complainant was 14 years old when the incident occurred, and 17 years old when she testified. The court *a quo* eloquently articulated that the reason for caution when presented with evidence of a young child is that such a child is “highly imaginative” and her “evidence may be the product of suggestion by others”. The manner in which the court approached the evidence of the complainant demonstrated amply that it never lost sight of the caution to be exercised. The court referred to a “three-pronged cautionary rule”, where it reminded itself that it was dealing with a single witness, that the complainant was young and that identity was in dispute.
- [8] The court indicated that the complainant made an “excellent impression” upon it, in that she maintained her version throughout and no material discrepancies were apparent in her evidence. The court undertook a detailed analysis her evidence, in support of its assertion that she made a good impression on the court. The court touched upon aspects of her evidence that were the subject of criticism, namely that certain aspects of her evidence only emerged

in cross-examination. The court, in dealing with these aspects adopted the practical and common-sense approach that she was not led on these aspects in evidence in chief and hence did not mention those aspects. It must be borne in mind that this is a young girl who would be unfamiliar with the intricacies of court proceedings and evidence required in a matter such as this, if she was not pertinently asked.

- [9] The court *a quo*'s analysis and manner of dealing with the discrepancies demonstrated amply that the court was very cognisant of the caution it had to apply in dealing with such evidence. The court's impression of the honesty and reliability of the complainant was correctly fortified by the many common-cause facts, which it detailed, namely, that the complainant and appellant were known to each other prior to this incident, the nickname by which she knew him, the fact that she was raped and the injuries she suffered. I cannot fault the reasoning of the court in this regard and its conclusion that that it was satisfied that her evidence in respect of the rape and how it occurred was reliable and that despite her youthfulness, the requirements for the application of the cautionary rule were met. The court dealt extensively with the issue of identity and analysed the evidence of the complainant in relation to the surrounding evidence, weighing the "negatives" such as the fact that it was dark, with the "positives", being that she knew both her assailants, named them to the police, even though she did not point them out. The police knew exactly who the assailants were, as Dewetsdorp, where the incident occurred, was such a small town. The court also held that there was no evidence that the alcohol that the complainant had consumed, had any effect on the reliability of her evidence.

- [10] The court then analysed the appellant's version and especially the evidence of his mother, who was the alibi witness. In this regard too, I cannot fault the court's reasoning for rejecting the alibi evidence. The court *a quo*, was in a much better position than this court to assess and analyse the evidence presented to it, and I am unable to find that the court misdirected itself in convicting the appellant, as charged.
- [11] With regard to sentence, the appellant argued that the sentence of life imprisonment was inappropriate, as the court failed to properly consider his personal circumstances and to find that substantial and compelling circumstances existed to justify imposition of a lesser sentence. The appellant's circumstances placed on record are that he was at the time of commission of the offence, 19 years old, was unmarried, with no children. He is a first offender who was earning an amount of R2500.00 per month from a six-month programme that he engaged in, and that he supported his mother financially. In his Heads of Argument, Mr Mokoena argued that the complainant did not sustain serious physical injuries and that this was not the worst kind of rape. This together with the youth of the appellant was deserving of a lesser sentence. He suggested a term of imprisonment of 20 years, antedated to 20 July 2017.
- [12] In its Heads of Argument, the state supported the conviction and sentence in this matter, but in oral argument in court stated that perhaps life imprisonment was a bit harsh, and did not appear to raise any objection to the proposal of a 20-year term of imprisonment by the defence. The court took into account and analysed all the personal circumstances of the appellant, including

the part that alcohol may have played in the commission of the offence. The court emphasised that it had to perform the very difficult task of balancing all the various factors relevant for sentencing and considered the cumulative effect of all these

circumstances in concluding that it could find nothing substantial or compelling in the appellant's circumstances that warranted imposition of a sentence lesser than the prescribed minimum. An appeal court is also limited in its ability to interfere with the sentence imposed by a trial court as sentencing is within the discretion of that court, unless an irregularity has been committed or the discretion of the court has been improperly applied. I can find no such irregularity or improper application of the trial court's discretion.

[13] In the circumstances, the following order is made:

13.1 The appeal is dismissed

13.2 The conviction and sentence imposed on the appellant are hereby confirmed.

NAIDOO, J

I concur.

AFRICA, AJ

On behalf of appellant: Adv P Mokoena
Instructed by: Legal Aid South Africa
Bloemfontein Local Office

On behalf of respondent: Adv. (Ms) MM Moroka
Instructed by: The Office of the DPP
Bloemfontein