IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal number: A148/2022

In the matter between:

NAKO ELLIOT MASELI Appellant

and

THE STATE Respondent

CORAM: LOUBSER, J et TSANGARAKIS, AJ

HEARD ON: 6 FEBRUARY 2023

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 2 MARCH 2023

---

[1] The appellant in this matter appeals against his conviction and sentence on a charge of raping his biological daughter, who was 17 years old and pregnant at the time. He was found guilty on this charge on 18 August 2017 in the Regional Court sitting at Ladybrand. On 27 September 2017 he was sentenced to life imprisonment. The appellant now comes in higher contention by virtue of an automatic right of appeal in terms of the provisions of section 309(1) of the Criminal Procedure Act 51 of 1977.

[2] The record of proceedings shows that the conviction of the appellant was founded on the evidence of a single witness, namely the complainant herself. In his judgement, the trial Magistrate applied the cautionary rules relating to the evidence of single witnesses, and he came to the conclusion that the complainant was a good witness.

[3] However, it was contended on behalf of the appellant that the court *a quo* erred by disregarding the cautionary rules applicable to single witness evidence, that the court *a quo* erred in finding no improbabilities in the State's case, and that the court *a quo* erred in dismissing the alibi of the appellant, whilst he carried no burden of proof in that respect. It must be mentioned right from the outset, though, that the power of an appeal court to interfere with the findings of a trial court on credibility, is limited. In **S v Francis**[1], for instance, it was held that "bearing in mind the advantage which a trial court has of seeing, hearing and appraising witnesses, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony."[2]

[4] As far as the alleged failure of the court *a quo* is concerned to find improbabilities in the State's case, it is necessary to deal with the specific improbabilities as alleged on behalf of the appellant. The first is that, according to the testimony of the complainant, she only asked her mother after the incident about supposed traditions, while she did not report to her mother that she was raped by her father, the appellant. The second is that the complainant made no attempt to escape despite the opportunity to do so when the appellant went to visit the toilet during the incident. The import of these alleged improbabilities will become evident when I turn to the facts of the matter hereunder. Suffice it to mention at this point that the trial Magistrate did deal with these alleged improbabilities in his judgement, and he came to the conclusion that the conduct of the complainant in these respects was due to the common cause fact that there existed a strict, tumultuous or difficult relationship between the complainant, the appellant and her mother.

---

[1] **1991 (1) SACR 198 (A)**
[2] **Ibid at 204 D**

[5] The third ground is that the trial Magistrate erred in dismissing the appellant's version of an alibi. The appellant testified that he was somewhere else with other people when the crime was allegedly committed. Despite the fact that those people were available to testify, they were not called by the appellant to support his version. The trial Magistrate referred to this aspect in his judgement, and he added that the appellant did not make a good impression when he testified. "His evidence was not of a very persuasive value," he found.

[6] It is now apposite to turn to the facts of the matter. The complainant testified that she was pregnant at the time when her father, the appellant, entered her room and got into her bed with her. He told her about a custom which her mother had also gone through, namely that a father would have intercourse with his pregnant daughter in order to make the process of her giving birth easier. She disagreed with this. Eventually the appellant undressed her lower body and then had intercourse with her. While in the act, the appellant interrupted the intercourse and went to the toilet. When he came back, he resumed the intercourse. Afterwards the appellant fell asleep. The complainant then sent a message to her mother by whatsapp to inquire about the custom she was told about. Although she did not give her consent to the sexual intercourse, she did not message her mother about the rape. The next morning she went to her boyfriend's mother, and she told the mother that her father had raped her. The mother confirmed this visit by the complainant in giving evidence. She testified that the complainant was shaking and crying at the time when she made the report.

[7] The trial Magistrate referred to this evidence in his judgement. He also referred to the evidence of the doctor who testified for the State. The doctor found a small tear or laceration on the lower part of the complainant's vagina. The trial Magistrate concluded that the probabilities of the case were also against the appellant.

[8] I have no reason to disagree with the findings of the trial Magistrate. But as a last bite at the cherry it was contended that the trial Magistrate was wrong in finding the appellant guilty "as charged". The appellant was charged with rape read with the provisions of section 51 and 52 of Act 105 of 1997. The charge

sheet referred to “an act of sexual penetration”. The trial Magistrate found in his judgement that the appellant had sexual intercourse with the complainant on two occasions.

[9] The thrust of the appellants argument in this respect is that the charge sheet did not refer to section 51(1) of Act 105 of 1997, which sets a minimum sentence of life imprisonment for rape that was committed twice. Since section 51 (1) was not mentioned, section 51(2) was applicable, the argument went. In terms of section 51(2), the minimum sentence is 10 years imprisonment. It appears from the record that the appellant was not apprised of the minimum sentence in terms of Section 51(1) in court, but on the other hand, he was legally represented.

[10] However, in **September v S**[3] the Constitutional Court had the following to say: “It is indeed desirable that the charge sheet refers to the relevant penal provision of the Minimum Sentences Act. This should not, however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentences Act in the charge sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in trial. This is so because even though there may be no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused’s section 35(3) right to a fair trial was not in fact infringed.”

[11] In my view, the individual circumstances of the present matter do reveal sufficient indications that the appellant’s section 35(3) rights (in the Constitution) to a fair trial was not in fact infringed. As already mentioned, the appellant was legally represented. Also, in the charge sheet there is reference to section 51 and 52, although subsections are not mentioned. One can safely assume that the legal representative would have informed the appellant of the different provisions of section 51. Moreover, in terms of section 88 of the Criminal Procedure Act, any incomplete information in the charge sheet was certainly remedied by the evidence before the court. Lastly, it is not alleged by the appellant in his grounds of appeal or in his heads of argument or anywhere

[3] **[2018] ZACC 27 par 40**

else that his right to a fair trial was infringed by what was stated in the charge sheet. It follows that there is no merit in this argument advanced on behalf of the appellant. The appeal against conviction must therefore fail.

[12] As for the sentence imposed, it is contended on behalf of the appellant that the sentence should be reduced to a minimum sentence of 10 years imprisonment as provided for in section 51(2) of Act 105 of 1997, read with Part 3 of Schedule 2 of the Act. Here reliance is again placed on the argument raised in respect of the charge sheet and what is stated in the charge sheet. I have already dismissed this argument, and it is not necessary to deal with it again in relation to the sentence.

[13] In sentencing the appellant, the trial Magistrate took account of, *inter alia*, the personal circumstances of the appellant. He was 35 years old at the time and a first offender. He has two children, the complainant being one of them. Considering the question whether the court should find the presence of compelling and substantial circumstances in order to deviate from the prescribed minimum sentence, the trial Magistrate observed that the conduct of the appellant was particularly reprehensible since the victim was his daughter, she was 17 years old and she was pregnant. Moreover, the appellant has raped her twice, the trial Magistrate found. In view of these findings, the court *a quo* could not find any reason to deviate from the minimum sentence.

[14] Again, I am in full agreement with the findings of the trial Magistrate in respect of sentence. In any event, in appeals against sentence, an appeal court is not free to interfere with the discretion exercised by the sentencing officer, unless the discretion was tainted with a material misdirection or where the sentence is so disproportionate to the crime, the personal circumstances of the offender and the interests of society, that it induces a sense of shock. These principles have already become trite law in the approach to sentences imposed. I cannot find that any of the factors mentioned are present in this appeal. Consequently, the following order is made:

1. The appeal against conviction and sentence is dismissed.

_____
P. J. LOUBSER, J

I concur:

_____
S. TSANGARAKIS, AJ

For the Appellant:	Me. S. Kruger
Instructed by:	Legal Aid SA, Bloemfontein
For the Respondent:	Adv. S. M. Mthethwa
Instructed by:	Office of the Director of Public Prosecutions, Bloemfontein

/roosthuizen