REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION PRETORIA)

CASE NO: A146/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

_____ _____

DATE SIGNATURE

In the matter between:

SEODISA SELLO JOHANNES **APPELLANT**

AND

THE STATE **RESPONDENT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 08 June 2022.

JUDGEMENT

NDLOKOVANE AJ (DE VOS J Concurring)

INTRODUCTION

[1.] The appellant was convicted in the Gauteng Regional court, held in Pretoria North on 06 November 2013 on one count of rape, committed during the year 2009 in the Soshanguve area. It was found that where he raped the complainant, a girl, who was 9 years at the time of the incident. The appellant was sentenced on 02 April 2014, to life imprisonment for contravention of the provisions of section 3 of Act 32 of 2007, read with the provisions of section 94 of Act 51 of 1977, with reference to the minimum sentence regime contained in section 51 of Act 105 of 1997. He now appeals against his conviction and sentence in terms of the automatic right to appeal the appellant enjoys by virtue of section 309(1) (a) of Act 51 of 1977.

[2.] One of the grounds of appeal in respect of the conviction is that the learned magistrate erred in rejecting the evidence of the appellant and found instead that the state had proved its case beyond a reasonable doubt. It is contended that the state witness, being a minor child was a single witness and that the charge was that of a sexual nature. The magistrate misdirected himself by failure to treat the complainant's evidence with great caution.

[3.] Regarding the sentence, the appellant contends that the learned magistrate over-emphasized the seriousness of the offence and the interest of the society, which led to the finding that no substantial and compelling circumstances existed justifying deviation.

POINT *IN LIMINE*

[4.] The appellant during the hearing of this matter and in his heads of arguments, raised a point *in limine* that the record was incomplete. The state witnesses' evidence by the name of Nongathini Mnisi, was incomplete. The cross examination was not typed in full and therefore incomplete. It was argued that the missing part is crucial for the appellant's defence. The appellant also contends that under these circumstances, it is difficult to compile heads of arguments especially on the aspects relating to guilt of the appellant and circumstantial evidence.

[5.] The respondent counsel concedes that the record is indeed incomplete, and it is not possible to have it reconstructed owing to the passing away of the trial magistrate. The respondent counsel submits that the judgement and the record in its present form is sufficient to determine the issues in the appeal.

[6.] In the case of ***S v Chabedi*** **[2005] ZASCA 5; 2005 (1) SACR 415 (SCA) at para 5** the SCA, dealing with an incomplete record, explained that a defective record need not be perfect. It need only be adequate:

> '*The requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect record of everything that was said at the trial. The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.'*

[7.] I align myself with the reasoning of that court and the submissions of the respondent in this regard. The record *in casu*, consists of the full judgement of the court *a quo* on conviction and sentence, the addresses by legal representatives of the parties, the evidence in chief and cross examination of the complainant which was made through the assistance of an intermediary, the evidence of the complainant's grandmother even though her cross examination was incomplete and the complete evidence of the appellant, The evidence read with the argument and judgement is detailed and specific which enables us to determine the issues before us. With the passing of the trial magistrate, I am of the view that there is no doubt in my mind that the missing

evidence as outlined above will not hamper this court of appeal to understand what evidence was before the trial court enabling us to determine whether a correct conviction and/ or sentence was arrived at.

[8.] In my view the record was amply adequate for just consideration of the issues the appellant raised on appeal and the point in *limine of* incomplete record must fail.

[9.] The general principles applicable to appeals are set out in the case of ***R v Dhlumayo* 1948 (2) SA677(A).** The point of departure is that the conclusion of the trial court was correct, unless it is convinced that the assessment of the evidence is wrong. This Honourable court may not interfere with credibility findings made by the court *a quo*, unless it is clearly wrong.

ISSUES

[10.] The issue in this appeal is whether the State succeeded in proving beyond a reasonable doubt its case against the appellant. I now first deal with the assessment of the evidence as it relates to the determination of issues before us.

ASSESSMENT OF EVIDENCE

[11.] The evidence of the complainant is that of a single witness in respect of the rape incidents upon her. The court *a quo* had regard to the cautionary rules applicable when assessing complainant's evidence.

[12.] The court *a quo* was aware that it was dealing with the evidence of a child witness and properly evaluated the evidence of a child witness who is also a single witness. The court found the witness evidence to be satisfactory in every material respect. The court *a quo* applied the principles set out in the case of ***DPP v S* 2000 (2) 711 (T) and *Klink v Regional Court Magistrate NO and Others* 1996 (3) BCLR 402 (SE) as well as *S v Sauls* 1981 (3) SA 172 (A) at 180E-G**.

[13.] In my view, the learned Magistrate correctly concluded that the evidence of the complainant was satisfactory in all material respects and rejected that of the appellant. For the following reasons:

(a) It is not in dispute that the appellant is known to both complainant and her grandmother. Further the appellant's responses to questions whether he knew the complainant before the incident confirmed complainant's version. Complainant referred the appellant as Mathi, this is not disputed by the appellant. Therefore, there can be no issue of identification as they are known to one another.

(b) It is the appellant's version that there is no bad blood between him and the grandmother and the complainant. This begs the question; why would the complainant and her grandmother falsely implicate him? This, I do not accept.

(c) If one considers when and how the first report of the rape incident was made. The first report was made to the grandmother on a 'least expected day'. The grandmother was enquiring from the complainant why Mathi was looking for her and that's when the complainant told her of the rape incident. It happened after being taken to the clinic for vomiting. This was not on one of the days that the appellant raped her. I have no reason to reject the evidence of the first report and the complainant in this regard.

CAUTIONARY RULE

[14.] In the present matter, the cautionary rule is applicable in two fold firstly, the witness is a minor child, secondly, she is a single witness as regards to the sexual offences.

CHILD WITNESS

[15.] In ***Rughubar v The State*** **[2012] ZASCA 188 (30 November 2012)** it was held that:

> '*It must be accepted that young children experience difficulties when relating to the court what actually happened with the precision expected of an adult, especially pertaining to incidents concerning sexual behaviour as well as incidents that occurred a while ago*.' The need for caution cannot be ignored.

[16.] However, in ***Woji v Santam Insurance Co. Ltd*** **1981 (1) SA 102**:

> *'(A) The evidence of a minor witness was commented upon as follows:*
> *"Trustworthiness of a child 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. His capacity of observation will depend on whether he appears intelligent enough to observe. Whether he had the capacity of recollection will depend again on whether he has sufficient years of discretion to remember what occurs while the capacity of narration and communication raises the question whether the child has the capacity to understand the questions put, and to frame and express intelligent answers."*

[17.] In this case, from the record the minor witness, who was repeatedly raped, had a recollection of the different occasions when the rape incidents happened. This corroborates what she told her grandmother.

[18.] The trial court found both witnesses (the complainant and her grandmother) to be competent and reliable witnesses.

[19.] I have no reason to find that despite the cautionary rule being applicable, the child witness was not competent.

SINGLE WITNESS

[20.] In the SCA decision of ***Stevens v S*** **[2005] 1 All SA 1 (SCA)** expressed itself at para 17 as follows:

'*As indicated above, each of the complainants was a single witness in respect of the alleged indecent assault upon her. In terms of* section 208 *of the* ***Criminal Procedure Act 51 of 1977****, an accused can be convicted of any offence on the single evidence of any competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (see, for example,* ***S v Webber 1971 (3) SA 754 (A) at 758G–H).****'* The correct approach to the application of this so-called "cautionary rule" was set out by Diemont JA ***in S v Sauls and others 1981 (3) SA 172 (A) at 180E–G*** as follows:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness…The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 ***[in R v Mokoena 1932 OPD 79 at 80]*** *may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded" (per Schreiner JA in* ***R v Nhlapo (AD 10 November 1952)*** *quoted in* ***R v Bellingham 1955 (2) SA 566 (A) at 569)*** *It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'*

[21.] The evidence of the complainant in all respects was free of shortcomings, the *court a quo* considered the merits and demerits of the evidence and correctly concluded that she was sexually assaulted.

(a) The trial court analysed the evidence of all the witnesses and found that there was more than enough corroboration in their evidence. For example:

(b) All the witnesses confirmed that they knew the appellant before the incident, so there was no question of false identification.

[22.] Accordingly, I have no reason to tamper with the decision of the court a *quo* in respect of conviction.

SENTENCE

[23.] It is trite that, in an appeal against sentence, the court of appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the court of appeal should be careful not to erode that discretion.

[24.] A sentence imposed by a lower court should only be altered if: -

(i) An irregularity took place during trial or sentencing stage.

(ii) The trial court misdirected itself in respect of the imposition of the sentence.

(iii) The sentence imposed by the trial court would be described as disturbingly or shockingly inappropriate.

[25.] In the present matter, the appellant was convicted in terms of the provisions of 51 and 52 of schedule 2 of the Criminal Law Amendment Act 105 of 1997('Act 105 of 1997').

[26.] Section 51 (1) of the Act 105 of 1997, provides for minimum sentences of categories of offenders who have been convicted of offences reflected to in Par I, II, III and IV of schedule 2 by providing that:

> *'Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life…'*

[27.] An escape clause appears under section 51 (3) of the Act and provides that:

> '*If any court referred to in subsections 1 or 1 is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in these subsections, it shall enter*

those circumstances on record of the proceedings and must therefrom impose such lesser sentence.'

[28.] In evaluating substantial and compelling circumstances Marais JA in ***S v Malgas*** **2001 (1) SACR 469 (SCA) at 477f** held:

'But for the rest I can see no warrant for deducing that the legislature intended a court to exclude from consideration, ante omnia as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets 'substantial' and 'compelling' cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure.'

[29.] The learned Judge continued at 481i to 482a:

'B. Courts are required to approach the imposition of sentence conscious that the legislature had ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.'

[30.] In mitigation, the appellant brought to the attention of the court a *quo* his personal circumstances. From the record, these can be summarised as follows:

(a) The appellant was 43 years old at the time of hearing, unmarried, he had two children, with ages 9 and 11 years old respectively and went to school up to grade 11(standard 9). Before his incarceration, the

appellant was self-employed as a hawker, selling food and toiletries. The appellant has previous convictions older than 10 years ago, and therefore regarded by court a quo as a first offender.

[31.] It should however be borne in mind that in cases of serious crime the personal circumstances of the offender by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is employed, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of "flimsy" grounds that ***Malgas*** said should be avoided.

[30.] In the case of ***S v GK 2013(2) SACR 505 WCC,*** the court held that there is nothing in the Act which fettered an appellate court's' power to reconsider the matter of substantial and compelling circumstances. The values of the constitution were better served by an interpretation which did not fetter the appellate court when it came to the question of the presence or absence of substantial and compelling circumstances. To allow an appellate court to make its own value judgment on appeal provided accused persons with greater safeguards against the imposition of disproportionate punishment. This principle was followed and approved in the case of ***S v De Beer 2018(1) SACR 229(SCA***).

[31.] The court a *quo* imposed the minimum sentences prescribed in the **Criminal Law Amendment Act 105 of 1997** ('Act 105 of 1997') in respect of the count of rape. After considering the factors required to be taken into account in the imposition of sentence, including the appellants' personal circumstances, the court *a quo* came to the conclusion that there were no substantial and compelling circumstances to deviate from the prescribed minimum sentences.

[32.] In this regard, the court *a quo* said that the appellant was convicted of a very serious offence and the victim report showed how the complainant was adversely affected as she started repeating the same to other boys at her

school. The seriousness of the crime in question therefore outweighed their personal circumstances.

[33.] Having considered the records, in the present matter, authorities cited above and submissions made by both counsel during the hearing, I do not see how the court *a quo* fused appellants' personal circumstances as set out above into the consideration of sentence. Much emphasis was placed on the seriousness of this rape offence, which of course is serious given the fact that the victim was only 9 years at the time of the incidents on her which occurred on numerous occasions. He was a first offender for this kind of crime, and this was not considered *or* given any weight when considering the circumstances of the case and appropriate sentence to be meted out. Failure to carefully consider all this factors made the sentence of life imprisonment disturbingly inappropriate.

ORDER

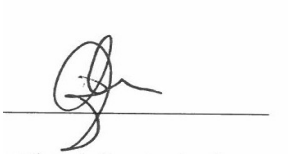
[34.] I propose the following order.

34.1 The appeal against conviction is dismissed.

34.2 The appeal against sentence succeeds.

34.3 The sentence of life imprisonment is set aside and replaced by the following: "The accused is sentenced to 18 years' imprisonment"

34.4 The sentence is antedated to 02 April 2014.



NDLOKOVANE N

ACTING JUDGE OF THE HIGH COURT

I agree, it is so ordered.

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DE VOS H J

JUDGE OF THE HIGH COURT

APPEARANCE:

ATTORNEY FOR THE APPELLANT	: M BOTHA
COUNSEL FOR THE RESPONDENT	: ADV C.P. HARMZEN
DATE OF HEARING	: 12 MAY 2022
DATE OF JUDGMENT	: 08 JUNE 2022