1**IN THE HIGH COURT OF SOUTH AFRICA**

GAUTENG DIVISION, PRETORIA

Case number: A326/2022

Date: _____

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
.....
DATE SIGNATURE

In the matter between:

NKOSINATHI LAWRENCE MALATJIE Appellant

and

THE STATE Respondent

JUDGMENT

MINNAAR AJ,

[1] The appellant was charged with rape in contravention of section 3 read with sections 1, 55, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law

Amendment Act (Sexual Offences and Related Matters) 32 of 2007, further read with section 256, 257 and 261 of the Criminal Procedure Act 51 of 1977, the provisions of sections 51(1) of the Criminal Law Amendment Act 105 of 1997, as amended, as well as section 92(2) and 94 of the Criminal Procedure Act 105 of 1977 in that, on or about 25 February 2020 and at or near KwaThema, Gauteng, the appellant raped the complainant, being seven years old at the time of the offence.

[2] Throughout the trial the appellant was legally represented. He pleaded not guilty to the charge and elected not to disclose his defence. On 14 September 2022 the appellant was convicted of the rape by the Regional Court, Springs.

[3] On 1 November 2022 the appellant was sentenced to life imprisonment. Due to the nature of the sentence, and as provided for in section 309(1)(a) of the Criminal Procedure Act, 105 of 1977 , the appellant had an automatic right to appeal.

[4] The appeal is against both the conviction and the sentence.

Conviction:

[5] In the appellant's heads of argument it was submitted that there were material contradictions in the complainant's testimony. At the hearing of the appeal, the appellant's representative submitted that the alleged material contradictions are limited to whether the penetration was in the front or back (referring to whether the penetration was in the anus or in the vagina) and to the date of the incident.

[6] It is common cause that the complainant is the appellant's adopted sister. Her evidence was that she came back from school, changed her clothes and went to play outside. The appellant then called her and as she refused to adhere, the appellant picked her up and put her on top of the bed in the bedroom she shared with her mother. After he undressed the complainant's legging and panty, the appellant did silly things to her. The 'silly things' the appellant did, was that he took out his thing, referring to the appellant's totolozi, and inserted it in her anus. The appellant told the complainant that she should not tell her mother or else the accused will kill both of them. The appellant then left the house. The complainant remained in the house and later the same evening, when her mother came back home, she told her mother what had happened.

[7] The complainant's mother testified that on 25 February 2020, when she arrived home, she found the complainant at the house and the complainant did not look okay. Upon enquiring, the complainant said that nothing was wrong but later in the evening the complainant

complaint that she was in pain ‘here under’. Upon further enquiry, the complainant told her mother what happened but said that the appellant penetrated her in front. According to the mother, she took the complianant to the hospital on the same day of the incident for an examination.

[8] Doctor Maletando then testified that she examined the complainant on 28 February 2020. Her findings were that there were no injuries on the gynaecological examantion but she did determine that there was penetration to the complainant’s anus. In this instance she noted, and recorded, scarring to the anus at the 6 o’clock and 12 o’clock position.

[9] The investigating officer, Warrant Officer Matlabo, testified that she received the complaint on 28 February 2020 and she interviewed the complainant and the complainant’s mother on the same date. She further testified that she obtained the statement from the complainant on the next day. The investigating officer was adamant that the complaint was filed on 28 February 2020 and that this was the same day the complainant told her mother of the rape.

[10] The appellant testified in his own defence. He denied the rape. According to him, his mother had a vendetta against him as he had previously threatened her that he would report her to the social worker as he was informed, by a neighbour, that his mother would take the complainant with her to the taverns when she would go there to drink.

[11] The appellant further testified that he had a good relationship with the complainant. It was further his evidence that three months after he gave his mother the warning of reporting her to the social workers, the police came and arrested him for the rape.

[12] It was further his testimony that around December his mother accused his grandfather of raping the complainant. This aspect was pertinantely denied by both the complainant and her mother during cross-examimation.

[13] If regard is had to the contradiction as to whether the penetration was in the anus or the vagina, the doctor found no evidence of penetration to the vagina during her gynacological examination. The doctor's finding was that there was anal penetration. This finding of anal penetration corroborated the complainant's testimony as to the 'silly things' the appellant did to her.

[14] On the aspect as to whether the incident occured on 25 February 2020 or 28 February 2020, this court finds that nothing turns on this alleged contradiction. Section 92(2) of the Criminal Procedure Act 51 of 1977 caters for situations like these. In terms of the charge sheet, the appellant was charged with the offence, which the State alleged took place on or about 25 February 2020. Had the appellant raised a defence of alibi as to the date of the rape, he then could have

relied on the provisions of section 93 of the Criminal Procedure Act 51 of 1977, and this contradiction as to the exact date of the rape, might then have opened the door to the appellant to raise an alibi as to the exact date of the incident. No such defence was raised by the appellant.

[15] The learned magistrate correctly accepted the version of the complainant and her version was corroborated by both her mother and Doctor Maletando. The appellant's version of some sort of conspiracy by the mother and the complainant was correctly rejected.

[16] In *R v Dhlumayo* 1948 (2) SA 677 (A) it was made clear that a court of appeal will be reluctant to interfere with the trial court's evaluation of oral evidence unless there is a misdirection by the trial court. A trial court is better suited to make credibility findings.

[17] In In *S v Chabalala* 2003 (1) SACR 134 (SCA) at paragraph 15 Heher JA found:

> *"[15] The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001 (2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and*

> *improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."*

[18] When I apply these principles, I find that the state proved the charge beyond a reasonable doubt. In my view the magistrate correctly convicted the appellant and the appeal against the conviction must fail.

Sentence:

[19] It was argued on behalf of the the appellant that the trial court erred by not finding substantial and compelling circumstances and as such erred by imposing the prescribed minimum sentence of life imprisonment.

[20] A court has to apply the so-called Zinn-trits when considering an appropiate sentence as set out in *S v Zinn 1969* (2) SA 537 (A) where Rumpff JA found at p 540:

> *"It then becomes the task of this Court to impose the sentence which it thinks suitable in the circumstances.* ***What has to be considered is the triad consisting of the crime, the offender and the interests of society.****"* (My emphasis)

[21] In *S v Dodo* 2001 (1) SACR 594 (CC) par 38 Ackermann J held:

"To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end."

[22] In *S v Malgas* 2001 (1) SACR 469 SCA at paragraph 22 Marais JA set out:

*"**The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society.** If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence."* (My emphasis)

[23] If I apply the principles as set out in the above *dicta*, then I have to consider whether in this instance compelling and substantial circumstances exist to warrant the imposition of a lesser sentence.

[24] I have to balance the interest of society with the personal circumstances of the appellant, the seriousness of the crime and the impact on the victim to conclude that a balanced and appropriate sentence was imposed.

[25] The appellant is not a first time offender. He was previously convicted or armed robbery and was sentenced to fifteen years imprisonment on 31 January 2003. He was released on parole on 30 June 2009. Subsequent to his release on parole, he broke his parole conditions. He further was convicted on 13 October 2015 for housebreaking with the intend to steal and theft and was sentenced to five years in prison. This sentence was suspended for a period of five years on conditions that he not be found guilty on a similar charge.

[26] At the time of the offence the appellant was 36 years of age and was the father of two children. He passed Grade 9 at Eureka High School and finished Grade 12 whilst incarcerated on the robbery conviction. He further obtained a certificate in boiler making during this incarceration.

[27] The evidence was that the appellant had a girlfriend at the time of the rape. Despite this, he went to his mother's house and raped the complianant on the bed she shared with her mother.

[28] From the evidence it is evident that the complainant had a difficult upbringing and was the adopted sister of the appellant. She was only 7 years of age when she was raped by a person whom she trusted. The rape left her with emotional scars and she still displays symptoms of trauma and lack of trust for male persons.

[29] Rape and violance against woman and children are matters of great concern in our country. The rape of a 7-year old girl by her adoptive brother, who is an adult male, is a cause of great concern. As stated by the trial court, and in my opinion correctly so, there is an outcry in this country that rapists, and more specifically where there are children involved, should be treated in the manner in which the law prescribes.

[30] The trial court duly took all factors into account in sentencing the appellant. It is trite that sentence is a matter best left to the discretion of the sentencing court. As stated in *S v Barnard* 2004 (1) SACR (191) (1) SCA at 194c-d a court of appeal should always guard against the trial court's discretion when it comes to sentencing. A court of appeal should only interfere where the discretion was not exercised judicially and properly or where there was a serious misdirection.

[31] There is no basis upon which this court can interfere in the sentence of the appellant and as such the appeal against sentence stands to fail.

[32] In the premises the appeal against both conviction and sentence is dismissed.

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J Minnaar AJ

Judge of the High Court

It is so ordered,

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D Makhoba

Judge of the High Court

Case number	:	A326/2022
Heard on	:	23 August 2023
For the Appellant	:	Mr S Moeng
Instructed by	:	Legal Aid South Africa
		Pretoria Justice Centre

For the Respondent	:	Adv M Masilo
Instructed by	:	Director of Public Prosecutions
Date of Judgment	:	_____