REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A27/2023

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

16/11/2023
DATE

MOKOSE SNI

In the mater between:

SIPHO ZWANE — Appellant

and

THE STATE — Respondent

JUDGMENT

MOKOSE J

[1] The appellant, who was legally represented, had been charged in the Regional Court sitting at Springs on one count of rape in contravention of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with the provisions of Sections 51(1) and 5 of the Criminal Law Amendment Act 105 of 1997 as well as Sections 92(2) and 94 of the Criminal Procedure

Act Procedure Act 105 of 1977 ("the CPA"). He was convicted as charged and was sentenced to life imprisonment.

[2] The appellant appeals against the conviction and sentence. The appeal to this court is automatic by virtue of the sentence of life imprisonment imposed by the Regional Court, in terms of sections 10 and 11 of the Judicial Matters Amendment Act 43 of 2013.

[3] The evidence led by the State which led to the appellant's conviction can be summarized as follows: the complainant NM, who was twelve (12) years old at the time of the incident, testified in the proceedings through an intermediary that on or about 13 January 2018 the appellant, her biological father, unlawfully and intentionally committed an act of sexual penetration by inserting his penis into her vagina without her consent.

[4] The complainant testified that on the night in question she had been watching television and fell asleep on her father's bed. She normally slept on a sleeper couch in the lounge in the house. She testified further that she was woken up by a person touching her breasts and felt a pain in her vagina. She testified that she was sure of the date of the incident being the 13th day of January 2018 as it occurred on the morning after she had attended her aunt's funeral.

[5] The incident was reported by the complainant to her friend MR. Sometime later, the incident was reported to MR's mother, Mrs Mngoma who testified as such. The appellant was subsequently taken to the Far East Rand Hospital where she was examined by Mrs Nkutha, a registered nurse, approximately two months after the incident. She concluded that the complainant had vaginal injuries which had since healed.

[6] The appellant testified in his own defence. He denied the allegations and that on the day of the incident, he had been out drinking all night with his friends celebrating receipt of his bonus and did not return home until the next morning at 8H30 to find the complainant, his brother and girlfriend making fire as there was no electricity.

[7] The appellant testified that he believed that the motive for the allegations by the complainant was that she had been influenced by her mother who had requested money which he had refused to give. He alleged that she often threatened to deal with him when he so refused. Evidence was also led by the appellant that the complainant has lived with him from the age of five years and never

suspected that anything had happened to her in that time however, he also suggested that the complainant could have injured herself as she was growing up.

AD CONVICTION

[8] The issue on appeal is whether the court *a quo* correctly dealt with the evidence of a single witness by considering the cautionary approach. Furthermore, the court must consider whether a *prima facie* case had been made out by the State to prove the appellants' guilt. Criticism was levelled by the appellant that the court *a quo* did not have sufficient regard to the cautionary rules applicable and that the court did not apply same with the degree of attention to detail demanded by the circumstances of the case.

[9] It is trite law that the onus of proof rests with the State to prove the guilt of an accused beyond reasonable doubt. It is not for the accused to rebut an inference of guilt by providing an explanation. If the accused's version is only reasonably possibly true, he would be entitled to an acquittal. The court in the matter of *Shackle v S*[1] held:

> *"The court does not have to be convinced that every detail of an accused's version is true, if the accused's version is reasonably possibly true, in substance, the Court must decide the matter on acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities; but it cannot be rejected merely because it is improbable. It can only be rejected on the basis of inherent probabilities if it can be said that it will be so improbable that it cannot be reasonably possibly true."*

[10] It is not the duty of this court to re-evaluate the evidence afresh as if sitting as a court of first instance but to decide whether patently wrong findings and/or a misdirection by a magistrate let to a failure of justice. A court of appeal is not at liberty to depart from the trial court's findings of fact and credibility unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.[2] Poonan JA in the case of *S v Monyane and others*[3] stated:

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[1] 2001 (1) SACR 279 (SCA) at 288 E - F
[2] S v Francis 1991 (1) SACR 198 (A) at 198J – 199A
[3] 2008 (1) SACR 543 (SCA) at paragraph 15

"This court's powers to interfere on appeal with the findings of fact of a trial court are limited.....In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f)."

[11] Heher AJA in the matter of *S v Chabalala* [4] said:

"The correct approach is to weigh up all the elements which points 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 to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as failure to call a material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture in evidence."

[12] The complainant was a single witness to the rape incident. She was only 12 years old at the time of the said incident. It is for these reasons that the court must exercise caution when accepting the evidence of such a witness. The court must be satisfied that the evidence is trustworthy (see *Woji v Santam Insurance Co. Ltd* 1981 (1) SA 1020 (A) at 1028b-d).

[13] Trustworthiness depends on factors such as the child's power of observation, his/her power of recollection and his/her power of narration on the specific matter to be testified upon. The evidence of a child witness must be considered as a whole, considering all the evidence.

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[4] 2003 (1) SACR 134 (SCA) at page 140 A - B

[14] Section 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, provides that:

> *"Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence."*

[15] The court in the matter of *R v Mokoena* 1932 OPD 79 at 80, when dealing with the evidence of a single witness stated:

> *"Now, the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by (the section), but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked, where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation etc."*

[16] Section 208 of Act 51 of 1977 provides that:

> *"An accused may be convicted of any offence on the single evidence of any competent witness."*

[17] The injuries sustained by the complainant were corroborated by the medico-legal examination of Mrs Nkutha and the medical report (J88) furnished to the court in evidence. Mrs Nkutha testified that penetration had previously taken place and that the injuries had healed. What was evident from the examination was the healed clefts and bumps in her vagina confirming that there had been a penetration.

[18] The appellant contends that the only evidence linking him to the offence was the complainant, a single witness. She was a relatively young child at the time of the rape and that the trial court should have demonstrated an awareness and appreciation apropos the reasoning behind each individual cautionary rule. Furthermore, the court should have guarded against affording a vulnerable witness

leeway in the evaluation of her evidence and apply the rules of evidence in adjudicating the reliability of such witness.

[19] The appellant contends that the complainant's version of how the rape occurred was contradictory in itself and was improbable in that she did not wake up prior to the actual penetration. Furthermore, she contradicted herself in testifying first that she was penetrated from behind then subsequently said that the appellant lay on top of her.

[20] The question to be answered by this court is whether these discrepancies are of a material nature, as to negate the evidence of the complainant, particularly with regard to the identity of the perpetrator. In my considered view, this court ought to answer that question in the negative for the following reasons:

(i) the complainant did not lie about being raped;

(ii) the independent medical evidence of Mrs Nkutha lends credence and corroborates the complainant's version of sexual penetration;

(iii) the evidence of the complainant was corroborated by MR and her mother, Mrs Mngoma.

[21] The inconsistency about whether the complainant was penetrated from behind or on top is not material in relation to the sexual offence in question because there is independent medical evidence which corroborates the evidence of the complainant. It does not detract from the fact that sexual penetration was committed by the appellant who was identified by the complainant. The court held in the matter of *S v Mafaladiso*[5] that:

> *"Secondly it must be kept in mind that not every error made by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations must be considered and evaluated on a holistic basis."*

[22] This court does not find any misdirection on the part of the court *a quo* in admitting the evidence of the complainant and rejecting the evidence of the appellant. Whilst it is trite that there rests no onus on the part of the appellant to prove or disprove the allegations against him, he could have called upon his brother and his girlfriend to corroborate his version of events. Accordingly, the appeal against the conviction is dismissed.

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[5] 2003 (1) SACR 583 (SCA) at 584H – 585D

AD SENTENCE

[23] When dealing with the court's powers to interfere with sentences imposed by the trial court, in the matter of *S v Bogaards*[6] the Constitutional Court stated:

> *"Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."*

[24] When imposing sentence, a court must try to balance the nature and circumstances of the offence, the circumstances of the offender and the impact that the crime had on the community. It must ensure that all the purposes of punishment are furthered. It will take into consideration the established main aims of punishment being deterrence, prevention, reformation and retribution.

S v Zinn 1969 (2) SA 537 (A)

[25] This approach was followed by the court in the matter of *S v Rabie*[7] where Holmes JA said:

> *"Punishment should fit the criminal as well as the crime, and be fair to society, and be blended with a measure of mercy according to the circumstances."*

[26] The trial court considers for the purposes of sentence, the following:

(i) The seriousness of the case;

(ii) The personal circumstances of the Appellant;

(iii) The interests of society.

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[6] 2013 (1) SACR 1 (CC) at ~~14~~ para 41

[7] 1975 (4) SA 855 at 862 G - H

[27] The appellant, the biological father was convicted of the rape of his minor daughter who was 12 years old at the time of the incident. This crime tears asunder the implicit trust a daughter places in her father as her protector, provider, nurturer. This crime destroys the very fabric of society and the cohesion of family. This conviction attracts a prescribed minimum sentence of life imprisonment, in terms of section 51(1) of Act 105 of 1997. In terms of section 51(1) of Act 105 of 1997, if a person is convicted under the provisions of this section, the prescribed minimum sentence may only be deviated from where they have demonstrated the existence of substantial and compelling circumstances in their case. There is no onus on the accused person to prove such circumstances, but he/she should at least *"pertinently raise such circumstances for consideration"*, if he/she wants the court to consider them seriously (see *S v Roslee*[8]).

[28] The concept of "substantial and compelling circumstances" is not statutorily defined. In the matter of *S v Malgas*[9] the court stated the following:

> *"... It signals that it has deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so, they are required to regard the prescribed sentences as being generally appropriate for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so."*

[29] The court *a quo* considered the personal circumstances of the appellant, taking into consideration that he was the youngest of five children who grew up without knowledge of his father. The Magistrate also considered that the appellant had had a difficult upbringing which enabled him to become independent and empower himself resulting in him completing high school and enrolling at a college to study sports management and subsequently becoming an assistant teacher and mentor to children in school.

[30] The court also had regard to the offence committed and the interest of the community. This is so, despite the fact that there is a prescribed minimum sentence, and that substantial and compelling circumstances must be found to exist in order for the court to deviate from imposing such a sentence. It is accepted that the fact that a prescribed sentence is stipulated, implies that the sentencing court ought to impose such a sentence.

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[8] 2006 (1) SACR 469 (SCA)
[9] 2001 (1) SACR 469 (SCA)

[31] When dealing with the personal circumstances of the accused in the matter of *S v Vilakazi*[10] the Supreme Court of Appeal concluded that in cases of serious crimes, the personal circumstances of the offender will necessarily recede into the background. However, this is not an indication that the personal circumstances of accused should not be considered, as it was correctly stated in *Malgas (supra)* in my view, that these traditional factors need to be considered, despite the legislature having set out the prescribed minimum sentences.

[32] The circumstances of this matter warrant the imposition of the prescribed sentence, despite the fact that the appellant is a first offender and was employed at the time of the offence, for the following reasons:

(i) the minor child was raped by her biological father to whom she looked to for guidance and protection;

(ii) the appellant was well aware of the importance to the complainant of remaining a virgin maiden.

[33] Counsel for the respondent was of the view that the Magistrate had taken account of all the relevant factors in the triad in consideration of the triad and that the sentence imposed was fair and just in the circumstances and that there are no substantial and compelling reasons which would have justified the deviation from the minimum sentence imposed and that would justify this Court to interfere in the sentence.

[34] I agree with Counsel for the respondent. I do not see that the Magistrate has erred in any way as to justify this Court in interfering in the sentence imposed by the Magistrate in the court *a quo.* Given the seriousness of the crime as well as the mitigating circumstances and aggravating circumstances which were taken into consideration by the Magistrate in the court *a quo*, I am of the view that the Magistrate did not err in sentencing the Appellant. There were no substantial and compelling reasons to sentence the Appellant to a lesser sentence than that prescribed by the provisions of Section 51(1) of Act 105 read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 51 of 1977 nor is there any evidence of the discretion of the Magistrate having been incorrectly exercised.

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[10] 2009 (1) SACR 552 at 574

[35] Accordingly, the following order is granted:

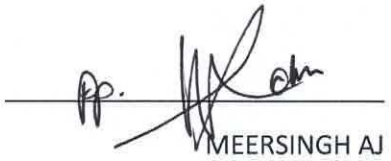
The appeal against both conviction and sentence are dismissed.

MOKOSE J

Judge of the High Court of
South Africa

Gauteng Division, Pretoria

I agree and it is so ordered.



MEERSINGH AJ

Acting Judge of the High Court

of South Africa

Gauteng Division,

Pretoria

For the Appellant:

Adv HL Alberts instructed by

Legal Aid South Africa, Pretoria

For the State:

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The Office of the Director of Public Prosecutions

Pretoria

Date of hearing: 1 November 2023

Date of judgement: 16 November 2023