IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: AR 117/2021

In the matter between:

SIPHO ABRAHAM ZONDI **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: D Pillay J, ME Nkosi J and M Reddi AJ

Heard: 13 May 2022

Delivered electronically: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII. The date for hand down is deemed to be 2 June 2022.

ORDER

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1 The appeal against the conviction is dismissed.

2 The appeal against the sentence is upheld. The sentence imposed is set aside and substituted with a sentence of life imprisonment.

JUDGMENT

REDDI AJ (PILLAY J et NKOSI J concurring)

Introduction

[1] This is an appeal against a conviction on two counts of rape and the sentence imposed of life imprisonment with a non-parole period of 25 years.

[2] The appellant, Sipho Abraham Zondi, was convicted in the Regional Magistrates' Court, Empangeni, on two counts of rape and subsequently sentenced in the High Court of South Africa, KwaZulu-Natal Local Division, Mtunzini, to life imprisonment with a non-parole period of 25 years.

The charge

[3] The allegations against the appellant, which formed the basis of his rape conviction, were that on two occasions during or about August 2005, he had lured the complainant, an eleven-year-old female neighbour, to his home under the ruse of needing the child to run errands for him. On the first occasion, 8 August 2005, having run the errand, the child went into the appellant's house. The appellant closed the door, took off the complainant's panties, undressed himself and made the child lie on a sofa. He then raped her. The complainant had cried out aloud during the violation. Afterwards, when the appellant got off her, the child dressed and went home, where she discovered that her panties were wet and soiled with blood. The child took off the offending garment and threw it into the toilet pit.

[4] A few days later, 12 August 2005, saw a repeat of the violation of the complainant by the appellant, who again raped the child after having lured her to his house on the same pretext as before.

[5] A medical examination of the child was conducted two days after the rape was reported to the police; it revealed that the child had fresh injuries to her vagina. The examining medical doctor's testimony about the age of the injuries corroborated the child's testimony of the date of the second rape incident.

The plea

[6] The complainant's identification of the appellant as her rapist led to him being charged with two counts of rape, to which he pleaded not guilty. The appellant denied the charges and advanced the defence that the complainant's parents had influenced her to fabricate false rape claims against him as they wanted to drive him off his property because of a grazing dispute involving their goats.

The conviction and sentence

[7] Several witnesses testified at the trial, which concluded with the trial court finding that the State had proved its case against the appellant beyond a reasonable doubt. The court convicted the appellant on both counts of rape. Since the minimum sentence provisions of the Criminal Law Amendment Act No 105 of 1997 ('the Amendment Act') were applicable in the circumstances, the matter was remitted to the High Court for sentencing. In sentencing the appellant to life imprisonment, the High Court could not find any substantial or compelling circumstances to warrant a departure from the minimum sentence. In addition, the court declared that under the provisions of s 276B of the Criminal Procedure Act 51 of 1977 ('the CPA'), the appellant was to serve a non-parole period of imprisonment of not less than 25 years.

[8] Aggrieved at the trial's outcome, the appellant applied for and was granted leave to appeal the conviction and sentence.

Appeal against the conviction

[9] On appeal, the appellant's counsel, Mr *Mkumbuzi,* emphasised that the evidence of the two incidents of rape came from a single witness who was a child.

This, according to Mr *Mkumbuzi*, called for a doubly cautious approach to assessing the complainant's evidence.

[10] Mr *Mkumbuzi* also submitted that the evidence of a single witness must be clear and satisfactory in all material aspects for the evidence to be reliable. He submitted that the complainant's testimony failed to meet the threshold for the evidence of a single witness as it was contradictory and materially unsatisfactory.

[11] In support of the contention that the complainant's evidence was unclear and unsatisfactory, counsel for the appellant referred to the child's failure to report the rapes to her teachers despite being taught in school about the need to report such abuse to their parents. Mr *Mkumbuzi* further contended that in light of the pain, suffering and fear the complainant had experienced after being raped the first time, had her rape attacker on that occasion been the appellant, she would not have gone back to his house on 12 August 2005 when he had called her over to run another errand for him.

[12] These two factors, it was argued, unequivocally indicated that the complainant's allegations against the appellant were false and her testimony lacked credibility. Therefore, according to the appellant, the trial court had erred in accepting the State's version as probable and rejecting that of the defence as improbable.

[13] The law regarding the approach to be adopted in assessing the evidence of a single witness is now fairly settled, with courts recognising that the oft-quoted and longstanding principle originating in the remarks of De Villiers JP in *R v Mokoena* must itself be approached with caution![1] In *Mokoena* De Villiers, JP said this at 80:

'Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for conviction by [the section], but in my opinion that section should

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[1] See for instance *S v Ndawonde* 2013 (2) SACR 192 (KZD) at 194; *R v Nhlapo* 1953 (1) PH H11 (A) and *R v Bellingham* 1955 (2) SA 566 (A) 569G-H.

only be relied on when the evidence of a single witness is clear and satisfactory in every material aspect.'

[14] In expressing reservations that the principle articulated in *Mokoena* was correct as a legal proposition, Broome JP in *R v Abdoorham* 1954 (3) SA 163 (N) at 165E stated that a court 'may be satisfied that a witness is speaking the truth notwithstanding that he is in some respects an unsatisfactory witness.' Expanding on the concept, the court in *S v Sauls and others* 1981 (3) SA 172 (A) at 180E-F said this:

'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber* 1971 (3) SA 754 (A) at 758). 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 more recent remarks of Dlodlo JA in *S v Rugnanan* [2020] ZASCA 166 at paragraph 23 reinforces the position even further. According to the learned judge, the cautionary rule does not demand that the single witness' testimony must be beyond all conceivable reproach. Instead, what is needed is that the evidence should be 'substantially satisfactory in relation to material aspects or be corroborated'.

[15] Where corroboration is concerned, several courts have concluded that if there is a measure of corroboration, even if minimal, the situation is no longer one of dealing with the evidence of a single witness.[2]

[16] It is common cause that the complainant was not the only witness for the State. But, she was the only witness to testify to the actual rapes. Although s 208 of the CPA stipulates that an accused may be convicted on the evidence of a single and competent witness, it does not displace the legal principle that the evidence

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[2] *S v Letsedi* 1963 (2) SA 471 (A) at 473; *S v Snyman* 1968 (2) SA 582 (A) 586-587; and *Khoza v S* [2019] ZAKZPHC 75 para 20.

of a single witness must be approached with caution. However, based on the authority of *Abdoorham, Sauls* and *Rugnanan* above, this does not mean that the court can rely on the evidence of a single witness only if it is clear and satisfactory in every material aspect.

Assessing the arguments

[17] I have difficulty following Mr *Mkumbuzi's* contention that the complainant's failure to tell her school teachers she had been raped indicates that her evidence was not credible. It is not disputed that the complainant was raped. The medical evidence indicates this. Therefore, my understanding of the appellant's submission in this regard is that he is not denying the child was raped. Instead, the submission amounts to the assertion that the failure to report the rapes at school lent substance to the claim that the child's parents had induced her to falsely accuse the appellant of this heinous act. To support this assertion, Mr *Mkumbuzi* emphasised that the reasonable thing for the child to have done in such circumstances, where her assailant had issued death threats not to tell her parents of the rapes, would have been to report the incidents to her teachers.

[18] In my view, this entire submission is preposterous. First, it would be an amazing coincidence that the child had been raped by an unknown person conveniently when her family was seeking nefarious means to force the appellant off his property. Secondly, absent a factual basis to contradict the conclusion, I find it wholly untenable that the child's parents would subject her to the trauma of falsely identifying the appellant as her rapist while letting the real culprit escape liability with impunity for his monstrous crime. Thirdly, the reference in *S v Mabuza* 2018 (2) SACR 54 (GP) at paragraph 36 to McLachlin J's statement in the Canadian case of *R v W (R)* [1992] 2 SCR 122 at 133, that it 'may be wrong to apply adult tests for credibility to the evidence of children', is instructive in the circumstances.

[19] In my view, the appellant's submission that had the child been telling the truth, she would have at least reported the rapes to her teachers sets the bar too high for a child. There are many reasons why the child may not have reported the rapes to her teachers. In fact, according to the child's testimony, the children had been taught at school to report abusive conduct to *their parents* (my emphasis). No evidence was presented to show that the children had been told that their teachers would be an alternate option if they could not report the abuse to their parents. In the context of this case, I cannot rule out the possibility that the complainant had taken the advice given during the lesson on abuse to mean that the only people to whom abuse must be reported are one's parents. Since the appellant had threatened her against so reporting, the probability arises that the child had not realised she could have reported the rapes to her teachers instead. To have expected anything more of her would amount to the application of 'adult tests for credibility' to the complainant's evidence.

[20] The second ground on which the complainant's credibility has been attacked is the appellant's allegation that, had he raped the child on the first occasion and threatened her, she would have been afraid of him and would not have come to his house when called to run another errand. The complainant's response to this allegation was unequivocal and unwavering during cross-examination. She testified that although she had feared the appellant, she had not been afraid to respond to the request to go to the appellant's home as several people were in his yard at the time. However, by the time she had returned from buying beer for the appellant, the visitors had left. When she went into the house to give the appellant the beer, he blocked the door and prevented her from leaving.

[21] I find the complainant's explanation for why she responded to the request to run an errand for the appellant despite him having raped her a few days previously to be entirely plausible in the circumstances. The child had anticipated that she

would be protected from a repeat of the same fate by the presence of other people at the time. Regrettably, this was not to be.

[22] The appellant also made heavy weather of the discrepancy regarding the complainant's first report of the rapes. The child had initially testified that she had reported the incident to her father, who had noticed that she had been walking with a limp. She subsequently reported to her mother. However, the child later corrected her earlier evidence when she explained that she had reported the rapes to her mother first and then her father, who had repeatedly asked her to explain why she was walking with a limp. According to the child, she had eventually capitulated and told him why she had been limping.

[23] Although the complainant's evidence must be evaluated with caution as she is a single witness in respect of the actual incidents of rape, I am satisfied that the trial court's assessment of the conspectus of her evidence is correct. The court concluded that the complainant's evidence on the incidents of rape was clear, satisfactory and frank, bearing in mind her age and the nature of the offence to which she had been subjected. Moreover, her evidence that she had been raped was corroborated by the evidence of the medical doctor. The court did not dwell inordinately on the discrepancy regarding the first reports of the rape, and justifiably so as that inconsistency apart, the complainant's evidence was clear, consistent and satisfactory in all other aspects. The refrain of Dlodlo JA in *S v Rugnanan* [2020] ZASCA 166 bears repeating here that the cautionary rule does not demand that the single witness' testimony must be beyond all conceivable reproach. Instead, what is needed is that the evidence should be 'substantially satisfactory in relation to material aspects or be corroborated'. Moreover, as was stated by the court in *S v Artman and another* [1968] 3 All SA 408 (A), when applying the cautionary rule, 'the exercise of caution must not be allowed to displace the exercise of common sense …'

[24] In assessing whether the State had proved the appellant's guilt, the trial court interrogated the latter's version of events that it rejected as not being reasonably possibly true. I am in full agreement with that court's conclusion.

Appeal against sentence

[25] I turn now to the appeal against the sentence, which is premised on the following two bases: (i) There were substantial and compelling circumstances present to justify the imposition of a lesser sentence than the minimum sentence prescribed; and (ii) The sentencing court had misdirected itself by imposing a non-parole period of 25 years without allowing the appellant to make representations in that regard.

[26] The courts have not uniformly interpreted the term 'substantial and compelling circumstances' and rightly so. The peculiar conditions of each case play a pivotal role in determining if substantial and compelling circumstances exist to warrant a departure from the imposition of the minimum sentence. In *S v Vilakazi* 2009 (1) SACR 552 (SCA), for instance, the court indicated that specific aggravating or mitigating factors should not be taken individually and in isolation as substantial or compelling circumstances. The expectation is that in determining whether substantial and compelling circumstances exist, one must consider the cumulative effect of traditional mitigating and aggravating factors on a case by case basis. *S v Pillay* 2018 (2) SACR 192 (KZD) in paragraph 10 expanded on this aspect when the court said this:

'A court must consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders. For circumstances to qualify as substantial and compelling, they need not be 'exceptional' in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender.'

[27] Counsel for the appellant advanced the following as factors which the sentencing court ought to have considered as constituting substantial and compelling circumstances:

The appellant:-

(a) had been 39 years old at the time of the rapes.

(b) had not used violence or a weapon in perpetrating the offence.

(c) was single with four children.

(d) was productive and employed

(e) had no pending cases against him; and

(f) was a first offender for an offence where Part 1 of Schedule 2 of Act 105 of 1977 was invoked.

Before proceeding further, I must point out the inaccuracies regarding some of these statements. First, the evidence indicates that the appellant was the father of only one child, a four-year-old boy. Secondly, the evidence also indicates that the appellant was unemployed at the time of the rapes.

[28] I turn now to the assessment of whether the remaining factors could conceivably be regarded as amounting to substantial and compelling circumstances to justify departing from the minimum sentence of life imprisonment. Of particular concern is the assertion that the appellant had not used violence or a weapon in executing the rapes. In the face of a surfeit of information on what rape is and its consequences on rape survivors, it beggars belief that the appellant would have the temerity to suggest the lack of infliction of *additional violence* (my emphasis) on the complainant must count in his favour. The medical evidence produced at the trial indicates that the child had been raped violently. The medical report indicates that the child had sustained bruising and at least four tears to her vagina; she had bled on each occasion she had been raped; she had cried out aloud from the pain while being raped, and she had limped so noticeably after being raped that her father had questioned her about the limp. These acts of violence are in addition to the inherent violence of

the act of rape itself. It is, therefore, disquieting that the violent nature of the rape perpetrated against the complainant was not viewed as an aggravating factor by the sentencing court.

[29] The appellant's age of 39 years was also submitted as a factor to be viewed favourably in determining the existence of substantial and compelling circumstances. My view is that, if anything, the appellant's mature age is an aggravating factor. A man of 39 years is middle-aged and expected to have a strictly paternal interest in children of the complainant's age, who was eleven years old at the time. Moreover, she was his neighbour and, therefore, familiar to him. Instead of behaving with protective propriety towards the child, the appellant viewed the girl as a nonentity only worthy of being used as a chattel to fulfil his lust-fuelled appetite.

[30] In the circumstances of this case, the fact that the appellant had no previous convictions and no pending cases against him is of little significance when weighed against the overwhelmingly aggravating factors present. In my view, the sentencing court was correct in finding that no substantial and compelling circumstances existed to justify not imposing on the appellant the minimum sentence of life imprisonment.

[31] I turn now to the issue of the non-parole period of 25 years imposed on the appellant. Standard practice dictates that a court considering whether to impose a non-parole period is obliged to allow the parties to address it on the issue at the sentencing stage. Moreover, the discretion to impose a non-parole period should only be exercised in exceptional cases.[3] In *S v Jimmale and Another* 2016 (2) SACR 691 (CC) in paragraphs 20–21, the Constitutional Court emphasised this point when it held that a s 276B(1)*(b)* non-parole order should not be resorted to

[3] See for instance *S v Stander* 2012 (1) SACR 537 (SCA) and *S v Mthimkhulu* 2013 (2) SACR 89 (SCA).

lightly and not without inviting oral argument on the issue as the imposition of such an order had a far-reaching bearing on the sentence to be served.

[32] It is evident from the record of the proceedings that the sentencing court had not afforded both parties the opportunity to address it on the question of the non-parole period. This is a material misdirection. Furthermore, determining a non-parole period falls within the discretion of correctional officers. That being the case, I do not deem it necessary to traverse whether the evidence or the facts of this matter point to it being an exceptional case justifying the imposition of a non-parole period. The appellant's appeal against his sentence should be upheld only to the extent of setting aside the non-parole period.

[33] I accordingly make the following order:

1 The appeal against the conviction is dismissed.

2 The appeal against the sentence is upheld. The sentence imposed is set aside and substituted with a sentence of life imprisonment.

REDDI AJ

I agree

PILLAY J

I agree

NKOSI J

CASE INFORMATION

APPEARANCES

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