Editorial note: Certain information has been redacted from this judgment in compliance with the law.

Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CC 67/2002

In the matter between:

B[…] M[…] **Appellant**

and

THE STATE **Respondent**

CORAM: HENDRICKS JP

DATE OF HEARING : 02 FEBRAURY 2024

DATE OF JUDGMENT : 16 FEBRUARY 2024

FOR THE APPELLANT : MR. MADIBA

FOR THE RESPONDENT : ADV. NDLOVU

JUDGMENT ON LEAVE TO APPEAL

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 14h00 on 16 February 2024.

ORDER

Resultantly, the following order is made:

(i) Condonation for the late filing and prosecution of the application for leave to appeal is refused.

(ii) The application for leave to appeal to either the Full Court of this division, alternatively the Supreme Court of Appeal (SCA), against both conviction and sentence is dismissed.

JUDGMENT

HENDRICKS JP

Introduction

[1] This matter has a very long, protracted history which is regrettable. Cases, inclusive of leave to appeal and appeals, must be finalized expeditiously without much delay. Justice delayed is justice denied. On the 10th day of April 2002, the appellant was arraigned before the Regional Court, Ganyesa on a charge of rape of a minor, aged

fourteen (14) years. He was conducting his own defence. He pleaded not guilty and the trial proceeded. The complainant, who was then fifteen (15) years of age, testified under oath. Her evidence can be succinctly summarized as follows. The appellant is her biological father and they were staying together at her grandmother's place. During an evening in August 2021, while she was asleep inside a room which was locked, the appellant unlocked the door of the bedroom she was sleeping in, and he entered. He undressed the complainant of her panty, mounted her and had sexual intercourse with her. She was underage, being fourteen (14) years old and could not consent, neither did she. Because she was crying, he then assaulted her with a plastic sjambok. She made a report to her teacher and one Elizabeth Leepile (Leepile) the head of the Department at school, as the principal was not at school.

[2] Leepile testified that the class teacher made a report to her about the complainant. She called the complainant and asked her what the problem was, as the children in her class refused to sit next to her because of a bad smell (odour) coming from her. She then related that her father had sexually violated (raped) her, and that she cannot wash her vagina (private part) properly, as it was painful. She also had whip marks as she was assaulted by her father, the appellant. She testified that the complainant is mentally challenged (retarded). The medical report compiled by the doctor who medically examined the complainant on the 6th day of August 2001 was handed in by consent, the correctness of the contents of which was admitted as being correctly recorded. The conclusion

reached by the doctor was that there were injuries of assault on her thighs and arms and evidence that the complainant was sexually active.

[3] The appellant chose not to testify and closed the defence's case without presenting any evidence. He was convicted. Previous convictions were admitted by the appellant, amongst which was one of rape. He was convicted on 15 March 1989 and sentenced to five (5) years imprisonment in that matter. In the current matter, he was convicted and the matter was transferred to the High Court for sentence in terms of the then applicable legislation. On 08th August 2002, the matter served before Justice Leeuw for the sentencing procedure. He was sentenced to life imprisonment.

[4] In a document entitled 'Notice of Leave to Appeal' dated 12th January 2018, leave to appeal was sought against sentence only. However, in another document also termed 'Notice of Leave to Appeal', dated 04 August 2023 and filed with the Office of the Registrar of this Court on 06 September 2023, leave to appeal is sought against both conviction and sentence. There is also an application for condonation for the late filing of the application for leave to appeal, dated 09th January 2018. The affidavit in support of the application for condonation was signed on 12th January 2018, deposed to on 15th January 2018, and filed with the Office of the Registrar on 16 January 2018. The reasons for the delay in filing this notice of application for leave to appeal are dealt with in the affidavit. It suffices to state that the delay was not dealt with comprehensively nor in great detail. There are lacunas of time periods that are unexplained. The appellant as applicant states

that it has always been his intention to lodge an application for leave to appeal within the prescribed time limit.

[5] He wrote letters to Legal Aid, Mahikeng, timeously, although he does not have copies of the letters, and he also did not receive any response. Letters to 'various statutory offices' were also written and he attached responses to his affidavit as annexures. One such response was from the Justice Centre, Johannesburg dated 28th January 2003. There is also correspondence from the Office of the Public Prosecutor dated 08 December 2004. Taken cumulatively, and not without criticism, the delay is not satisfactory explained. However, it demonstrates the fact that the appellant/applicant was all along desirous to prosecute his application for leave to appeal.

[6] Despite, this is not the only factor to be taken into account in order to determine whether or not condonation should be granted for the late filing of the application for leave to appeal. The prospects of success on appeal should also be considered. It is trite that good prospects of success compensate for a poor explanation for the delay in filing and prosecuting the application for leave to appeal.

[7] However, condonation is not for the mere asking. The law on condonation is best summarised with reference to the oft quoted passage by Holmes JA in **Melane v Santam Bank Insurance co. ltd** 1962 (4) SA 531 (A) at 532 B-E, where the following was stated:

> *"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be*

exercised judicially upon the consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success, and the importance of the case. Ordinarily, those facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of al/ the facts. Thus a slight delay and a good explanation may help to compensate for the prospects of success which are not strong. Or the importance of the issue and the strong prospects of success may tend to compensate for a long delay. "(See also Wynberg and Another (1998) SACR 18, 1998 (3) SA 34 (SCA) at 40 H-41 9"

[8] The Supreme Court of Appeal (SCA) in **Mulaudzi v Old Mutual Life Assurance Company (SA) Limited** 2017 ZASCA 88, restated the factors that are to be given due consideration in a condonation application as stated in Melane. It is stated:

"Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation thereof, the importance of the case, the respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice."

[9] In **Grootboom v National Prosecuting Authority** 2014 (2) SA 68 (CC) at paragraph [23] the following is stated:

> *"It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."*

Much depends on whether there are reasonable prospects of success on appeal.

[10] In terms of section 17 (1) of the Superior Courts Act 10 of 2023, leave to appeal may only be granted where the judge (s) are of the opinion that

> *"(a) (i) the appeal would have a reasonable prospects of success,*
> *(ii) there is some other compelling reason why the appeal or should be heard, including conflicting judgments on the matter under consideration."*

[11] The heads of argument filed on behalf of the appellant/applicant dated 16 January 2018 only deals with sentence. Those filed on 06 September 2023 deals with both conviction and sentence. Likewise, the heads of argument filed for and on behalf of the respondent (State) on 03 November 2022, in reply to the appellants'/applicants' heads dated 16 January 2018, only deals with sentence, whilst those filed on 04 January 2024 in response

to the appellants heads filed on 06 September 2023, deals with both conviction and sentence. In the interest of justice and to bring finality to this matter, and also to avoid that the appeal be dealt with on a piece-meal basis, I will deal with both conviction and sentence.

[12] In the 'Notice of Appeal' filed on 06 September 2023, the only ground upon which the judgment on conviction is assailed is:

> *"That the Honourable court a quo erred in finding that the State managed to prove its case beyond a reasonable doubt."*

No specifics are mentioned. Whether this is an all-encompassing ground of appeal, is debatable. Be that as it may. However, in the heads of argument filed on the same date, the conviction is attacked on the basis that the Regional Magistrate administered an oath on the complainant without holding an inquiry to determine whether or not the complainant of fifteen (15) years of age, understand the import of taking an oath, and should have admonished the complainant instead. Particularly, because the complainant is mentally challenged (retarded). Reliance for this proposition was placed on:

- **Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others** 2009 (4) SA 222 (CC).
- **S v Matshiva** 2014 (1) SACR 29 (SCA).
- **S v Rhagubar** 2013 (1) SACR 398 (SCA).

[13] The trial court made very strong credibility findings in favour of the complainant. The trial court stated:

"She answered all the questions put to her by the accused during the cross-examination without any difficulties.

Her evidence ois clear and satisfactory in all material respect."

The court *a quo* was well aware of the age of the complainant, which the appellant also admitted. She was fifteen (15) years of age. Section 164 provides:

"***164 When unsworn or unaffirmed evidence admissible***

(1) Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.

[Sub-s. (1) substituted by s. 68 of Act 32 of 2007.]

(2) If such person wilfully and falsely states anything which, if sworn, would have amounted to the offence of perjury or any statutory offence punishable as perjury, he shall be deemed to have committed that offence, and shall, upon conviction, be liable to such punishment as is by law provided as a punishment for that offence."

It is quite apparent that given the age of the complainant (15 years), the trial court was satisfied that she understands the nature and importance of taking an oath.

[14] The second argument advanced is that the trial court did not afford the appellant/applicant a fair trial, in that there is no evidence on record to suggest that he was given the contents of the docket, in order to properly prepare for his defence, since he was conducting his own defence. There is no evidence on record that indicates that the contents of the docket was provided by the State to the appellant. As alluded to earlier, the only ground of appeal insofar as the conviction is concerned, only states that the State failed to prove its case against the appellant/applicant beyond reasonable doubt. No more no less. No details whatsoever was given for this general proposition. It is expected that the appellant/applicant should set out the grounds upon which the appeal is premised with particularity and precision. So much so, that the court and also the respondent should know exactly on what basis the appeal is premised, and not to second-guess what the grounds might be. This is trite. Arguments advanced in heads of argument that does not fall within the confines of the grounds of appeal doesn't carry any weight.

[15] However, this is exactly what the appellant/applicant was doing. It is only speculation and nothing more. There is no evidence on record that the contents of the docket was either provided or not provided. The person best suited to state whether or not he received the contents of the docket or not, is no one else than the appellant/ applicant himself. His affidavit is silent about this issue. Nothing more, nothing else can be said about it and this Court cannot second-guess whether or not the contents of the docket was indeed provided to him or not. This puts paid to this allegation.

[16] A careful reading of the contents of the record in its totality clearly indicates that there is no misdirection that was committed by Regional Magistrate Modibedi Djaje. The judgment on conviction cannot be faulted. Especially, bearing in mind that the appellant/applicant did not testify in the face of the strong *prima facie* case been made out against him.

See: **S v Boesak** (CCT25/00) [2000] ZACC 25; 2001 (1) BCLR 36; 2001 (1) SA 912 (CC) (1 December 2000)

[17] Insofar as sentence is concerned, the appeal is premised on the basis that the *'sentence of life imprisonment induces a sense of shock and that it was not blended with mercy,'* and, *'is inappropriate.'* This, because the appellant has 'two minor children whom he was taking care of' and that 'he had admitted his previous convictions.' An effective sentence of twenty-five (25) years is proposed instead. The following personal circumstances and mitigating features were placed on record: He was thirty-seven (37) years of age at the time of sentence; he is the father of two children aged by then seventeen (17) and fifteen (15) years respectively; he had casual employment earning R10.00 (ten rand) per day; he was unmarried; he attended school up to Grade 6 (Standard 4); the children are in the custody of his mother because his wife deserted him.

[18] The aggravating features of this case are: the appellant is the biological father of the complainant; he was supposed to protect her; he was in a position of trust *vis-a-vis* the complainant; the complainant was fourteen (14) years old when she was sexually violated; the complainant locked herself in a bedroom and he gained entrance by taking another key and unlocked the door; after the rape, the appellant took a sjambok and viciously assaulted the complainant, because she was crying as a result of the rape which was painful; he has a relevant previous conviction of rape, amongst others.

[19] I am of the view that there are no substantial and compelling circumstances present in this case, that warrants a deviation from imposing the prescribed sentence of life imprisonment.

See: **S v Malgas** 2001 (1) SACR 469 (SCA).

S v Matyityi 2011 (1) SACR 40 (SCA).

[20] I echo the sentiments expressed in the matter of **DPP, North Gauteng v Thabethe** 2011 (2) SACR 567 (SCA) at 577 G-I in which it is stated:

> *"Rape of women and children have become cancerous in our society. It is the crime that threatens the very foundation of our nascent democracy, which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedom. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self-respecting members of society. Our courts have obligation to impose a sentence*

for such a crime particularly where it involves defenseless and vulnerable gender. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal Justice System."

and also

S v SMM 2013 (2) SACR 292 (SCA).

"[14] Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continues unabated."

[21] There are no reasonable prospects of success on appeal that another court sitting as Court of Appeal **would** arrive at any different decision, than what the trial court (Regional Court and High Court) has arrived at. There is also no other compelling reason why the appeal should be heard nor are there conflicting judgments on the matter under consideration, in terms of section 17 (1) (a) (i) and (ii) of the Superior Courts Act 10 of 2013. The application for leave to appeal should consequently fail.

Order

[17] Resultantly, the following order is made:

(i) Condonation for the late filing and prosecution of the application for leave to appeal is refused.

(ii) The application for leave to appeal to either the Full Court of this division, alternatively the Supreme Court of Appeal (SCA), against both conviction and sentence is dismissed.

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R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG