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

**IN THE HIGH COURT OF SOUTH AFRICA**

**NORTH WEST DIVISION – MAHIKENG**

APPEAL CASE NO**: CA 04/2017**

In the matter between:

**LUCAS NGOBENI** Appellant

**And**

**THE STATE** Respondent

**CRIMINAL APPEAL**

***Quorum*: DJAJE DJP & SCHOLTZ AJ**

Heard: **30 NOVEMBER 2023**

Delivered: The date for the hand-down is deemed to be on **16 FEBRUARY 2024**

**ORDER**

The following order is made:

1. The appeal against conviction and sentence is dismissed.

**APPEAL JUDGMENT**

**DJAJE DJP**

[1] The appellant appeared before the Regional Court in Temba. He now appeals against conviction and sentence wherein he was convicted of nine different counts and effectively sentenced to life imprisonment. The counts and sentences were as follows:

Count 1 – Indecent Assault – five years imprisonment

Count 2 – Indecent Assault- five years imprisonment

Count 3 – Indecent Assault – five years imprisonment

Count 4 – Rape – Life Imprisonment

Count 5 – Rape – Life Imprisonment

Count 6 – Rape – Life Imprisonment

Count 7 – Rape – Life Imprisonment

Count 8 – Assault with intent to do grievous bodily harm- one year imprisonment

Count 9 – Assault with intent to do grievous bodily harm – one year Imprisonment

It was ordered that the sentences in count 1,2,3,9 and 9 to run concurrently with the life sentences.

[2] There were no oral submissions made in this appeal as the parties requested that it be decided on the papers.

[3] As far as conviction is concerned the appellant only takes issue with the conviction on count 5 and 7. There was no argument advanced in relation to the other counts. It will therefore not be necessary in this judgment to deal with the evidence relating to the rest of the counts. In count 5 the appellant was alleged to have had sexual intercourse with SN a four-year-old minor without her consent. This is the same complainant in respect of count 1,2,3,4,5,6,7, and 8. At the time of her testimony, the complainant was 15 years old. She testified that the incident relating to count 5 happened in December **2007**. The appellant was residing with them as her mother's partner and they addressed him as their father. On that day the appellant sent her sister away and she was instructed to go to her bedroom. In the bedroom the appellant forced her to lie on her back on the bed, threatened her with a knife to undress her panties. The appellant lowered his underwear to his knees. The following appears from the reconstructed record as the evidence by the complainant: *"She told him it was painful and he withdrew and put his penis between her thighs. When he did that, he ejaculated and then put on their clothes".*

[4] In count 7 the complainant testified that on **7 March 2008** the appellant again had sexual intercourse with her. She reported to her mother that the appellant had sexually assaulted her. When the mother confronted the appellant he assaulted her and her

mother with a sjambok. The following day the complainant showed her teacher the marks on her body as a result of the assault by the appellant. The complainant's mother testified and confirmed that the complainant did report to her about the sexual assault by the appellant. She further stated that during a heated argument with the appellant about the incidents, the appellant admitted to having sexual intercourse with the complainant. At that time, she confronted the appellant to make a choice between her and the complainant.

[5] The complainant's sister also testified about how she would be sent away from home by the appellant and on her return she would find the complainant's mood changed. In addition, she witnessed the assault on her mother and the complainant by the appellant. The two teachers from the complainant's school testified about the complainant reported the sexual incidents and the assault to them.

[6] According to the doctor the medical examination on the complainant was done on **12 March 2008**. The conclusion by the doctor was that the complainant had no hymen and that she was sexually active but from the history it was not consensual. It was further noted that the complainant had a sexually transmitted disease and a whitish offensive discharge. She was also bruised on her arm, lower legs and the left hand side of the body.

[7] The appellant testified in his defence and denied the sexual contact with the complainant. He admitted to having assaulted the complainant's mother, to stop her from assaulting the complainant. According to the appellant, he could not have had sexual intercourse with the complainant as he was impotent and receiving treatment from a traditional healer.

[8] In convicting the appellant the court *a quo* found that the totality of the evidence pointed to the guilt of the appellant beyond reasonable doubt. The following was stated by the court *a quo* in the evaluation of the complainant's evidence:

> *"I have also noted that the complainant in this case was very articulate for a person of such young age who had been subject to all experiences that she has related to the court. Her testimony on each counts draws upon recollections which she recalls vividly in many respects. But is not 100% total recall of each and every event that she experienced. The complainant's detail, however, of what she can recall indicates that it is not something that she could easily have concocted and made up.*
>
> *She is honest because there are times when she says clearly in her evidence that she cannot recall exactly the sequence of events on that particular day. What she does recall is the abuse she suffered at the hands of Mr Ngobeni, that is what she does recall.*
>
> *For example she can recall what she was wearing on a particular day when she was abused. She can recall how her hair was made up. On the one occasion she indicates her hair was braided. So in each event, in each set of experiences this young child recalls something that she can connect to the experience. It is either her clothing or it is an event, such as her sister having to look for goats, there is something that she couples to each and every*

*experience at the hands of Mr Ngobeni to something outside the sexual event.*

*Her testimony was logical and the general impression of her evidence was that her recall was really quite good, more so when one considers that when the abuse commenced she was in the region of 12 years age. I say that because her mother testified where her birthdate is given as 9 May 1994, so on 9 May 2006 she would have been 12 years of age. That means in 2007 she would have been 13, 2008, 14, 2009, 15.*

*Besides that when one considers in totality her evidence of her experiences then there is a clear modus operandi that emerges and there are clear points of connection to thread her evidence together. In each case she was taken to the bedroom. Sexual abuse and the alleged rapes occurred in the bedroom on each specific day. She was threatened by the accused on each occasion. In some instances she said she was assaulted. On some occasions her sister was sent to look for goats. These are not events that a child of her age could easily fantasise about or be told about or be coached about or lie about."*

**AD CONVICTION**

[9] In the main as stated above, the appellant argued that the court *a quo* erred in convicting him of the charges in count 5 and 7. It was submitted that there was no evidence proving that the appellant sexually assaulted the complainant in count 5 and 7 as the complainant failed to state categorically how she was raped. The argument by the appellant is to the effect that in respect of the two counts the evidence of the complainant lack details. On the other hand, the respondent contended that the evidence cannot be faulted and was properly evaluated by the court *a quo.*

[10] In this matter the state relied on the evidence of a single witness as far as the offence of rape is concerned. Section 208 of the Criminal Procedure Act states that:

> *"**208 Conviction may follow on evidence of single witness***
>
> *An accused may be convicted of any offence on the single evidence of any competent witness."*

[11] It is trite that the state bears the onus to prove the guilt of an accused person beyond a reasonable doubt. All that is expect of an accused is to come up with a reasonably possibly true version. In the case of **Shackell v S 2001 (4) All SA 279 (SCA)** Brand AJA (as he then was) stated as follows: *"A 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 the 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 to be so improbable that it cannot reasonably possibly be true."*

[12] In order for a conviction of rape to be sustained the state has to prove beyond a reasonable doubt that all the elements of the offence are present and that the offence has been committed by the accused. In this matter the appellant's version was that he is impotent and denied having sexual intercourse with the complainant.

[13] The complainant in this matter was a single witness. In the matter of **S v Stevens (417/03) [2004] ZASCA 70; [2005] 1 All SA 1 (SCA)**

(2 September 2004) the following was stated in relation to evidence

of a single witness:

*"[17] As indicated above, each of the complainants was a single witness in respect of the alleged indecent assault upon her. In terms of **s 208** of the **Criminal Procedure Act, 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 (see the remarks of Rumpff JA in S v Webber. . .). 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.'*

[14] The evidence of the complainant was corroborated by the medical evidence that there was forceful penetration. The mother confirmed having received a report from the complainant about the sexual assaults by the appellant. There was also the evidence of the sister and the teachers. In count 5 the complainant testified that the incident took place in **December 2007**. She could not remember the exact date but she related what happened. He testimony to the effect that the appellant withdrew his penis and placed it on her thighs is sufficient to prove that he had penetrated her vagina and withdrew when she complained of the pain. The same applies to the incident in count 7, she testified that it was on **7 March 2008** when the appellant once again forced himself on her and she reported to the mother. Her evidence in both counts is clear and does not lack any detail.

[15] The appellant explanation was that the complainant and her mother are colluding against him. He was not able to rebut the medical evidence showing that the complainant had been forcefully penetrated. The version of the appellant was correctly found to be improbable and false. The court *a quo* correctly found that the appellant unlawfully and intentionally had sexual intercourse with the complainant in all the counts including count 5 and 7.

**AD SENTENCE**

[16] It was argued on behalf of the appellant that when charges were put to the appellant, the charge sheet in counts 4 and 5 referred to the provisions of section 51(2) of the Criminal Law Amendment Act

105 of 1997 which prescribes a minimum sentence of 15 years imprisonment. Therefore, life imprisonment should not have been imposed. In counts 6 and 7, the charge sheet does not specify which sub-section is applicable. It was submitted that the appellant was a first offender and that should have been considered as one of the substantial and compelling circumstances to deviate from the prescribed minimum sentence. A further argument on behalf of the appellant was that the court *a quo* in imposing life imprisonment, overemphasised the seriousness of the offence at the expense of the interests of the community and the personal circumstances of the appellant. It was submitted that the appropriate sentence to be imposed is an imprisonment term of fifteen (15) years ordered to run concurrently with all the counts.

[17] In contention the respondent argued that the sentence of life imprisonment was the appropriate sentence in this matter as there were more aggravating circumstances than mitigating. It was submitted that the complainant was young and she was raped more than once by the appellant. The respondent's argument was that rape is a serious offence and is prevalent countrywide. As a result, the sentence imposed by the court *a quo* was appropriate.

[18] It is trite that rape of a minor child carries a minimum sentence of life imprisonment. As in this matter, the complainant was 13 and 14 years respectively when she was raped. The court *a quo* found that there were no substantial and compelling circumstances and imposed life imprisonment in respect of the rape counts.

[19] It is correct as submitted by the appellant that in counts 4 and 5 the charge refers to the applicability of section 51(2) of the Criminal Law Amendment Act and in counts 6 and 7 no specific section is mentioned.

[20] In **S v MT 2018 (2) SACR 592 (CC)** at paragraph [38] to [40] the following was said in relation to the drafting of a charge and the applicability of the Minimum Sentences Act:

*"[38] The cases before us come after a number of Supreme Court of Appeal judgments with differing approaches to the necessity of citing the Minimum Sentence Act's provisions in the charge sheet. The starting point is Legoa, where the Supreme Court of Appeal held that it was not desirable to lay down a general rule as to what is required in a charge sheet and that whether an accused's right to a fair trial, including their ability to answer the charge, has been impaired will depend on "a vigilant examination of the relevant circumstances". Since then, the Supreme Court of Appeal has primarily dealt with cases where charge sheets cite the incorrect section of the Minimum Sentences Act. In Ndlovu, this Court held decisively that, where an accused is convicted in a Magistrate's Court of an offence under an incorrect section of the Minimum Sentences Act, that Court will only have jurisdiction to sentence under that section,*

*[39] This precedent has not created a hard-and-fast rule that each case where an accused has not been explicitly informed of the applicability of the Minimum Sentences Act will automatically render a trial unfair. However, a practice has developed to include the relevant section of the Minimum Sentences Act in the charge sheet because of this precedent.*

*[40] It is indeed desirable that the charge sheet refers to the relevant penal provision of the Minimum Sentences Act. This should not, however, be*

*understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentences Act in the charge sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in trial. This is so because even though there may be no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused's section 35(3) right to a fair trial was not in fact infringed."*

[21] There are a number of decisions from this Court on this issue of incorrect section referred to in the charge sheet. **See : MS v The State case no CA 40/2017 per Djaje J and Petersen AJ; Josias Mokobane v S CA 26/2017 per Hendricks J (as he then was) and Petersen AJ.** In all these matters this court found that it is important for the court to make a finding on the applicable section as failure to do so results in a serious misdirection. All these decisions are in line with the decision of the Constitutional Court in **S v MT** referred to above.

[22] In this matter despite the charge sheet not referring to the correct section, before the appellant could plead to the charges, the court *a quo* explained to the appellant that in respect of count 4,5,6 and 7, the minimum sentence applicable is life imprisonment. These are the counts of rape. This is an indication that the appellant was aware of the minimum sentence applicable before he could plead to the charges. There was no miscarriage of justice in that instance.

[23] In imposing the appropriate sentence the court should always balance the nature and circumstances of the offence, the personal circumstances of the offender and the impact of the crime on the community, its welfare and concern. **See: S v Banda and Others 1991(2) SA 352 BGD) at 355.**

[24] The appellant in this matter was convicted of an offence which has been described as a horrific and dehumanizing violation of a person's dignity. It not only violates the mind and body of a complainant but also one that infuriates the soul. The appellant was known by the complainant and considered as a father to her. He was residing in the same house with her and having a love relationship with her mother. It was expected of the appellant to protect the complainant and not expose her to such trauma and humiliation. The complainant was not only scarred physically but emotionally as well.

[25] The appellant argued that he was a first offender and that should have been one of the factors taken into consideration as a substantial and compelling circumstance. Further that he is a father. In **S v Vilakazi 2012 (6) SA 353 (SCA)** it was held that: *"The personal circumstances of the appellant, so far as they are disclosed in the evidence, have been set out earlier. In cases of serious crimes, 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 in employment, are in themselves largely immaterial to what that period will be, and those seem to me to be the kind of `flimsy` grounds that Malgas said should be avoided"*

[26] This is a matter where the circumstances of the appellant should recede into the background. The court *a quo* correctly found that there were no substantial and compelling circumstances and imposed a sentence of life imprisonment.

[27] Having considered the submissions on behalf of the appellant and the respondent the appeal against both conviction and sentence stands to be dismissed.

**Order**

[28] Consequently, the following order is made:-

1. The appeal against conviction and sentence is dismissed.

_____

**J T DJAJE**
**DEPUTY JUDGE PRESIDENT**
**NORTH WEST DIVISION**
**MAHIKENG**

I AGREE

_____

**H SCHOLTZ**

**ACTING JUDGE OF THE HIGH COURT**

**NORTH WEST DIVISION**

**MAHIKENG**

**APPEARANCES**

| | | |
|---|---|---|
| **DATE OF HEARING** | **:** | **30 NOVEMBER 2023** |
| **DATE OF JUDGMENT** | **:** | **16 FEBRUARY 2024** |
| **COUNSEL FOR THE APPELLANT** | **:** | **MR E M SETUMU** |
| **COUNSEL FOR THE RESPONDENT** | **:** | **ADV T SEPTEMBER** |