



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: CA&R107/2023

In the matter between:

MTUTUZELI GEORGE MAZELE

Appellant

and

THE STATE

Respondent

JUDGMENT

Govindjee J

[1] The appellant was convicted in the Regional Court, Gqeberha, of the rape of the complainant, 'LM', and sentenced to life imprisonment. This is an automatic appeal in terms of s 309(1) of the Criminal Procedure Act, 1977¹ against both conviction and sentence.

[2] The incident in question occurred on 21 March 2022, a few days before the complainant's 16th birthday. Ms Andiswa Africa testified that she had visited her

¹ Act 51 of 1977.

aunt's house and, hearing that her aunt was drunk and asleep, peeped through a hole in the door. She observed the appellant showing the complainant his penis while his pants were down. The complainant's mother, who lived with the complainant in the next-door house, was called and testified that she observed a similar occurrence, causing her to scream. These events resulted in the complainant reporting that she had been raped by the appellant, and an examination at Dora Nginza Hospital. The registered forensic nurse who examined the complainant was called to testify and confirmed genital injuries consistent with sexual penetration. All these witnesses testified that the complainant suffered from a mental disability.

[3] The complainant was considered competent to testify and did so through a duly appointed intermediary having been admonished. The court *a quo*, having heard testimony from a registered clinical psychologist who had examined the complainant on various occasions during 2022, held that the complainant was a person with a mental disability.²

[4] There is no appeal against that finding. 'Consent' is defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007³ ('the Act') to mean 'voluntary or uncoerced agreement'.⁴ One of the stipulated circumstances in respect of which a complainant does not voluntarily or without coercion agree to an act of sexual penetration, is where the complainant is a person with a mental disability, as in the present instance.⁵ This is reinforced in s 57 of the Act, in respect of any 'sexual act'.⁶ Persons with a mental disability are also defined as 'vulnerable' in the Act.⁷

[5] The notice of appeal avers that the court *a quo* erred in both its assessment of the complainant's credibility and in its finding that the injuries had been caused by sexual penetration, considering the nurse's evidence that there were other possibilities for this.

² See s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007) ('the Act').

³ Act 32 of 2007.

⁴ S 1(2) of the Act.

⁵ Ss 1(3) of the Act.

⁶ 'Sexual act' is defined to mean an act of 'sexual penetration or an act of 'sexual violation', both notions being defined separately.

⁷ S 40 of the Act.

[6] The only issue in dispute in respect of conviction is therefore whether the state has proved beyond reasonable doubt that sexual penetration occurred. The court *a quo* considered the state's evidence in its totality, including possible reasons for the complainant falsely implicating the appellant, and made favourable credibility findings in respect of the complainant. In particular, the complainant's testimony was assessed as demonstrating good recollection and sufficient detail absent exaggeration or contradiction, so that the evidence was accepted as trustworthy and reliable notwithstanding the application of the necessary caution in dealing with a single child witness who is a person with a mental disability.

[7] The evidence of the complainant's mother and Ms Africa supports the complainant's version, in so far as it is apparent from that evidence that the appellant had exposed himself to the complainant at close quarters. The complainant's version is further supported by the medical evidence led, as accepted by the court *a quo*. There is also a presumption that the trial court's evaluation of the evidence is correct, so that it will only be disregarded if it is clearly wrong.⁸

[8] This does not appear to me to be one of the exceptional cases in which this court is entitled to interfere with the trial court's evaluation of oral testimony. The alleged misdirections are unmerited and insufficient to show that the trial court's acceptance of LM's evidence was erroneous. This bearing in mind the oft-cited advantages which a trial court has of seeing, hearing and appraising a witness.⁹ That court delivered a careful and well-reasoned judgment, fully cognisant of the caution to be applied before accepting LM's evidence. The record reflects that LM's testimony, considered as a whole, was rightly accepted in its material dimensions. There were neither material contradictions or inconsistencies in the testimony, nor improbabilities to the extent that the evidence was rendered suspect. The supporting evidence confirms this assessment, as does the assessment of the appellant's own testimony, which was rightly rejected as being so improbable and replete with falsities that it could not be reasonably possibly true.

⁸ *S v Francis* 1991 (1) SACR 198 (A).

⁹ *Ibid* at 204D–F.

[9] The appeal against conviction must, therefore, be dismissed.

[10] As for the sentence imposed, it is trite that punishment is pre-eminently a matter for the discretion of the trial court. Imposed sentences should only be altered on appeal if the trial court's discretion has not been 'judicially and properly exercised'. The test is whether the sentence is 'vitiating by irregularity or misdirection or is disturbingly inappropriate'.¹⁰

[11] In this instance a minimum sentence of life imprisonment was imposed when considering that the complainant was a person with a mental disability.¹¹ The imposition of life imprisonment is criticised as inducing a sense of shock and disbelief, over-emphasising the interests of society and the crime committed at the cost of the appellant's personal circumstances. This includes poor health and advanced age.

[12] These matters were considered by the trial court and rejected in the face of the nature and seriousness of the crime and its impact on society. Whether or not the sentence imposed was 'right or wrong' is not the test. Instead, the question is whether the alleged misdirection is of a nature, degree or seriousness sufficient to demonstrate the trial court's failure to exercise its discretion properly or reasonably. It is a misdirection of this extent that would vitiate the trial court's decision on sentence.¹²

[13] To the contrary, consideration of the judgment on sentence reflects a careful weighing of the various considerations and applicable authorities. This was coupled with the exercise of a judicial discretion, the trial court concluding that there was an absence of substantial and compelling circumstances warranting deviation from the prescribed minimum sentence. The sentence imposed is also not strikingly disproportionate to any sentence this court might have imposed in the circumstances. There is therefore no basis for this court to interfere with the outcome, so that the appeal against sentence must also be dismissed.

¹⁰ *S v Rabie* [1975] 4 All SA 723 (A) 724; 1975 (1) SA 855 (A) 857E-F.

¹¹ Schedule 2 Part I of the Criminal Law Amendment Act 105 of 1977, read with the s 1 of the Act.

¹² *S v Pillay* [1977] 4 All SA 713 (A) at 717; 1977 (4) SA 531 (A) at 535E-G.

Order

[14] The following order is issued:

1. The appeal against conviction and sentence is dismissed.

A

GOVINDJEE

JUDGE OF THE HIGH COURT

I agree

N GQAMANA

JUDGE OF THE HIGH COURT

Heard: 14 February 2024

Delivered: 14 February 2024

Appearances:

For the Applicant:

Ms HL McCallum
Legal Aid South Africa
Makhanda Local Office
69 High Street
Makhanda
Email: HelenM@legal-aid.co.za

For the Respondent:

Adv AA Nohiya
Director of Public Prosecutions
94 High Street
Makhanda
Email: wdevos@npa.gov.za