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

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

APPEAL NUMBER: A111/2023

In the matter between:

NDZEMENE KENNETH FANISWA **APPELLANT**

and

THE STATE **RESPONDENT**

HEARD ON: **5 FEBRUARY 2024**

CORAM: **NAIDOO, J et Hefer AJ**

JUDGMENT BY: **NAIDOO, J**

DELIVERED ON: **12 MARCH 2024**

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[1] The appellant was convicted on 12 August 2021 on one count of Rape, in the Brandfort Regional Court, and sentenced to life imprisonment. The appellant approaches this court in terms of his automatic right of appeal. The appeal lies against both his conviction

and sentence. Mr JD Reyneke appeared for the appellant and Mr TE Komane for the respondent (the state). I mention that the appellant applied for condonation for the late filing of the Notice of Appeal. Mr Komane indicated that he does not oppose the application for condonation, and condonation for such late filing was accordingly granted.

[2] The Appellant's grounds of appeal against the conviction and sentence are, in essence, that the court *a quo* erred in:

2.1 finding that the state had proved its case beyond reasonable doubt;

2.2 finding that the evidence of a single witness was satisfactory in all material respects, despite him having proffered an alibi defence;

2.3 not placing sufficient weight on the absence of DNA evidence;

2.4 rejecting the appellant's evidence as not being reasonably possibly true;

2.5 not taking into account the following factors with regard to sentence:

2.5.1 that the appellant had no previous convictions;

2.5.2 that he was fairly young at 32 years old when the offence was committed;

2.5.3 that he is the father of two young children and the breadwinner of his family;

2.5.4 by finding that no substantial and compelling circumstances exist to justify deviating from the imposition of the minimum sentence of life imprisonment.

[3] The complainant lived with her aunt B[…], the appellant, who was B[…]'s boyfriend, and their two children. On 16 November 2019, B[…] and the appellant left their two young children in the care of the complainant, who was nine years old at the time, and went to a tavern close to their home. A while later the complainant heard a knock on the door, and she recognised the voice of the appellant who asked where B[…] was, to which the complainant replied that B[…] was not at home as she had left to the tavern with him. He asked her to open the door, which she did. I pause to mention that the complainant referred to the appellant as Kadafi, which the latter confirmed was his nickname.

[4] When the appellant entered the house, his children were asleep in the complainant's bedroom. He picked her up and took her to his bedroom, where he undressed the complainant and himself. He initially sucked her genitals and then raped her. Thereafter he performed oral sex on her, and shortly thereafter her aunt, B[…] returned home. She dressed hurriedly and ran to her bedroom. The appellant who was naked at the time, opened the door for […].

Although she saw B[…], she did not report to her what had happened as she knew that B[…] would shout at her, as she usually does.

[5] The complainant did not go to school on the Monday thereafter, and only went on Tuesday. She reported the incident to her relative K[…] and others, who in turn reported it to the teacher. The teacher. Ms Khiba, confirmed that the complainant informed her that her aunt's boyfriend had raped her on 16 November. She immediately called the police.

[6] The appellant's version is a bare denial. His version is that he went to a tavern in the area with B[…]. They sat at the tavern and had a few drinks and at about 22h00 they returned home together. She checked on the children and the complainant said they were fine. They then all went to sleep. B[…] testified as a witness for the appellant and said that she and the appellant left home together and went to the tavern where they were drinking. Later that evening they left together and arrived home together. She did not check on the children and she was drunk and there was not much she could do. She said it was not possible for the appellant to have left the tavern without her seeing him, as she sat outside near the door and would have been able to see him leave the tavern. The next morning she found the complainant's panty in her bedroom, and did not think this was unusual.

[7] It is trite the state bears the onus to prove its case beyond reasonable doubt, while there is no such duty on the appellant to prove his case. Not only was the court faced with two mutually

destructive versions in this matter, but it also had to deal with the evidence of a single witness, who was a child. The task of analysing and evaluating evidence is vested in the trial court. An appeal court is limited in its ability to interfere with the trial court's conclusions, and may not do so simply because it would have come to a different finding or conclusion. The trial court's advantage of seeing and hearing witnesses places it in a better position than a court of appeal to assess the evidence, and such assessment must prevail, unless there is a clear and demonstrable misdirection. This is a principle that is well established in our law.

[8] In *R v Dhlumayo and Another 1948 (2) SA 677 (A) at 705* the majority, per Greenberg JA and Davis AJA (Schreiner dissenting) said: "The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness and being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing their demeanour, but also their appearances and whole personality. This should not be overlooked." A similar view was adopted in *S v Pistorius 2014 (2) SACR 315 (SCA) par 30,* which cited, *inter alia Dhlumayo* with approval**:**

"It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para 12. It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, *this court* is not at liberty to interfere with his findings."

[9] The trial court, in evaluating the evidence before it, was eminently aware that the complainant was a single, child witness and reminded itself of the caution to be exercised when dealing with such evidence. The trial court cited the relevant case law as well as section 208 of the Criminal Procedure Act 51 of 1977 (the CPA), which provides for the admission of the evidence of a single witness, upon which a court can convict an accused person. The learned

authors *Du Toit et al* in the *Commentary on the Criminal Procedure Act* introduce their commentary on section 208 of the CPA thus:

> "*The danger of relying exclusively on the sincerity and perceptive powers of a single witness has evoked a judicial practice that such evidence be treated with the utmost care. This practice seems to have originated in the following remarks made by De Villiers JP in R v Mokoena 1932 OPD 79 at 80:*
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> > *'Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by [*section *256], 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.' (RS 67, 2021 ch24-p1).*
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> > [*Section 256 of the old CPA 56 of 1955 was the predecessor of the current section 208)]

[10] The guidelines set out in Mokoena have solidified the manner in which courts approach the evidence of a single witness. It has become trite that the final evaluation of the evidence of a single witness can rarely be made without considering whether such evidence is consistent with the probabilities. Where there is even a small measure of corroboration, the court is no longer dealing with the evidence of a single witness, and such corroboration renders the accused's version less probable on issues in dispute. Courts generally employ corroboration as a safeguard against the dangers of relying on the evidence of a single witness. [*See S v Teixeira 1980(3) SA 755 (A); S v Letsedi1963(2) SA 471 (A); S v Gentle 2005(1) SACR 420 (SCA*)].

[11] In the present matter, the complainant was nine years old when the incident happened. The court *a quo*, examined the complainant's evidence in detail and found it to be detailed and "a model of clarity". The court correctly found that the complainant was consistent in her version, as relayed to her teacher and the medical practitioner who completed the J88 medical examination form, following his examination of the complainant. The injuries described by the doctor are consistent with the complainant's version. Her narration to these two officials, in my view, provides the corroboration the court relied on to make the credibility findings in respect of the complainant

[12] Similarly, the trial court evaluated the evidence of the appellant and B[…] in the light of the probabilities of the case as well as the version of the complainant, and found that their versions were not

credible. This was especially so in view of the detailed version of complainant, where the trial court, in citing with approval the case of *S v V 1995(1) SACR 22 (O)*, agreed with that court's dictum that "children do not fantasise over things that are beyond their own direct or indirect experience". I am in agreement with the court's assessment of the quality of the complainant's evidence, as it was clear that a nine year old child has neither the intellectual development nor the mental sophistication to fabricate such a detailed and chronologically sound version. The court's rendering of a guilty verdict cannot be faulted, and consequently the grounds of appeal in respect of the conviction, which I set out earlier in this judgment, cannot be sustained.

[13] With regard to sentence, it is well established that sentencing is a matter which is within the discretion of the trial court. It is trite that an appeal court will only interfere with a sentence if the trial court misdirected itself in imposing sentence or its discretion is vitiated by irregularity, or if the sentence is unreasonable, unjust or disproportionate to the offence. This trite principle has been well settled in our law, and was succinctly enunciated approximately 50 years ago in the case of *S v Rabie 1975(4) 855 (A) at 857*, where Holmes JA said:

"1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under *(b)* is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate".

This principle was subsequently re-iterated in the much-quoted case of *S v Malgas 2001(1) SACR, 469 (SCA) at, 478 para12*, where the court remarked that:

"…A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh…".

[14] In this matter, the appellant's personal circumstances, as placed on record by his legal representative, are that he was a 34 year old, unmarried man who was living with his partner, with whom he had two children, who were aged four and five years old. He held a Grade 11 education and was, at the time of his arrest, employed as a general worker, earning R3 600.00 per month. He is a first offender, and the breadwinner of the family.

[15] The court undertook a comprehensive examination of the case law relevant to sentencing and applied the established principles of sentencing in its consideration of the appellant's personal circumstances. The court found that such personal circumstances did not individually or cumulatively amount to substantial and compelling circumstances, justifying a departure from imposing the prescribed minimum sentence of life imprisonment. The trial court's comprehensive analysis of the various factors relevant to sentencing in this matter cannot be faulted, and I am unable to find

any misdirection in the imposition of the sentence of life imprisonment in this matter,

[16] In the circumstances, the following order is made:

16.1 The appeal in respect of the conviction and sentence is dismissed

16.2 The conviction and sentence imposed on the appellant are confirmed.

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NAIDOO, J

I concur.

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HEFER, AJ

On behalf of appellant: Mr JD Reyneke
Instructed by: Legal Aid South Africa
Bloemfontein Local Office

On behalf of respondent: Mr TE Komane
Instructed by: The Office of the DPP
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