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

APPEAL NUMBER: A7/2022

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

In the matter between:

C[....] B[....] **APPELLANT**

and

THE STATE **RESPONDENT**

HEARD ON: **18 JULY 2022**

CORAM: **NAIDOO, J et MHLAMBI, J**

JUDGMENT BY: **NAIDOO, J**

DELIVERED ON: **19 JULY 2022**

[1] The appellant was convicted on 15 August 2017, in the Bloemfontein Regional Court, for the rape of two minor children, the charges relating to contraventions of section 3 of the Criminal Law (Sexual and Related Matters) Act 32 of 2007 (the Sexual Offences Act), read with the relevant provisions of the Criminal Procedure Act 51 of 1977 (the CPA),

The Criminal Law Amendment Act 105 0f 1997 (Minimum Sentences Act) and the Children's Act 38 of 2005. The appellant was sentenced on 29 January 2018 to eighteen years' imprisonment on each count, which were ordered to run concurrently. He was, therefore sentenced to an effective Eighteen (18) years in prison. The appellant approaches this court with the leave of the court *a quo*, and the appeal lies against his conviction. Adv (Ms) S Kruger appeared for the appellant and Adv (Mr) T Sekhonyana for the respondent.

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

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

2.2 the contradictions in evidence of the state witnesses, particularly the complainants were not material;

[3] The background to this matter, briefly, is that the appellant was married to the third state witness (Mrs B[....]) at the time of the incidents which are the subject matter of this case. The latter is the mother of the two complainants in counts one and two and the appellant was their stepfather. On 10 October 2015, after consuming alcohol, the appellant was playing with the two complainants in the bedroom of the appellant and Mrs B[....]. The latter was watching television and asked them to go and play in the children's bedroom, which they did. They were noisily having a pillow fight and after a while there was silence. Mrs B[....] went to the children's bedroom to investigate and was confronted by the sight of her younger daughter (D) sitting on the face of the appellant, with her pyjamas pulled down to her legs. The older daughter (N) was under a blanket with her face at or near the appellant's exposed genital area. When she asked the appellant what was going on he said that if she did not like what she saw, she could leave the house.

[4] The appellant thereafter went to the bathroom to brush his teeth and wash his mouth. He thereafter went to his bedroom and fell asleep. At the time, the two complainants were six and seven years old. Mrs B[....] then asked the girls what had happened. N told her that the appellant took a blanket from the cupboard, lay on the bed, pulled his shorts down and made her suck his penis. Through an opening in the blanket she noticed D was sitting on the appellant's face while he licked the child's

genitals. Mrs B[....] called her friend and told her what had happened and requested the friend to call the police. The police arrived shortly thereafter and arrested the appellant.

[5] The appellant's version was that his wife was angry that he bought wine instead of food, and that he borrowed money to buy a second bottle of wine. He also confronted her about not looking for employment and said to her that if she did not find employment by the end of that month, she and the children (the two complainants) must leave his house. He consumed two bottles of wine and he thereafter played with N and D, initially in the room in which his wife was watching television and subsequently in the children's bedroom. He passed out and fell asleep. He was wakened by the police at approximately 11.30pm. He was not on the children's bed but in his own bed. He did not know how he got there because he was intoxicated. The appellant proffered the version that his wife fabricated the incident because he threatened to kick her out of the house. He also said that if anything in fact happened, it is the children who interfered with him, due to their late father exposing them to sexual behaviour.

[6] The trial court bears the task of analysing and evaluating evidence. 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 has the advantage of seeing and hearing witnesses, which 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.

[7] 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."

[8] In the present matter, the trial court undertook a comprehensive analysis of the evidence for the state and the appellant, as well as the law applicable to the facts. The Court reminded itself extensively of the extreme caution required when dealing with the evidence very young children. In this case the complainants were six and seven years old when the incidents occurred, and they testified a year later, when they were seven and eight years old. The court *a quo* eloquently articulated that the reason for caution when presented with evidence of a very young child is that such evidence is potentially unreliable and untrustworthy. The manner in which the court approached the evidence of the complainants demonstrated amply that it never lost sight of the caution to be exercised in this regard and particularly that it guarded against "the possible imaginativeness and suggestibility" of the two young complainants.

[9] The appellant complained of contradictions in the evidence of the two complainants and their mother, and that the court erred in finding that such contradictions were not material. It is so that there were differences and contradictions in certain aspects of the versions proffered by the state witnesses. The court was acutely aware of these and dealt comprehensively with each such contradiction or difference, before concluding that they were not material. The discrepancies related, inter alia, to such aspects as whether the appellant or N took the blanket from the cupboard, the position of D when she sat on the appellant's face and whether D jumped off his face or the appellant removed her from his face. Ms Kruger, in any event, conceded that such contradictions were not material.

[10] The court *a quo* was at all times cognisant and mindful of the tender ages of the complainants and the fact that children testified differently to adults. Its analysis and manner of dealing with the discrepancies demonstrated this amply. The court's impression of the honesty and reliability of the two complainants was correctly fortified by the fact that it was not put to either of them that what they said in their statements to the police shortly after the incident was largely the same as their narration in court, a year later. This is particularly so as the police arrived very shortly after the incident, leaving little or no time for their versions to have been suggested to them by their mother or for them to have been coached in any way. I should perhaps remark that it is common sense that complainants as young as the two in this matter do not have the mental or intellectual capacity to fabricate and describe in such detail the incidents of sexual violence, as they did in this matter, and much less to remember such minute details a year later, unless such incidents did in fact occur.

[11] The appellant took the point that the state did not prove sexual penetration in count 2, as defined in the Act and therefore the appellant ought to have been found guilty of sexual assault as defined in section 5 of the Sexual Offences Act instead of rape in terms of section 3. This was not raised as a ground of appeal. However, if the provisions of section 3 and 5 of the Act are examined, I have no reason to fault the analysis of the court *a quo* of the evidence in this regard and I am, therefore, satisfied that the court *a quo* was correct in finding that the complainant in count 2 was raped, in accordance with the definitions and provisions of the Sexual Offences Act.

[12] Similarly, with regard to count 1, it was raised at the trial and again in oral argument before us that the interpretation of the word "moes" used by N when she said "*Ek moes sy verkeerde plek suig*", can be that she had to but did not suck the appellant's penis. The trial court dealt comprehensively with this aspect and even called on the prosecution and defence to address the court in this regard. The court correctly found that when that word is viewed in the context of all the evidence surrounding this aspect, the only reasonable meaning to be assigned to these words is that she (meaning N) had to do it and had no choice. Again, I cannot fault the reasoning of the trial court in this regard. Ms Kruger did not pursue this point with any vigour and left the interpretation in the hands of this court.

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

13.1 The appeal is dismissed

13.2 The conviction and sentence imposed on the appellant are hereby confirmed.

NAIDOO, J

I concur.

MHLAMBI, J

On behalf of appellant:	Adv S Kruger
Instructed by:	Legal Aid South Africa Bloemfontein Local Office

On behalf of respondent:	Adv. T Sekhonyana
Instructed by:	The Office of the DPP BLOEMFONTEIN