IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

_____ _____
DATE SIGNATURE

CASE NUMBER: A273/2015

In the matter between:

MOFOKENG, MBONGISENI APPELLANT

And

THE STATE RESPONDENT

JUDGMENT

DOSIO AJ:

INTRODUCTION

[1] The Appellant was arraigned in the Regional Court, sitting in Soweto on two counts. The first count was an offence of rape, read with the provisions of section 51(1) of the Criminal law Amendment Act, 105 of 1997 ("Criminal Law Amendment Act"). The second count was a charge of escaping, namely, a contravention of section 117(a) read with Section 1 of the Correctional Services Act 111 of 1998.

[2] The Appellant pleaded guilty to count 2 and not guilty in respect to count 1. The Appellant enjoyed legal representation. He was convicted on both counts and was sentenced to twenty (20) years imprisonment on count one (1) and three (3) years imprisonment in respect to count two (2). The sentence of three (3) years imprisonment on count two (2) was ordered to run concurrently with the sentence imposed on count one (1). The Appellant was also declared unfit to possess an arm.

[3] The appeal is directed against the Appellant's conviction and sentence imposed on count one (1).

AD CONVICTION

[4] It is trite law that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. If the version of the Appellant is reasonably possibly true, he must be acquitted.

[5] In considering the judgment of the Court *a quo*, this court has been mindful that a Court of Appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.[1]

[6] At issue in this appeal, is whether the Appellant raped T S, (the "complainant"), a seven (7) year old child.

[7] Counsel for the Appellant submitted that the court *a quo* erred in finding the Appellant guilty on count one (1) in that;

[1] See *S v Francis* 1991 (1) SACR 198 (A) at 198 J – 199A and *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645 E-F

i. The Court *a quo* failed to apply the cautionary rule that applies to the evidence of a single witness, and that the complainant was not a satisfactory witness.

ii. There were material contradictions as well as inconsistencies in the State's case

The Court *a quo* failed to apply the cautionary rule

[8] In the decision of *S v Mahlangu and another* 2011 (2) SACR 164 (SCA) the court held that;

" Section 208 of the Criminal Procedure Act 51 of 1977 provides that: 'An accused may be convicted of any offence on the single evidence of any competent witness.'
The court can base its finding on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration."

[9] The learned Diemont JA in *S v Sauls and Others* 1981 (3) SA 172 (A) held at page 180E-G:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness…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."

[10] In *R v Abdoorham* 1954 (3) SA 163 (N) it was decided that;

"The Court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true."

[11] This Court finds that the Court *a quo* was alive to the cautionary rule and found that the complainant's evidence was reliable and trustworthy. There is corroboration for the complainant's evidence, in that J M ("Julia"), E D ("E"), both saw the complainant walking with difficulty. The medical evidence also confirmed a sexual assault took place.

[12] Esther corroborated the complainant by stating that the complainant was afraid to tell her what had transpired. E testified that before the complainant narrated the events to her, she was very emotional and even asked E if she was going to tell that person. It is clear to this Court that this complainant was extremely terrified.

[13] The Appellants version is one of a complete denial. The Appellant averred that he had a quarrel with E as he had kicked a ball injuring her son and had also slapped her son. As a result of this incident, E was falsely incriminating him. This court finds the Court *a quo* correctly rejected the version of the Appellant as false and not reasonably possibly true. E did not initially know that the complainant had been raped. She initially thought the pain to the complainant's gynaecological area was caused by a boil. It is only after Julia took the complainant to the doctor, that the doctor informed her that she had been raped. If E had an axe to grind with the Appellant, she would have immediately accused the Appellant of rape, prior to the complainant being examined by the doctor. Had E wanted to incriminate the accused sooner, she could have laid a much simpler charge against him than that of rape. There is also no reason why J would want to falsely incriminate the Appellant.

[14] The version of the Appellant stating that the complainant was told what to come and say in court is highly unlikely. This complainant was very clear about the sexual intercourse that transpired. She maintained this version during cross-examination. A child of seven (7) years cannot vividly explain the sexual acts that transpired, unless she witnessed them herself.

<u>There were material contradictions as well as inconsistencies in the State's case</u>

[15] Counsel for the Appellant stated that the complainant contradicted herself, in that initially she testified that, she and her friend called "T", were present when the Appellant told her to undress her pantie. Later, she stated her friend had already left when the Appellant ordered her to undress her pantie. These contradictions, this Court does not find as being of such a material nature to disregard the evidence of the complainant as being false.

[16] Counsel contended further that the complainant's evidence was unreliable because initially she stated it was the first time for her to see the Appellant on the day of the incident, yet later, it transpired that she knew him as he was living in her area.

[17] It is common cause that the Appellant was the complainant's neighbour. The complainant remembers the day of this incident vividly. She remembers her friend "T" was present, and she remembers what she herself was wearing. Although she stated that it was the first time for her to see the Appellant, it is common cause that the Appellant played soccer with her brothers. The fact that the Appellant was residing in that neighbourhood for only three (3) weeks prior to this incident, makes it probable that the complainant had never spoken to him before. She knew his name was "Coach" as her brothers played soccer with him.

[18] No clarity was sought from the prosecutor as to what the complainant meant when she said *"It was the first time to see him".* It could mean it was the first time for her to speak to the Appellant, or the first time to see him. The former seems more probable, as Esther confirmed that the Appellant confirmed he would see the children on a daily basis. He knew *"S* [complainant's brother] *and T and T's mother"*.[2] [my emphasis].

[19] Counsel contended that if the complainant was raped on the 5th of July 2005, it was impossible that the *"rotten meat"* smell could already have been detected at the time that E came back from the hospital, because, this is inconsistent with the doctor's evidence which stated, that a sexually transmitted disease would take seven (7) days to manifest. The complainant testified that when she got home, J informed E that she had a boil and she was taken to the doctor. From the evidence of J, this was not on the 5th of July but on the 9th of July. The doctor confirmed he examined the complainant on the 9th. The doctor accordingly saw her four (4) days after the alleged incident. Whether this incident happened four (4) days or more before the doctor examined her, the fact remains that the doctor found that this complainant had contracted a sexually transmitted disease which caused the discharge and the foul smell. The absence of a hymen further accentuated the fact that the complainant had been raped.

[20] This Court cannot fault this seven (7) year old complainant who was trying to remember the dates with clarity. It is natural for a child of such a young age to mix up the dates. It is possible that the Appellant could have had sexual intercourse with her before the 5th of July 2005. Counsel for the Appellant argued that there were no fresh

[2] Page 89 of the transcript line 22 to 23

tears. This fact in itself, corroborates the possibility that this incident must have happened a lot earlier than the 5th of July.

[21] After a thorough reading of this record, this Court has no doubt as to the correctness of the Court ***a quo's*** factual findings. I can find no misdirection which warrants this Court disturbing the findings of fact or credibility that were made by the court *a quo*. The State proved the guilt of the Appellant beyond reasonable doubt, and the court *a quo* correctly rejected the version of the Appellant as not reasonably possibly true.

AD SENTENCE

[22] It is trite that in an appeal against sentence, the Court of Appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the Court of Appeal should be careful not to erode that discretion.

[23] A sentence imposed by a lower court should only be altered if;

I. An irregularity took place during the trial or sentencing stage.
ii. The trial court misdirected itself in respect to the imposition of the sentence.
iii. The sentence imposed by the trial court could be described as disturbingly or Shockingly inappropriate.

[24] The trial court should be allowed to exercise its discretion in the imposition of sentence within reasonable bounds.

[25] As was stated in the decision of *S v Malgas* 2001 (1) SACR 496 SCA;

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial court."

[26] In the case of *S v Pillay* 1977 (4) SA 531 (A) at page 535 E-G, the court held that;

"..the essential inquiry in an appeal against sentence, …is…whether the court in imposing it, exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of

such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably."

[27] In *S v Salzwedel* and other 1999 (2) SACR 586 (SCA) at 588a-b, the Supreme Court of Appeal stated that an Appeal Court can only interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate.

[28] The following aggravating factors are present;

i. The Appellant maintains he is innocent and shows no signs of remorse.
ii. The complainant was very young when this happened and she was threatened that she would be killed if she told anyone.
iii. During the interview with the probation officer the complainant appeared withdrawn and the probation officer concluded that she was emotionally unstable. The complainant's grandmother also confirmed that she became withdrawn after this rape occurred. She would be afraid to sleep at night. According to the probation officer this child has been physically, emotionally and psychologically traumatised by the incident and has not healed. Her self-esteem is poor.
iv. The Appellant abused the trust the complainant had in him. It is clear that a child of this age will not forget this incident. It will affect her in future years.
v. The medical report shows that the fossa navicularis was inflamed and swollen. There were hymenal remants and signs of a long standing chronic infection extending perianally. The complainant had also contracted a sexually transmitted disease.

[29] The personal circumstances of the Appellant are the following;

i. He is a first offender and relatively young of age. He was nineteen (19) when he committed the offence.
ii. He is the third child in a family of three children. His mother passed away and although he was raised by his grandmother, she too has passed away. He never knew his father.
iii. He has no scholastic qualifications as he left school whilst he was doing grade nine.
iv. He was doing part-time work in New Castle prior to relocating to Johannesburg in June 2005, where he stayed with his brother. He secured a part-time job at

China City, earning R250-00 a week.

v.He is single with no dependants.

[30] The charge of rape falls in the category of offences listed in Part I of Schedule 2 of the Criminal law Amendment Act. A minimum sentence of life imprisonment is prescribed for a first offender.

[31] In *S v Ndlovu* 2003 (1) SACR 331 (SCA) Mpati J at paragraph [12] stated that;

"…it is implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences …"

[32] In the case of S v Makatu 2006 (2) SACR 582 (SCA) paragraph 3 and 7 the learned Lewis JA stated that;

"As a general rule, where the State charges an accused with an offence governed by section 51 (1) of the Act,…it should state this in the indictment…an accused faced with life imprisonment…must from the outset know what the implications and consequences of the charge are".

[33] Even though the Court *a quo* failed to bring the provisions of this Criminal Law Amendment Act to the attention of the Appellant at the beginning of the trial, the charge sheet contained the provisions of section 51 (1) of the Criminal law Amendment Act. In addition it is clear that the attorney representing the Appellant was aware of the minimum prescribed sentence applicable, as he addressed the Court *a quo,* requesting that substantial and compelling circumstances be found in order to impose a lesser sentence than that prescribed. Accordingly, this Court cannot find any prejudice to the Appellant.

[34] The substantial and compelling circumstances alluded to by the attorney representing the Appellant, were that he was young when he committed this offence. He was a first offender and the complainant's performance at school was not affected in that she

was coping well. In addition, no evidence was led which indicated that there was serious or physical injuries sustained by the complainant, or that there was any psychological damage caused.

[35] Although the Appellant was young when the offence was committed, he was an adult and has to take responsibility for his actions. In my view, an appropriate sentence must still be one of a long term of imprisonment.

[36] The Court *a quo* was at liberty to invoke the sentencing regime created by the Criminal Law Amendment Act. In the present case, the Court *a quo* found substantial and compelling circumstances justifying a departure from the prescribed sentence. It imposed twenty (20) years instead of life imprisonment.

[37] The offence for which the Appellant has been found guilty is a serious offence. Rape constitutes a humiliating, degrading and brutal invasion of the privacy, dignity and person of the victim. As stated in the case of *S v Nkunkuma and others* 2014 (2) SACR 168 (SCA) at paragraph [17];

"Rape must rank as the worst invasive and dehumanising violation of human rights".

[38] Rape is a crime that threatens every woman and child, particularly the poor and the vulnerable. In this country it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. The Legislature and community at large, correctly expects our courts to punish rapists severely.

[39] In the premises, it cannot be said that the sentence imposed is disturbingly inappropriate.

[40] This Court finds no misdirection on the part of the Court *a quo*. The sentence imposed does not induce a sense of shock and neither is it out of proportion to the gravity of the offence.

[41] In the result, having considered all the relevant factors and the purpose of punishment I consider twenty (20) years imprisonment to be an appropriate sentence.

[42] In the premises I propose the following order;

The appeal is dismissed both in respect to conviction and sentence.

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D DOSIO

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

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S.E. WEINER

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Appellant :		Adv. D.C MKHWANAZI
Instructed by	:	Legal Aid South Africa Corner Fox and Sauer Street Johannesburg
On behalf of the Respondent	:	Adv. M.T Ntlakaza
Instructed by	:	Director of Public Prosecutions Johannesburg
Date Heard	:	7 June 2016
Handed down Judgment	:	7 June 2016