IN THE GAUTENG DIVISION HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: A529/13

DATE: 25 JULY 2014

REPORTABLE

OF INTEREST TO OTHER JUDGES

ADAM CHINRIDZE **APPELLANT**

V

THE STATE **RESPONDENT**

JUDGMENT

DOSIO AJ:

[1] The appellant was arraigned in the Benoni Regional Court on a count of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("Sexual Offences Act"). He pleaded not guilty stating the sexual intercourse was consensual. He was convicted of raping the complainant.

[2] The appellant was sentenced to fifteen (15) years imprisonment. In terms of section 103 of the Firearms Control Act 60 of 2000 the appellant was declared unfit to possess an arm.

[3] The appellant was legally represented during the proceedings.

[4] The appellant was granted leave to appeal by the court a ***quo*** in respect to conviction and sentence.

AD CONVICTION

[5] The state led the evidence of four (4) state witnesses, namely, Dr Benjamin Absalom Phangela, L[...] M[...], N[...] M[...] ("the complainant") and B[...] M[...]. The appellant then testified.

[6] Doctor Phangela, who is a clinical psychologist, consulted with the complainant prior to her testifying. He did a number of tests to asses her IQ level. His results concluded that the complainant was mildly mentally retarded, possessing an IQ level of 60 and below. Accordingly his findings showed that the complainant's cognitive functioning was compromised as well as her ability to differentiate between right and wrong. He testified that because of her low IQ level, he believed the complainant would be easily manipulated. Although her actual age was sixteen (16) years old when he assessed her, her actual mental age was below seven (7) years old. His findings were based on the fact that she had difficulty in reading time from a clock, she did not understand the concept of money and change and neither was she able to do simple mathematical calculations like adding the numbers three and four.

[7] L[...] M[...], who is the mother of the complainant, testified that the complainant was not having her periods and she noticed her stomach was growing bigger and that she was gaining weight. She confronted the complainant to ascertain whether she was sexually active, but the complainant denied it. The complainant was taken to the clinic where it was confirmed she was three (3) months pregnant. This witness asked the complainant if she knew what it meant to be pregnant but she had no proper understanding of this term. After this witness threatened to assault her with a washing machine pipe, the complainant cried and told her it was the appellant who had raped her. The appellant is well known to this witness as he was renting next door. This witness was fond of the appellant. He had known the complainant since she was a baby. This witness stated that it would be obvious to any person that the complainant was not normal due to the manner in which she spoke. The complainant was also unable to understand that a two rand coin was money.

[8] The complainant testified that she did not have a relationship with the appellant. She stated the appellant raped her on more than one occasion. On the first occasion he took her to his house where he took off her pantie, climbed on top of her and inserted his penis in her vagina. Her brother who was present was sent by the appellant to go and buy some snacks. When her brother returned he saw the appellant getting off her. The appellant closed her mouth with his hand. The appellant raped her on another occasion in February 2011 and after that she was asked to cook some eggs and to wash the dishes. On a third occasion whilst the appellant was visiting her home and whilst they were watching television, the appellant inserted his finger in her vagina. The complainant stated she never told anyone about these incidents as the appellant had threatened to beat her if she spoke about them. She eventually did tell her mother who threatened to beat her if she did not explain what had happened.

[9] B[...] M[...], the complainant痴 brother, testified that he knew the appellant from an early age. The

appellant used to invite him after school to his house together with the complainant. He would be told to read the bible and on occasion he would be sent to buy snacks and sweets. On one instance he returned from the shops and found the appellant climbing off the complainant. The appellant was only wearing his undergarments. He believed the appellant was raping his sister. He did not ask the complainant anything and was afraid to tell his mother as the appellant had threatened to beat him if he told her.

[10] The appellant testified it is the complainant who continually proposed to him to have sexual intercourse. The complainant came to his home on two occasions. The first time she crept under the blankets with him but nothing happened. On the second occasion the complainant had sexual intercourse with him. The appellant told her that although he had a wife in Mozambique, he would marry the complainant and keep her as his second wife. It is the mother of the complainant who told him that the complainant was seventeen (17) years old. He did not know the complainant was retarded, according to him she was "***fine".*** He believes the complainants' mother told the complainant to utter these allegations as possibly they wanted his possessions.

[11] Counsel for the appellant submitted that the court a *quo* erred in finding the appellant guilty of rape in that;

> I. The tests conducted by doctor Phangela which determined the functioning level of the complainant to be that of a seven (7) year old was a pure guess based on speculation. The State had not proven the mental disability of the complainant as defined in section 1 (1) of the Sexual Offences Act.
>
> II. The complainant had the body of a woman and not a prepubescent girl. It was the complainant who enjoyed sexual intercourse and who had proposed to the appellant. Had she not fallen pregnant this sexual intercourse would have carried on for longer. The complainant's credibility was poor.

[12] Counsel for the appellant submitted that the appellant should rather have been found guilty of the competent verdict of statutory rape or sexual assault as envisaged in section 15, and section 5 of the Sexual Offences Act.

[13] Counsel made reference to the case of **S *v Dladla* 2011 (1) SACR 80 (KZP)** where Madondo J at paragraph [16] stated that;

> "*Whether the witness was or is suffering from a mental illness or mental defect this must be determined with the aid of psychiatric evidence. See* ***S v Mahlinza*** **1967 (1) SA 408 (A)** *at 417 F-H"*

[14] Counsel argued that the evidence of Dr Phangela and the nurse, Ms Mountford was not psychiatric evidence. These two witnesses could not make conclusive findings as to her mental disability as required by Section 1 (1) of the Sexual Offences Act.

[15] Counsel referred this court to two previous decisions of this division where the same two experts, namely Dr Phangela and the registered nurse Ms Mountford were used to assess the two respective complainants. Counsel contended that in both cases the appeals were upheld due to the experts not complying with the definition of section 1(1) of the Sexual Offences Act. The two appeal cases were **A1048** ***Patrick Botya v The State*** a judgment delivered orally in court on the 5th of May 2014 by Louw et Fourie, JJ and A 521/2013 ***Sifiso Wiseman Mayisela v The State*** a judgment delivered orally in court on the 20th of February 2014 by Preller J and Janse Van Nieuwenhuizen J.

[16] Dr Phangela and Ms Mountford were witnesses in the case of ***Patrick Botya supra,*** however not in the case of ***Sifiso Wiseman Mayisela supra.***

[17] In the case of ***Patrick Botya*** the complainant was epileptic, sexually active and had given birth to a child. The severity of the epilepsy was not before the court. The mother of the complainant had conceded that the complainant looked normal, as she spoke and mingled with people well. It was argued by Advocate Nel, (who incidentally was the counsel for the appellant before this court), that although the complainant was epileptic, she had engaged in meaningful sexual relationships before. She was accordingly able to foresee what sexual intercourse was. Counsel argued that Dr Phangela's finding had concentrated on whether the complainant was a competent witness and had concluded that her ability to distinguish between right and wrong was compromised. Relying on the findings made by Dr Phangela and Ms Mountford, the Regional Court magistrate made the finding that the consent was absent due to mental disability. The learned Fourie J concluded that Dr Phangela's finding that the complainant could distinguish between right and wrong did not address the requirements of section 1 (1) of the Sexual Offences Act, accordingly the finding that the complainant was mentally disabled had not been proven beyond a reasonable doubt. Fourie J stated that without laying down a general rule, a registered medical practitioner or preferably a psychiatrist should always address the requirements of the definition.

[18] In the case of ***Sifiso Wiseman Mayisela*** the doctor wrote on the medical report that the complainant was epileptic and mentally retarded. The doctor was not called to testify and the medical report was handed in by consent and the contents were admitted as correct. The Regional Magistrate found that the complainant testified well, however, because she had said that she was fifteen (15) years old, when in fact she was twenty (20) years old and due to her physical appearance (namely misaligned eyes) the appellant ought to have known she was mentally retarded and not able to consent. The learned Preller J concluded that from the evidence presented in court together with the actions and conduct of the complainant, it could not be said that the complainant was so mentally retarded not to understand the implications of sexual intercourse or to consent.

[19] Counsel's reference to the case of ***Patrick Botya*** is relevant in that Dr Phangela in the matter before this

court should have made a finding in respect to the complainant's mental retardation in terms of section 1(1) of the Sexual Offences Act. Apart from this the facts of ***Patric Botya*** as well as the case of ***Sifiso Wiseman Mayisela*** are distinguishable from the facts before this court.

[20] The facts before this court indicate that the complainant refuted the advances of the appellant. There is also the corroboratory evidence of her brother who saw the appellant climbing off the complainant and who confirms the appellant threatened them not to talk.

[21] In considering the evidence of a complainant who was allegedly raped and who was suffering from some mental retardation, a court should consider whether there was both factual and/or legal consent. The former existing when a complainant subjectively or objectively desires to indulge in sexual intercourse, as compared to the latter where a complainant does not choose for herself to have sexual intercourse.

[22] This court is accordingly tasked with a two-fold enquiry;

1. Was there consent as a matter of fact.

2. If yes, then the second enquiry is to ascertain whether there was legal consent (bearing in mind her mental retardation).

If there was no factual consent then naturally the conviction must stand and the second enquiry should fall away.

The first enquiry: Whether there was factual consent

[23] The complainant was an honest witness. This court could find no motive for her to falsely incriminate the appellant. When cross-examined why she kept going back to the appellant's house if she knew that he would rape her, she convincingly explained that she went there as the appellant had threatened to beat her and her brother and even kill them. This witness was adamant during her cross-examination that the intercourse was never consensual. She denied ever proposing to the appellant to have sexual intercourse with her. She stated that prior to this rape, she was not sexually active and did not have a boyfriend.

[24] During cross examination this complainant did not know the difference between rape and sexual intercourse, however, her version of the appellant closing her mouth and threatening to beat her was consistent. These are not the circumstances one would expect to have unfolded if the sexual intercourse was consensual. Such oppressive behaviour on the part of the appellant is indicative of the intercourse not being consensual.

[25] The evidence of B[...] M[...] who saw the appellant with very little clothing climbing off his sister, who

in turn was fully dressed, does not support the appellant's version of consensual intercourse. Instead it indicates forced sexual advances by the appellant in respect to the complainant.

[26] The judgment of the court *a quo* requires some scrutiny in that it was stated that;

> "**...** *there may have been instances where there* was *consensual sex or intercourse after the accused initiated it initially. I however find that the victim in this matter did not have the mental capability to make the decision to have intercourse as she did not even know what it was and for those reasons as per the evidence of the victim I find that especially the initial stages were not consensual and then that she was unable to give consent to sexual intercourse later on and therefore the accused is then CONVICTED as charged.* "

[27] The finding of the court a *quo* is unclear, in that on the one hand a finding is made there were instances of consensual intercourse, and then makes a finding that at the initial stages there was no consensus.

[28] The finding of the court a *quo* that there may have been instances where there was consensual sexual intercourse is not sustainable from the facts.

[29] Either there was factual consensus or there wasn't. The facts presented favour the latter conclusion. From the evidence presented it is clear that factually this complainant did not consent at any point, and on this basis alone the appellants appeal in respect to conviction should be dismissed.

[30] However, if the court is wrong in its conclusion that there was no factual consent, the court has considered the second leg of the enquiry to ascertain whether there was legal consent.

The second enquiry: Whether there was legal consent

[31] The learned author W A Joubert in ***The law of South Africa***[1] at paragraph 61, states that;

> "*Capacity to consent depends on whether the person consenting is able to understand the nature of the act for which consent is required... The capacity to consent may be affected by factors such as . ..mental defect...*"

And further

> *溺ental defect can render a person incapable of consent and it is a question of fact in every case whether the complainant was mentally capable of consenting...In* ***R v Ryperd Boesman***[2] *it was held that no consent exists where a woman is so devoid of reason that she cannot exercise any judgment at*

all on the question whether she will consent to or dissent from., .intercourse. ”

[32] The learned author JRL Milton, in ***The South African Criminal Law and Procedure***

stated the following in respect to lack of mental capacity due to a mental defect;

“*(1) It is a question of fact in every case whether Y’s mental defect* was *such as to make her incapable of consenting.*

(2) It nevertheless seems clear that if Y痴 mental condition rendered her insensible or incapable of understanding what she is doing, her consent must be regarded as vitiated... [3]

[33] Section 1(1) of the Sexual Offences Act defines a mentally disabled person as follows;

“*...a person affected by any mental disability, including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question was -*

(a) Unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;

(b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;

(c) unable to resist the commission of any such act; or

(d) *unable to communicate his or her unwillingness to participate in any such act; ”*

[34] The report of Dr Phangela concentrated on the complainant’s cognitive level of functioning as well as her ability to differentiate between right and wrong. From the reasoning of Fourie J in the case of ***Patrick Botya*** I agree that in the case before this court, the State should have led conclusive evidence to prove beyond a reasonable doubt that the complainant’s behaviour fell within the requirements of section 1(1) of the Sexual Offences Act.

[35] This court must reiterate what was said by the learned Fourie J, namely, without laying down a general rule, a registered medical practitioner or preferably a psychiatrist should always address the requirements of the definition. The Director of Public Prosecutions is encouraged to ensure that in each case where a complainant is alleged to be mentally retarded that evidence in compliance with the requirements of section 1(1) of the Sexual Offences Act is presented.

[36] Notwithstanding that such requirements were not met in the report by Dr Phangela in the court a *quo*, it

is clear that he did go one step further than in the case of ***Patrick Botya*** in that he did make a finding that her IQ was 60 and below which is indicative of her being mildly mentally retarded. However in light of Dr Phangela not making a conclusive finding in strict compliance with section 1(1) of the Sexual Offences Act, it is difficult for this court with certainty to find that the complainant fell within one of the four categories mentioned in section 1(1) and accordingly this court cannot with certainty state that there was no legal consent.

[37] This court can state that considering the evidence presented it is clear this complainant was unable to differentiate between the meaning of the words "rape" or "sexual intercourse" and that she did not know how to do basic mathematical calculations or tell the time. The fact that her mother testified that this child spoke in a strange manner, and was unable to appreciate the consequences of a sexual act, that these are strong indications that she was probably also unable to communicate her unwillingness to participate in the sexual act. Had the necessary enquiry been done in terms of section 1(1) it is most likely that the complainant would have fallen within one of the four above-mentioned categories which would have suggested that there could not have been legal consent.

[38] However as stated previously, this court finds that factually there was no consent and on that basis the appeal must fail.

[39] 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.

[40] This court finds that the appellant's denial of raping the complainant and that she voluntarily had sexual intercourse with him is not reasonably possibly true and that the court a ***quo*** was justified in rejecting his evidence as false.

[41] In regard to the appellants' counsel contending that the appellant should be found guilty of a contravention of section 15 of the Sexual Offences Act, such a proposition is not sustainable from the facts. During cross examination this complainant was adamant that the appellant had asked her what her age was and she had told him she was fifteen (15) years old. She repeated this a few times during the cross-examination. The appellant's version of believing that the complainant was normal and seventeen (17) years old is not reasonably possibly true. He knew her from when she was a baby and had interaction with her on a daily basis. The fact that he contradicted himself as to the actual age of the complainant is indicative that he did not believe himself she was seventeen (17) years old.

[42] This court accepts the State proved the guilt of the appellant beyond reasonable doubt.

[43] The court a ***quo*** did not misdirect itself as regards conviction of the appellant.

AD SENTENCE

[44] 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.

[45] 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.[4]

[46] 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. "*

[47] 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, however, is not whether the sentence* was *right or wrong, but 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. "*

[48] Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 ("Criminal Law Amendment Act") states that;

" *Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life"*

[49] Part I of schedule 2 offences include rape as contemplated in section 3 of the Sexual Offences Act;

"*(b) where the victim -*

(i) *Is a person under the age of 16 years;*

(ii) ...

(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; **...**"

[50] Due to the fact that there was no conclusive evidence that the complainant is mentally disabled the provisions of Part 1 schedule 2 (b) (iii) have no application.

[51] The medical report, specifically the date of birth indicates that she was 15 years old. This is confirmed by her mother. Accordingly this offence falls within the ambit of a Part 1 of schedule 2 (b)(i).

[52] The court *a quo* clearly did find substantial or compelling circumstances to depart from imposing the minimum prescribed sentence of life imprisonment and only imposed fifteen (15) years imprisonment

[53] Counsel for the appellant submitted that a fifteen (15) year sentence for the rape of a fifteen (15) year old could not be labelled as heavy and was not disproportionate to the offender.

[54] This court has borne in mind that the appellant abused the position of trust that the complainant had in him and raped and sexually assaulted this child on more than one occasion. The appellant also threatened the complainant and her brother not to tell their mother anything.

[55] This court is satisfied that the court a *quo* carefully considered the sentencing options and imposed a sentence commensurate to the seriousness of the offence, balancing carefully the personal circumstances of the appellant, the seriousness of the offence and the interests of the community.

[56] In the result, having considered all the relevant factors and the purpose of punishment I consider fifteen (15) years to be an appropriate sentence.

[57] In the premises I make an order that the appeal be dismissed both in respect to conviction and sentence.

D DOSIO

ACTING JUDGE OF THE HIGH COURT

I AGREE, AND IT IS SO ORDERED.

N KOLLÁPEN

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Appellant: Adv. Van Zyl Nel

Instructed by : Pretoria Justice Centre

Church Street Pretoria

On behalf of the Respondent : Adv. C Pruis

Instructed by : Director of Public Prosecutions

Pretoria

footnote1