IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: A461/2011

19/6/2015

(1) REPORTABLE:)'/NO
(2) OF INTEREST TO OTHERS JUDGES: /NO
(3) REVISED

18/6/15 .....
DATE SIGNATURE

In the matter between:-

ISAAC MODIKOE MAKUBE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

MOSEAMO AJ:

[1] This is an appeal against both conviction and sentence. Appellant who was legally represented was convicted on a charge of rape of a six year old girl and sentenced to life imprisonment at the Regional Court of Pretoria.

POINT IN LIMINE

[2] I firstly want to deal with the issue of the incomplete record and the appellant's submission that as a result of the incomplete record it is not clear whether the complainant was properly admonished. It is submitted on behalf

of the appellant that the appeal on both conviction and sentence ought to be upheld as the record is incomplete and cannot be reconstructed.

[3] It is true that the record is incomplete and cannot be reconstructed. The part of the evidence where the complainant is being sworn in is not on record and it is also not on record whether the complainant knew the difference between the truth and a lie. It appears from an affidavit submitted by the magistrate that her notes of the proceedings were destroyed in the fire which occurred at the Pretoria magistrates court during October 2010.

[4] The appellant is not contending that the complainant did not appreciate the difference between the truth and a lie. It is also not the appellant's contention that the complainant was not admonished, but it is submitted that because the record of the complainant's evidence is incomplete then this court should find that the complainant was not a competent witness. Although the record cannot be reconstructed, the magistrate confirms in her affidavit that 'I was at all stages aware that a child should be properly admonished to tell the truth after a proper examination to establish whether the child understands the importance of telling the truth and have always done it as a matter of course. I am therefore convinced that before the child started to give evidence I was convinced through questioning of the child that the child understood the importance of telling the truth and was admonished to tell the truth.' The prosecutor states that because of her experience she is aware that a child victim should be properly admonished to tell the truth and she would not proceed if that was not done.

[5] I am therefore satisfied that the child was properly admonished before giving evidence.

[6] Secondly, the fact that the record is incomplete and cannot be reconstructed does not automatically mean that the appeal has to be upheld. The defects in the record have to be so serious that a proper consideration of the appeal is not possible. The nature of the defects in this case do not make it impossible to consider the appeal. I am of the view that the defects will not affect the appellant's right to a fair trial.

[7] Therefore the appellant's point in limine stands to be dismissed.

CONVICTION

[8] The conviction was attacked essentially on the following grounds:

(a) The trial court misdirected itself in speculating what the complainant meant when demonstrating with anatomical dolls about what happened to her;

(b) The evidence of the complainant does not prove beyond reasonable doubt that there had been penetration of her vagina by way of the penis of the appellant;

[9] The complainant testified through an intermediary. She testified that the incident happened at Moreletapark, Pretoria in the house of Rondekop (appellant). The appellant undressed her and came on top of her and started bumping on top of her. Then a person by the name of Ma K. came into the room and said to the appellant: 'Rondekop you have raped the child'. She demonstrated that when the appellant was on top of her, she felt pain on her chest as well as in her vaginal area.

[10] C. M. testified that she is the mother of L. M. and her birth date is the [……] 2000. (Her evidence was incomplete)

[11] JohnM. testified that on the 30[1] " June 2007 he was from work.
He asked the appellant to cook as he was hungry. Appellant agreed, he cooked and when the food was ready appellant called him. As they were sitting down and preparing to eat the complainant came to where they were seated. Appellant left with the complainant and went to his shack 'to put the blankets in order'. After about 20 minutes he called out to appellant and enquired from him whether he is not coming to eat and enquired about the

whereabouts of the complainant. The complainant was still inside appellant's shack He reported to C. that the appellant was in his shack with the complainant. At the time of the incident he had a good relationship with the appellant.

[12] C. S. testified that on the 30 June 2007 she found the complainant in the appellant's shack wearing only her underwear. She took the complainant and left the shack. During cross examination she testified thatM. followed her to the appellant's shack but he did not go inside. She confirmed that when she called out to the appellant, he did not respond. She reiterated that she found the complainant in the appellant's shack. Members of the community wanted to assault the appellant and her husband, I., protected him.

[13] E. M. testified that the complainant was playing at I.'s place. She was informed that the complainant was raped.

[14] Dr Sophia Carla Language testified that she is the doctor that examined the complainant. She confirmed that she recorded the complainant's date of birth as 8 January 2000. She testified that she saw the complainant at 22h30 on the 30th June 2007. She noted that there were small tears, the labia majora also had linear tears. It was in line with trauma. Under conclusions Dr Language noted: 'Injuries observed is consistent with alleged sexual assault'. The JBB was handed in as an exhibit. During cross- examination she could not explain the discrepancy with regard to the birth date. She further testified that it was an oversight that she did not complete the name of the complainant on the JBB. Although the JBB did not have the name of the complainant, it had the case number which corresponds with the case number on the Affidavit in terms of Section 212(4) of Act 51 of 1977 (as amended) in which the name of the complainant is completed.

[15] Appellant testified in his own defence and did not call any witnesses. He testified that on the 30th June 2007 he came back from work and went to I. Samulapo's place where he consumed alcohol. He was with I. and

they were sitting under a shelter. Complainant arrived asking the appellant for R1.00 to buy chips. He told complainant that he did not have money and she left. He went back to his shack. S. came to his shack and accused him of raping the child. Community members came out and attacked him. The police were called and he was arrested. He denied that he raped the complainant. He denied that the complainant was found at his place.

[16] The magistrate stated that the evidence of the state forms a picture of a six year old child who enters the appellant's shack and is 'sexually assaulted or raped by the appellant'. As to the credibility of the complainant, the magistrate found the complainant to be a very good witness, for her age. '... I have to emphasise that I found her, under the circumstances, for her age, to be a very good witness. She did not contradict herself in any material aspects and the court could understand what she was telling me and what she said'.

[17] The magistrate remarked that she found one piece of her evidence very interesting, where she said that after she was found someone said 'Rondekop you have raped a child'. The magistrate stated that it is difficult to think a six year old child would have the 'imagination or knowledge to fabricate the kind of evidence ...' about what happened to her. The magistrate considered the fact that the complainant was a single witness as to what happened to her but found that her evidence was corroborated by the evidence of M., S. and Dr Language.

[18] The magistrate considered the evidence of the accused. She noted that the appellant's version is a bare denial which is very difficult to disprove. She further noted that the appellant denied that M. saw the complainant come into his shack, and denied that C. found the complainant at his shack. The magistrate noted that the appellant's version about seeing the complainant at I.'s place was not corroborated and the appellant never called I. to testify.

[19] The magistrate also considered the version that was put to the doctor that the trauma suffered by the complainant might have been caused by other

factors. She noted that the version was never put to the complainant or her mother to confirm that she did get hurt. So she concluded that the version about other factors that might have caused the injury was mere speculation.

[20] The appellant was in fact convicted on the evidence of a single witness, a complainant aged approximately 6 years at the time of the trial. The complainant is a single witness with regards to what happened to her. The evidence M. supports the complainant's evidence that appellant took her to his shack. His evidence is supported by the evidence of S. who testified that she found the complainant, who was dressed only in her underwear, in the appellants shack. Dr. Language's evidence corroborates the evidence of the complainant that she was hurt between her legs as per her illustration in court.

[21] The appellant's reliance on Dr Language's response that the trauma suffered by the complainant cannot be attributed to one specific thing was not supported. It was not put to the complainant or her mother that the complainant could have sustained those injuries due to other factors other than sexual assault or rape.

[22] It is trite that an appeal court will not disturb the factual findings of a trial court unless the latter has committed a material misdirection. See Rex Dlumayo and Another 1948 (2) SA 677A at 689-690; S v Naidoo and Others 2003 (1) SACR 347.

[23] The State bears the onus of establishing the guilt of the appellant beyond reasonable doubt and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent. The test to be applied is that the court must be satisfied upon consideration of all the evidence. See S v Van der Meyden 1999 (2) SA 79 (W)

[24] The complainant in this case is a single witness as far as the commission of the offense is concerned. In addition to being a single witness, the complainant is also a child and therefore more than one cautionary rule applies to the complainant as a witness See S v Dyira 2010(1) SACR 78E.

[25] The evidence of the complainant is that the appellant called her into his shack, undressed her, undressed himself and laid on top of her and hurt her between the legs. The evidence of M. that he saw the appellant take the child into his shack and the evidence of S. that she found the complainant in the appellant's shack and she was only wearing her underwear corroborates the testimony of the complainant that she was in the appellant's shack on the day in question.

[26] The evidence of the doctor indicating that the complainant sustained injuries to her vagina which were consistent with sexual assault, corroborates the evidence of the complainant that appellant hurt her between the legs.

[27] The accused denies that the complainant was at his shack on the day in question; he denies that she was found in his shack and he denies that he raped the complainant. His version is that he saw the complainant at I.'s house. He however did not call I. to testify on his behalf.

[28] In S v Chabalala 2003(1) SACR 134 (SCA) para 15 it was said that the correct approach is to weigh all elements which points towards the guilt of the accused against all those that are indicative of his innocence, taking proper account of inner strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.

[29] It is submitted on behalf of the appellant that the available evidence of the complainant does not prove beyond reasonable doubt that there had been penetration of her vagina by way of the penis of the appellant. It is submitted that the complainant failed to respond when she was asked what hurt her. Further that complainant used the terms 'bumping' and 'sleeping' and that she never testified that 'she had seen the private part of the appellant and that he had inserted his private part into her private part'. It is submitted that since

there is no proof of penetration, the appellant should have at most been charged with sexual assault.

[30] In S v Mlambo 1957(4) SA 727(A) at 738A, it was stated that while it was not incumbent on the state to close every avenue of escape which may be said to be open to an accused, it would be sufficient, in order to secure a conviction, to produce evidence by which a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged. See S v Phallo and Others 1999 (2) SACR 553 SCA at 10; S v Mavinini 2009 (1) SACR 523 SCA at 26.

[31] The trial court came to a conclusion that the medical evidence proves that there was at least partial penetration of the vaginal area of the complainant. The medical evidence as recorded by Dr Language on the J88 is as follows: 'complainant had small linear tears on her para-urethral folds and labia minora, she also had swelling and fresh tears to her hymen.' She concluded that the injuries observed are consistent with alleged sexual assault She said that the small linear tears were an indication of trauma.

[32] She testified that the injuries were consistent with the alleged rape. When she was asked during cross-examination whether fresh tears on the hymen could have been caused by other factors, she said that something must have applied pressure against the hymen for it to tear.

[33] She testified that this particular tear is different from the ones on the para-urethral folds and on the labia minora. She stated that ' .. dis heeltemal binne. Dis hoekom jy nie inwendige ondersoek op ·n maagd kan doen nie want dan gaan jy hymen skeur'. In my view the above testimony proves that there was penetration and the trial court's finding of guilt on a charge of rape cannot be faulted.

[34] The fact that the complainant did not mention that she was penetrated cannot be used to exonerate the appellant from a conviction of rape where there is corroborating medical evidence. The terms used by her i.e 'bumbing' and 'sleeping' should be considered in light of her age.

[35] In my view the appellant was correctly convicted of rape.

SENTENCE

[36] The only time that the court of appeal can interfere with sentence is when the sentencing court has seriously misdirected itself or when there is such disproportion between the sentence that the appeal court considers appropriate and the one imposed by the sentencing court that it invokes a sense of shock, as stated in S v Malgas 2001 (2) SA 1222 par 12.

[37] The sentence is challenged on the basis that life imprisonment is the ultimate sentence that the court can impose and that it is disproportionate to the facts of this case.

[38] It is submitted on behalf of the appellant that: (a) the complainant did not suffer serious injuries; (b) the complainant was not threatened during the commission of the offence; (c) the complainant showed no symptoms of trauma; (d) the appellant was held in custody for 1 year and 4 months pending the finalisation of the trial; (e) the complainant was not fearful of the appellant.

[39] In sentencing the appellant the trial court considered the offender, the offence and the interest of the society. In a detailed judgement the trial court had regard to the appellant's personal circumstances. The personal circumstances of the appellant that were placed before the court were as follows: (a) he is 27 years old; (b) he has a child; (c) he is contributing to the maintenance of the child; (e) he was employed as a gardener earning R100 per day.

[40] The following factors were placed before the trial court as substantial and compelling circumstances in order to justify a lesser sentence that the

prescribed sentence of life imprisonment: (a) the appellant's age; (b) the fact that he spent one year four months in custody awaiting finalisation of the trial;
(c) the appellant can be rehabilitated; (d) the fact that the appellant's previous conviction was older than 10 years. In my view the trial court correctly found that there were no substantial and compelling circumstances.

[41] The trial court also had regard to the seriousness of the offence. It noted that the rape had a devastating effect on the emotional wellbeing of the child. It had regard to the report which stated that the child was permanently scarred emotionally.

[42] In the present case the appellant was not a first offender, he had a previous conviction of attempted rape. He did not accept responsibility for what he had done to the complainant and made her relieve the trauma by testifying at the trial.

[43] The State presented a report that detailed the effect that the rape has had on the complainant. The report was considered by the trial court, and it was noted that the rape has damaged the complainant permanently. The court also noted that her relationship with other people and her relationship with her father and other males have been scarred. Her ability to perform at school has been negatively affected.

[44] In my view the trial court cannot be faulted for imposing life imprisonment. Consequently the appeal against sentence stands to be dismissed.

[45] In the result I make the following order:

1. Appeal against conviction is dismissed.
2. Appeal against sentence is dismissed.

P D MOSEAMO

ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered

J W LOUW

JUDGE OF THE HIGH COURT