IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

CASE NO: A75/15

DATE: 5 JULY 2016

NOT REPORTABLE
NOT OF INTEREST TO OTHER JUDGES
REVISED

In the matter between:

THEMBA MASEKO Appellant

and

THE STATE Respondent

JUDGMENT

TEFFO, J:

[1] The appellant was convicted in the regional court, Secunda, on one count of rape of a 13 year old boy in contravention of s 3 of the Sexual Offences and Related Matters Act, 32 of 2007 read with the provisions of s 51 (1) and schedule 2 of Act 105 of 1997 (the Act). He was sentenced to 10 years imprisonment. He now

appeals against his conviction and sentence with leave of this court having been granted on petition.

The appeal against conviction

[2) The issues raised in the appeal against conviction were that the evidence presented by the state was not enough to convict the appellant. It was argued that there was no corroboration in the evidence of the three state witnesses but instead there were material contradictions in their evidence. It was pointed out that if the appellant had raped the complainant, the DNA results would not have been negative. It was submitted that the medical doctor who examined the complainant gave two contradictory versions when she made her conclusion. A further submission was made that the trial court erred in rejecting the appellant's version as not being reasonably possibly true.

The appeal against sentence

[3) It was argued on behalf of the appellant that should it be found that the trial court misdirected itself when it convicted him of rape, the sentence of the appellant should be set aside.

[4) The state disagreed with the submissions made on both conviction and sentence. It was argued on behalf of the state that the appellant was correctly convicted of rape. As regards the sentence Counsel for the state submitted that the trial court did not give reasons why it imposed a lesser sentence than the prescribed minimum sentence. He pointed out that the minimum sentence of life imprisonment should have been imposed.

The evidence

[5] Four witnesses testified on behalf of the state, namely, Ms De M M, Ms M Jo M, Mr T T and Dr A K Mamba. The appellant also testified in defence of the allegations against him.

(6) The evidence of Ms D M M (Deliwe) was briefly as follows: She has a romantic relationship with the complainant's uncle. On 21 March 2009 she had a conversation with one Masekgoto who called her to a certain place to come and see what the appellant was doing to the complainant. As she was leaving her premises, she came across the complainant at the gate of her premises. The complainant was at that time entering her yard. He appeared upset and she could see that something was wrong with him although his physical appearance was fine. The complainant was 13 years old at the time. She asked the complainant what was wrong and where did he come from. He told her he was from a neighbouring house. She told him that M told her that he slept with the appellant in the caravan and also asked him if that happened. The complainant said it did happen. The neighbouring house that she was talking about where the complainant said he was coming from, belongs to M and her family. The complainant told her that the appellant requested him to accompany him to the shop and upon their return they went to his house. They entered the appellant's house. The appellant said he was going to fetch something in his room. As they were about to leave the appellant's homestead, the appellant went inside the toilet while he remained standing outside. Suddenly the appellant came out of the toilet naked and left with him to the caravan. Upon their arrival at the caravan, the appellant told him to enter and take a seat. They both entered the caravan and the appellant told him to take off his clothes while he also took off his. They slept and that was not the first time. He subsequent thereto gave him R0,50.

[7] She took the complainant to the police station and he was later taken to the hospital. She confronted the appellant about the incident. He did not answer but when she asked whether that was happening for the first time, he said it was not.

[8] Under cross-examination she testified that M also told her that G was present when she noticed what was happening between the complainant and the appellant.

[9] Ms M J M also testified. She is a neighbour to D and the complainant. On 21 March 2009 at approximately 19:30 she was at home sitting. G arrived and called her. She left with Gift to a

caravan that was in the neighbouring area. Upon their arrival there, she saw the appellant on top of the complainant. The door of the caravan was not closed or locked. Around that time, it was not completely dark outside. There were no lights inside the caravan. There was an apollo light outside the caravan further up the street (+/- 60 metres). As she entered the caravan, she saw the appellant on top of the complainant. She asked him what was he doing. He said he was not doing anything. The complainant was at the time lying on his stomach facing down on the floor and the appellant was on top of him. The appellant was naked while the complainant's pants were pulled down to his ankles.

[10] Immediately he asked the appellant what was he doing, the appellant stood up and got dressed. He asked the appellant as to what did he mean when he said he was not doing anything because he found him on top of the complainant. He also asked the complainant as to what was going on and the complainant said the appellant was having sexual intercourse with him. She eventually took the complainant to his uncle. The complainant appeared scared. As she went out with the complainant, the appellant followed them. The appellant resided in the same street. She last saw Gift the previous year.

[11] Under cross-examination she testified that she took the complainant to D and told her what happened. She was in the company of the complainant when she told D what happened. D asked the complainant whether what happened was happening for the first time and the complainant said 'no'. She also asked him why did he keep quiet when it happened. The complainant said the appellant always gave him R0,50 and told him not to say anything. When told that De testified that when she informed her about the incident the complainant was not present, she stated that when G arrived at her place, she first went to D’s place to call her. D requested her to go and fetch the complainant. She immediately went to fetch the complainant. She further explained that she initially went to D to tell her that she saw the two having sexual intercourse after G called her. D wanted to know where was the complainant. She told her that she left him in the caravan busy dressing up.

[12] She was questioned about the statement she made to the police, that she did not mention anywhere on the statement that she saw the appellant on top of the complainant. Her response to this was that she did tell the police and she further told them that the appellant and the complainant got dressed in her presence. At the time of the incident G was staying in the caravan. At the time the appellant was on top of the complainant, the complainant was facing down, lying flat on his stomach. When she entered into the caravan, she was in the company of G.

[13] Mr T I T (the complainant) also testified. His evidence was that he was 15 years old when he was testifying. He was attending school at Wisedi and was in grade 5. On 21 March 2009 he left his homestead and went to a house in the neighbouring area where he watched the television. Upon his arrival there, he found Do who was busy dancing. Later on the appellant arrived. He joined them and also danced. As and when Do and the appellant were dancing, he was sitting down and watching them. Afterwards the appellant sat down. He started looking at him and kept on saying he was going to hit him. He told him he would not hit him. The appellant then said they should go outside. He went out first and told him to follow him. He indeed followed him. While they were outside, he asked the appellant where did he want them to go and fight. The appellant eventually took him to the caravan in one of their neighbours' yards. The place was not far from Do's homestead. There was no one in the caravan. The caravan was used as a shop in the past and the appellant also slept in it.

[14] Upon their arrival at the caravan, the appellant opened it and entered. He then called him. He also went inside the caravan and the appellant closed the door. Suddenly the appellant told him to undress himself. At that time he had already taken off his clothes. He could not leave the caravan because he did not know how to alight from the caravan. The door of the caravan was locked with a shooter lock. He could not unlock the door because it was dark. In the caravan there were no lights. The appellant undressed himself, grabbed him and also undressed him. At the time the appellant was undressing himself, he was standing next to him. The appellant took off his pants, t-shirt and underpants. He then made him to lie down. He took off his clothes because the appellant told him to do so. He listened to him because he wanted to hit him. He took off his belt, came closer to him and said he

was going to hit him. He took off his short pants, jersey, t-shirt and underpants. The appellant went on top of him. At that time he was lying on his stomach on the sponge. The appellant inserted his penis inside his buttocks. He kept on doing what he was doing until Du arrived. Du opened the door and entered the caravan. Du saw them naked. At some stage the appellant lit the candle inside the caravan. Immediately Du entered the caravan, they both got up and dressed themselves. Du called A and S's mothers.

[15] A's mother phoned the police. A's mother did not enter the caravan but was present when he and the appellant alighted from the caravan. D is A's mother. He did not tell anyone what happened. His mother came to know about the incident because she was present when M came to fetch him. The appellant did not give him anything while they were inside the caravan. He knew G and he saw him on the night of the incident at Do's place and at the caravan. When he went to the caravan with the appellant, G was not there. G arrived when they were naked. Du was the first to come at the caravan and G followed. Gi also entered the caravan. He saw that the appellant was naked and at that stage he was already dressed. It was the first time such an incident took place.

[16] Under cross-examination he testified that from Do's homestead, you pass four houses to go to the place where that caravan was. When he went outside of Do's house, he thought he was going to fight with the appellant as he said he was going to beat him. He did not scream because Do was making a lot of noise with his hi-fi. Some of the people in the neighbourhood were not present at the time and some of them were busy drinking liquor. At the time of the incident, the caravan was no longer used as a shop during the day. He could not resist when the appellant took off his clothes because he wanted to hit him. He left the caravan with Du and went to An and S's mothers. At that time Gi was not there. Both Du and G found him in the caravan with the appellant. He did not tell his mother about the incident because the appellant told him not to tell anyone about it. He did not respond when he was told that all along the evidence was that G was the person who said he saw him and the appellant inside the caravan and not Du as he testified.

[17] Under re-examination he testified that G was the person who saw him when he entered the caravan.

[18] Doctor Alet Kaina Mamba testified that on 22 March 2009 she was requested to examine a 13 year old boy (the complainant) and he wrote his findings on the JBS medical report. Her qualifications were placed on record. She confirmed her signature on the JBS medical report. She examined the complainant who had a history of sexual assault. His clothing and general body were normal. The complainant came to her accompanied by his mother. On examination she did not find any laceration, swelling or bruises on his body. She only noticed that the complainant has faeces in his pants. She asked if the complainant had any history of faecal incontinence and she was told he did not have. The complainant's scrotum and penis were normal but he was emotionally affected. She could see he was very sad. On anal examination, the hygiene was poor because the pants were full of faeces. Pigmentation was normal and at the orifice, the anal orifice was one centimetre tears. She observed a tear in the anal area. She was able to insert her two fingers in the anal area when she was examining the complainant to check if the anal cavity was torn. She estimated 3 cm because it was not tight to her fingers. Soft faeces were found in his rectum.

[19] Under cross-examination she testified that she put two fingers in the anal area of the complainant to check if the centre was torn. She could not put three fingers because the complainant was in pain. She estimated her two fingers to be two centimetres. She estimated the length to be 3 centimetres because she could move her fingers. The area was not tight. The tears she observed were about 1 centimetre. The tear could have been caused by other things. For an example, maybe the patient had constipation and used force to release the faeces. When asked why did she come to the conclusion that the boy was sexually assaulted, she said as far as she could recall when the complainant was brought to her the way he was walking, he looked sad and was emotionally affected. When she examined the rectum, it was soft. It was not like the complainant was constipated as the faeces were soft.

[20] Mr T M M also testified. Briefly his evidence was as follows: He knew both the complainant and D. The police came to fetch him on 24 March 2009 when he was with his wife in the company of D. He was accused of raping the complainant. They eventually took him to the police station where he was taken into custody. He knew nothing about the incident. D resides three streets away from his house. He disputed staying in the caravan. The caravan was used as a shop where they went to buy items. At the time of his arrest, G stayed in the caravan just to look after it. Liquor was also sold at the caravan. He would go to the caravan to buy what he needed and then go home. He disputed having penetrated the complainant by inserting his penis into his anus.

[21] He disputed that on the night of the incident he was home watching the television and also dancing. He testified that he left home at approximately 09:00. He could not explain why he was able to remember what he did on the dates he was given because the incident happened two years ago. He was adamant that he was at extension 9 with his brother and they went to a night vigil on the night of the incident. He could not respond when he was told that his alibi was not put to the state witnesses when they testified, that it was also not mentioned in his plea explanation and also in his evidence in chief. Later on he conceded that he forgot to tell his attorney about it. He mentioned that he did not get along with Do. When asked if he was calling his brother as a witness, he said he had passed on. He was also asked if he could call the many people who saw him at the night vigil on the night of the incident. His response was only his deceased brother could testify about the events of the night of the 21 March 2009.

(22] He further denied that he danced with Do on the night of the incident. He did not get well with M because in December 2008 two cell phones got lost. Since then he did not get well with M. He did not have problems with the appellant and D. He could not explain as to why it was D who pressed charges against him and not M. He testified that he did not know if the complainant was making up a story about him or was told to say what he said in court. He further said many boys came to his house to watch the television and asked as to how could he single out the complainant among all of them. He denied ever having sexual intercourse with the complainant.

[23] S 208 of Act 51 of 1977 ("the Criminal Procedure Act") provides that an accused person may be convicted of any offence on the single evidence of a competent witness. It is, however, a well established judicial principle that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility **(S v Stevens 2005 (1) All SA 1 (SCA)).**

[24] The correct approach to the application of the so-called 'cautionary rule' was set out by Diemont JA in **S v Sauls and Another 1981 (3) SA 172 (A)** at 180 E-G where he said the following:

"There is no rule of thumb test or formula to apply when it comes to a *consideration of the credibility of* a *single witness...The trial judge will weigh his evidence, will consider the 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 had been told. The cautionary rule referred to by De Villiers JP in R v Mokoena 1932 OPD* 79 *at 80, may be* a *guide to the right decision but it does not mean that 'the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded ...' It has been said that more than once that the exercise of caution must not be allowed to displace the exercise of common sense."*

[25] The complainant is a single witness regarding the rape. There is corroboration in his evidence that he left Do's homestead with the appellant to the caravan in the evidence of M to the effect that she went to the caravan with G where they found the appellant and the complainant together. Although it is not clear on the record who is Du, the complainant's evidence was that Du and G saw them naked. M testified that the appellant and the complainant got dressed in her presence. The complainant's evidence that after him and the appellant took off their clothing, the appellant climbed on top of him and did his things while he made him to lie down, was also corroborated by M's evidence that she saw the appellant on top of the complainant. He was clear in this evidence that as he was lying down on his stomach, the appellant inserted his penis inside his buttocks. According to his evidence the actions of the appellant were

interrupted by Du who was able to open the caravan and entered. When she entered they both got dressed and stopped what they were doing. M further testified that she asked the appellant what was going on. Although the appellant said he was not doing anything, the complainant was able to tell her that the appellant was having sexual intercourse with him.

[26] Issues were raised that what the state witnesses said in court differed with what was mentioned in the statements they made to the police. In **S v Mafaladiso [2002] 4 All SA 74 (SCA)** it was held that the court must handle discrepancies between different versions of the same witness with circumspection. First, the court must ascertain what the witness meant to say in order to determine whether there was a discrepancy and the extent of the discrepancy. The court must take into account the following: the fact that a statement was not subject to cross examination, language and cultural differences between the witness and the person who took down the statement, and the fact that the police did not require any explanation of a statement. Secondly, not every error by, or discrepancy in the statement of, a witness affects the witness's credibility. Thirdly, the different versions must be evaluated holistically. This evaluation includes the circumstances in which the versions were given, reasons for the discrepancies, the effect of the discrepancies on the witness's credibility and whether the witness had sufficient opportunity to explain the discrepancies. Lastly, the witness's statement to the police has to be weighed up against the witness's *viva voca* evidence.

[27] The record shows that the statements made to the police were not properly introduced to the witnesses in court. When M was confronted under cross-examination with the statement she made to the police, that she did not mention that when she arrived at the caravan, she saw the appellant on top of the complainant, she was clear and adamant that she mentioned that piece of evidence to the police and even told them that the appellant and the complainant dressed up in her presence. She was not asked if the statement was read back to her before she signed it to verify its contents. In any event the trial court correctly found her to have been an honest and credible witness. It is important to note that this piece of evidence was corroborated by the complainant himself.

[28] The trial court found all the state witnesses to have been credible witnesses. Although there were minor discrepancies in their evidence, e.g the complainant testified that the appellant grabbed him and took off his clothes while at the same time he testified that he undressed himself as ordered by the appellant because he kept saying he would beat him. Further to this while M and D testified that the complainant told them that what happened between him and the appellant was not happening for the first time, the complainant testified that it was happening for the first time. The complainant testified that he could not open the door of the caravan as it was closed with a shooter lock and because it was dark inside, M was able to open it from the outside and gained entry. These discrepancies are not material and do not advance the case for both the state and the defence any further. The fact of the matter is that the appellant and the complainant were found inside the caravan on the night of 21 March 2009. Identity is not an issue here as the complainant, the appellant, D and M were neighbours and knew each other quite well.

[29] What is important in the overall evidence of the state is that the complainant and the appellant were found naked inside the caravan, the appellant was seen on top of the complainant while he was lying on his stomach on the floor and they were seen coming out of the caravan together. Further to this evidence, the complainant was able to make a first report about the rape to D.

[30] Negative DNA results do not necessarily mean that no rape has been committed. In the absence of DNA results, the most important question to be asked is who committed the offence of rape on the complainant. There is no way the state witnesses can make a mistake regarding the identity of the appellant. They stand nothing to loose or gain from testifying about what they observed. Even in the absence of positive DNA results, there is overwhelming evidence that the appellant committed the offence he has been charged with.

[31] The issue of the cell phones that got lost and causing bad blood between the appellant and M's family is far-fetched.

(32] In the light of the evidence presented by M who saw the appellant on top of the complainant in the caravan, coupled with the evidence of the complainant as to how he was raped, the evidence of the doctor that it does not appear that the complainant was constipated as the faeces found in the rectum were soft, in my view the injuries sustained could not have been caused by the fact that the complainant was constipated and forced the faeces out. The only inference to be drawn under the circumstances is that the appellant had sexual intercourse with the complainant through the anus. According to the J88 there were two tears, one on the skin surrounding the orifice and one on the orifice itself. It is clear from this evidence that there was anal penetration. I cannot find any contradictions on the J88 medical report by Dr Mamba and also from her evidence adduced in court. The trial court correctly found that she was a credible witness.

[33] The fact that the appellant raised an alibi at a late stage of the trial, *viz,* only during cross-examination raises some doubts. His alibi was just an afterthought and it is false beyond a reasonable doubt. It is my view, given the totality of the evidence, that the trial court correctly rejected the version of the appellant as not being reasonably possibly true.

(34] I am satisfied under the circumstances that the trial court correctly accepted the complainant's evidence regarding the rape, which had some corroboration on the J88 medical report form, the evidence that the complainant and the appellant were seen in each other's company in the caravan, and when they left the caravan. In my view the trial court correctly found that the state proved its case beyond reasonable doubt against the appellant and convicted him of rape. Accordingly the appeal against the conviction falls to fail.

(35] I now turn to sentence. It is trite that 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'."

(See **S v Rabie 1975 (4) SA 855 (A)** at 857 0-F, **S v De Jager and Another 1965 (2) SA 616 (A), S v Petkar 1988 (3) SA 571** at 571 C).

[36] The following personal circumstances of the appellant were placed on record in mitigation of sentence: That he was 37 years old at the time he was sentenced. He has one child who receives a grant. He had no previous convictions. He was employed and earned a salary of R1500-00 per month. He went to school up to standard 2. His father passed on in the year 2000. His mother is still alive and receives a grant. He looks after his mother and brother who is mentally retarded. The injuries sustained by the complainant are not serious. He was arrested in 2009. He has been in custody from 2009 until December 2010 when he was released on bail.

[37] The state made the following submissions in aggravation of sentence: The age of the complainant. The injuries he sustained. The nature and prevalence of the offence. It was argued on behalf of the state that the rape of a boy of 13 years is very serious. The crime itself is severe and it should be accepted that the complainant suffered psychological harm as a result of the incident. Counsel for the state further submitted that the appellant violated a young innocent person and invaded him without regard to his privacy, dignity and bodily integrity. He pointed out that the appellant did not show any remorse throughout the trial and that there is no hope that he will be rehabilitated. A further submission was made that the court a *quo* did not give any reasons as to why it deviated from imposing the prescribed minimum sentence. Counsel for the state argued that there are no substantial and compelling circumstances justifying a deviation from imposing the prescribed minimum sentence. Accordingly so it was argued, the aggravating circumstances far outweighs the mitigating factors and that a maximum term of imprisonment should be imposed.

[38] At para 18 of the unreported judgment of the Supreme Court of Appeal in **S v De Beer** case number 121/04 handed down on 12 November 2001, the following was said:-

"Rape is a *topic that abounds with myths and misconceptions. It is* a *serious social problem about which, fortunately, we are at last becoming concerned. The increasing attention given to it has raised our national consciousness about what is always and foremost an aggressive act. It is* a *violation that is invasive and dehumanising. The consequences for the rape victim are severe and permanent. For many rape victims the process of investigation and prosecution, is almost as traumatic as rape itself."*

(39] The court in **S v C 1996 (2) SACR 181 (C)** at 186 E – F said:

"Rape is regarded by society as one of the most heinous of crimes, and rightly so. *A rapist does not murder his victim – he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life –* a *fate often worse than loss of life."*

(40] The appellant was charged with rape in contravention of s 3 of Act, 32 of 2007 read with the provisions of s 51 (1) and schedule 2 of the Act. S 51 (1) of the Act provides that notwithstanding any other law but subject to ss (3) and (6), a Regional Court or High Court shall sentence a person it has convicted of an offence referred to in Part 1 of schedule 2, to imprisonment for life. It is evident from the record that the sentence imposed by the trial court is too lenient, hence the magistrate did not give any reasons as to why he deviated from imposing the prescribed minimum sentence. He also did not indicate which factors he regarded as substantial and compelling. Unfortunately the state did not cross-appeal the judgment of the magistrate on sentence and no notice was given to the appellant that the court contemplated increasing the sentence. It is my view under the circumstances that the sentence of 10 years imprisonment should not be interfered with. The appeal against the sentence is bound to fail.

(41] I accordingly make the following order:

41.1 The appeal against both conviction and sentence is dismissed.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree

M MADIMA
ACTING JUDGE OF THE HIGH COURT SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances:

For the appellant	KIA PHETOE
Instructed by	PRETORIA JUSTICE CENTRE
For the Respondents	H CREIGHTON
Instructed by	THE DIRECTOR OF PUBLIC PROSECUTIONS
Handed down on	5 July 2016