IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
2017-04-25	
DATE	**SIGNATURE**

CASE NUMBER: A178/16

DATE: 25 April 2017

JUSTICE MASHABA — Appellant

V

THE STATE — Respondent

JUDGMENT

MABUSE J:

[1] This matter came before us as an appeal against both the conviction and sentence.

[2] The appellant, Mr. Justice Mashaba, appeared before the regional court in Brakpan where he was charged with rape as contemplated in section 3 of Act 32 of 2007. Despite his plea of not guilty he was convicted accordingly and sentenced upon conviction in terms of the provision of s 51 of Act 105 of 1997, to life imprisonment.

[3] The appellant, who enjoyed legal representation during his entire trial made a plea-explanation in terms of s 115 of the Criminal Procedure Act 51 of 1997. In such plea-explanation he makes the following admission through his legal representative:

"We are admitting that during 2012 and 2013 at or near Tsakane Extension 9 in the regional division of Gauteng he did unlawfully and intentionally commit an act of sexual intercourse with a female person to whit N S at the stage 13 years of age by inserting his penis into her vagina and he had sexual intercourse with her. He further admits that he was of full and sober senses whilst having intercourse with the complainant and he admits that he was aware that having intercourse with a minor constitutes an offense."

[4] The legal representatives of the appellant mailed the appellant's colours to the mast when she told the court that what was in dispute was consent. She went further and explained that the complainant approached the appellant on or about August 2012 and requested him to have intercourse with her. Originally he refused but had to give in ultimately following the

persistence of the complainant. In the end they formed a relationship. It was for this reason that sexual intercourse between them was by consent.

[5] According to the complainant, the alleged rape took place under the following circumstances. It took place on a bed that she at the same time shared with three of her siblings and in a room in which the four of them slept at the time. There was at the same time a television set in this room which the appellant was watching before the incident of sexual intercourse. Next to this room and divided by a curtain was a room in which the appellant and the complainant, his girlfriend and her mother slept. The appellant and the complainant's mother had an intimate relationship.

[6] On that faithful night she was in bed with her siblings while the appellant was watching television. On three different and successive occasions she woke up to find inexplicably her pants pulled down to her knees. This happened, on each occasion because she had been fast asleep. For that reason she could not see who did it and why he or she did it.

[7] On the fourth occasion she woke up only to find the appellant on top of her and her pants pulled down up to her knees. The appellant ordered her to keep quiet. With one hand he closed her mouth while with the other hand he took of his pair of trousers and his underpants down to his knees. He also took of the complainant's panty, squat it between her thighs and

inserted his penis into her vagina. Having inserted his private parts into hers, he moved up and down. When he finished he put his pants on and went to sleep. He dared the complainant to tell anyone about the incident at the pain of being taken to Maputo where the applicant threatened to kill her. As a consequence of this threat she would not tell any person of her experience for a very long time until she had become pregnant.

[8] During cross-examination it was put to her that she had consented to having sexual intercourse with the appellant. She disputed this statement and added that she could not have consented to sexual intercourse with the appellant under the circumstances where she regarded him as the father and where he had an affair with her own mother. Furthermore, she denied that she and the appellant developed any love relationship. Her evidence was followed by that of her mother, L S, and Doctor Monomputo Muka-Makiangi gave evidence as the respondent's third and last witness. In view of the nature of the dispute between the parties this evidence of both L and the Doctor did not take the case any further.

[9] The accused testified in his defence and called no witness to support his case. His version was that the complainant approached him and requested him to have sexual intercourse with her. He testified furthermore that during the middle of approximately July 2012 the complainant approached him for the first time. At this stage the appellant resisted. Later

during August 2012 the complainant approached him again. He proceeded to enter into a sexual relationship with her.

[10] The sexual intercourse, according to his testimony, took place under the following circumstances. At the time the complainant confronted him while he was in his room and in the bath. She came into the house and asked where he was. He responded and told her that he was in his room taking a bath. The complainant bravely walked into his room. She wanted him to have sexual intercourse with her. He got tempted and had sexual intercourse with her.

[11] He testified furthermore that he discovered at the time she had sex with the complainant that she was not a virgin. Apart from this occasion he had sex with the complainant several times later. He stated that he and the complainant continued to have sexual intercourse each and every time at the pleasure of the complainant. On each of such occasions it was the complainant who would approach him for sex, the other children would be present and they would be sleeping when they had sex.

[12] The court *a quo* was satisfied that the State had proved its case beyond reasonable doubt. It convicted the appellant as charged. The court found that the appellant's version supported the State's case to a very large extent.

[13] The appellant has, in his notice of appeal, set out a number of fronts on the basis of which he challenged his conviction by the court *a quo.* In the final analysis he contended that the court *a quo* erred in finding that the State had proved its case beyond reasonable doubt. In this appeal the appellant is represented by Adv. Phahlane of the Pretoria Justice Centre. In advance of the hearing of this appeal Mr. Phahlane filed written heads of argument in which he submits that the court *a quo* erred in finding that the State proved rape in terms of s 3 of Act 32 of 2007 and in rejecting the evidence of the appellant as not being reasonably possibly true. Furthermore, he submitted that the court erred in disregarding the plea to which the appellant wanted to plead on which the statutory rape without giving any reasons thereto, more particularly because the State did not indicate whether such a plea is accepted by it or not. Thirdly he submitted that the appellant's evidence regarding the sexual act itself was done through the consent of the complainant hence the need to plead statutory rape and giving effect that he acknowledged that sex with a minor child is unlawful. Mr. Phahlane submitted that the appellant should have been convicted of statutory rape in terms of s 15(1) and not s 3 of the same Act. Relying on the case of Tshabalala v State (A74/2011) (2013) ZAGPP8C 159 decided on 12 June 2013 he submitted that he court *a quo* should have followed that principle and convicted the accused as set out in the said case. Finally, he submitted that there was no duty on the appellant to convince the court otherwise as long as

his version was reasonably possibly true even though his explanation was found to be improbable.

[14] The duty of this appeal tribunal is not so much to find any errors in the judgment of the court *a quo* as it is to establish as whether it has abridged the facts of the matter correctly, in other words, whether it has properly analysed the facts of the case and correctly applied the principles of the law to the facts.

[15] In its judgment the court *a quo* pointed out that the appellant had, in his plea-explanation in terms of s 115 of the CPA, made material admissions of the elements of the crime he had been charged with. It was aware that the battlefield between the parties was whether the sexual intercourse took place with the consent of the complainant as pleaded by the appellant. The court *a quo* found that there was no consent. It was alive to the fact that it had to treat the complainant's evidence with caution.

[16] The court *a quo* was satisfied with the evidence of the complainant. It made no adverse remarks about her as a witness. It stated that the mere fact that she made a mistake on the period of her gestation before she gave birth did not mean that the court should ignore the rest of her evidence. It observed, and in our view quite correctly so, that the rest of her evidence was clear, straight forward and that it was beyond reproach. It could not find any

fault with the rest of her evidence. It was satisfied with the way in which the complainant described how the incident took place in the bedroom; how the appellant meticulously went about in shifting her brothers and sisters out of the way so that he could have more room within which to maneuver. The court *a quo* found that the complainant's memory was extremely good. Having considered the evidence in totality the court could not find any evidence on the basis of which it could infer that there was consent.

[17] It is important to point out that the appellant was charged with contravention of section 3 of Act 32 of 2007. This section states as follows:

"Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with the complainant ("B"), without the consent of ("B") is guilty of the offence of rape."

Accordingly this was a charge to which the appellant had to plead too. He could not choose to plead the statutory rape, as he called it, when he was not charged with it. He was not charged with contravention of section 15 of the Sexual Offences Act. Any other contention is flawed. The State is *dominis litis*. It is at large to bring upon any facts placed on it any charges it fancies against an accused person. The fact that it had an option to bring the charge under section 15(1) of the Act did not mean that it could not bring the charges under s 3 of the same Act.

[18] The appeal against conviction cannot succeed.

[19] This bring us to the appeal against sentence. Three submissions were made by counsel for the applicant in this respect and these were that:

19.1 the court *a quo* erred in holding that there were no substantial and compelling circumstances which warranted deviation from the sentence of life imprisonment;

19.2 the sentence imposed by the court *a quo* is too harsh, inappropriate and induces a sense of shock;

19.3 the court *a quo* erred in over emphasising the seriousness of the offence and failed to take into account the rehabilitative effect which the sentence should have on the appellant.

[20] The starting point is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court. See in this regard R v Maphumulo and Others 1920 AD page 56. This is a discretion that belongs to the trial court and we should be slow to interfere with this discretion unless the trial court misdirected itself or exercised its discretion capriciously. There is no complaint that the trial court exercised its discretion capriciously or committed a misdirection in its selection of sentence.

[21] The next issue that this court must consider is whether the trial court should have found that there were substantial and compelling circumstances in which case it would have required to

deviate from imposing the ordained sentence. In considering this aspect, it must always be remembered that there is no definition of substantial and compelling circumstances and that one factor or a combination of factors may constitute substantial and compelling circumstances.

[22] In the first place the charge against the appellant was read subject to the provisions of s 51(2) of the Minimum Sentence Act. This subsection ordains a sentence of life imprisonment where the victim of such rape is a person under the age of 16 years which is the case in this matter unless there are substantial and compelling circumstances. While Mr. Phahlane submitted that the court a quo erred in holding that there were no substantial and compelling circumstances he has himself not pointed out, whether in the notice of appeal or in his heads of argument, what those circumstances are. We could not find any such circumstances placed before the trial court. In the absence of such circumstances the trial court was entitled to oppose the ordained sentence.

[23] Finally, the sentence of life imprisonment is the kind of sentence prescribed by the legislature. It is therefore not too harsh or inappropriate and does not induce a sense of shock if it is imposed under appropriate circumstances, e.g. where the law prescribes the sentences under which such a sentence may be imposed and when such circumstances exist. No justification exists for this court to interfere with the sentence imposed by the court *a quo* on the appellant.

[24] It was finally submitted that the court *a quo* erred in overemphasising the seriousness of the offence and failed to take into account the rehabilitative effect which the sentence should have on the appellant. Neither the State nor the appellant's legal representative argued this point before the court *a quo*.

[25] Having imposed a sentence upon the appellant, the court *a quo* made three orders, among them, an order in terms of section 50(2)(a)(i) of Act 32 of 2007. We gave both counsel an opportunity to peruse the said section and to make submissions on whether or not in making that order, the court *a quo* followed the correct procedure. The correct procedure is set out in **J v National Director of Public Prosecutions and Another 2014(2) SACR 1 CC (J v NDPP)** and also in the following paragraphs 50(2)(c) and 50(2)(d) which were included by section 7(b) of Act 5 of 2015 on 7 July 2015. Both counsel were ad idem that the court *a quo* did not follow the correct procedure and that the matter should be referred back to the court *a quo* only to deal with this aspect.

[26] In the result the following order is made:

1. The appeal against conviction and sentence is hereby dismissed.
2. The conviction of the appellant by the court *a quo* and the sentence imposed on him are hereby confirmed.

3. This matter is referred back to the court *a quo* to comply with the requirements of section 7(b) of Act 5 of 2015.

P.M. MABUSE
JUDGE OF THE HIGH COURT

I agree

S.C. MIA
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the appellant:	*Adv. P Phahlane*
Instructed by:	*Pretoria Justice Centre*
Counsel for the respondent:	*Adv. M Molatudi*
Instructed by:	*Director of Public Prosecutions*
Date Heard:	*25 April 2017*
Reasons furnished on:	*25 April 2017*