IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

CASE NO.: A34/2021

(1) **REPORTABLE: NO**

(2) OF INTEREST TO OTHER JUDGES: [N]

(3) REVISED: [Y]

(4) Signature:

Date: 22/01/24

In the matter between:

AUGUSTINE PANTSO MOKWELE Appellant

and

THE STATE Respondent

JUDGMENT

KUMALO J

INTRODUCTION

[1] This is an appeal against both conviction and sentence. The appellant was convicted of 3 counts of contravening section 3 of Act 32 of 2007 (rape of a 12- year-old child) read with the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 in the Regional Court of Gauteng sitting in Pretoria.

[2] He was sentenced to life imprisonment for each count of rape. He had an automatic right to appeal because he was sentenced to life imprisonment by a regional court.

[3] It is common cause that at the time of the incident the complainant was 12 years old, knew the appellant very well and the issue of identity is not in dispute. The appellant was 24 years of age at the time of his arrest.

[4] It is further common cause that on 25 December 2017, the appellant found the complainant alone at her home. The appellant and the complainant went to the appellant's house after the appellant had told the complainant that her parents would fetch her at his house when they returned.

[5] The complainant's parents upon their return to their home and when they found the complainant missing, went looking for her. The complainant was eventually found at the appellant's shack.

[6] On the first count, it was alleged that during December 2017, at or near Mamelodi in the Regional Division of Gauteng, the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant who was 12 years of age by inserting his penis into her vagina.

[7] The second and third counts also related to rapes that allegedly occurred on 16 December 2017 and 25 December 2017 respectively.

[8] The appellant denied seeing the complainant on the dates mentioned in counts 1 and 2. He also denied raping the complainant on 25 December 2017 but admitted being with the complainant in his room and that the door was locked. He also admitted that the light was switched off, that the complainant's parents came and knocked at the door, and he did not open for some time.

[9] I do not intend to regurgitate the entire evidence led against the appellant save to state that the State led the evidence of four witnesses namely the complainant, Constable Philemon Nkoko, P[...] B[...] and Mashadi Motswetswe. The

warning statement of the appellant was introduced as part of the evidence and its admissibility was not challenged. The appellant indicated during the trial was that he intended to challenge its credibility.

[10] The complainant was 13 years of age at the time of the trial and testified through an intermediary. In relation to the first incident, she testified that the appellant arrived at her home and asked for eggs. The complainant's father told him that they did not have them. He however permitted the complainant to accompany the appellant to go buy eggs, which she did.

[11] She accompanied the appellant to his shack to fetch money for the eggs and upon arrival at his room, the appellant proposed love to her. She declined the proposal stating that the appellant was much older than her. The appellant threw her on the bed and took off her panties and inserted his penis into her vagina after he had covered his penis with plastic(condom).

[12] The second incident happened on 16 December 2017. The complainant testified that the appellant was at her home with her parents. She requested from her parents to go to the outside toilet and on her return, met the appellant outside the house. The appellant pulled her to his shack. She tried to scream but the appellant blocked her mouth. Again, the appellant inserted his penis into her vagina. She heard her mother calling her and the appellant released her, and she ran home.

[13] On the evening of 25 December 2017 , the complainant was home alone when the appellant came looking for her parents. The appellant told her to accompany him to his place and he would borrow her his laptop to watch movies. She accompanied him to his place and on arrival, the appellant instructed her to undress but she refused. He then forcefully undressed her and inserted his penis into her vagina.

[14] Whilst at the appellant's place, her parents came and called out her name. She did not answer their call on the instruction of the appellant. They came and knocked on the door. The appellant hid her under the bed and switched off the light. Her parents continued knocking and her father tried to open the door. They then left

and came back with her uncle who managed to break the door. She told her mother what happened.

[15] The next state witness was Constable Philemon Nkoko. He is the police officer who took the appellant's warning statement. He confirmed that the appellant told him that he went to the complainant's place to look for Jan, the father of the complainant. He found the complainant sitting alone and asked her to accompany him to his home. Further, he confirmed that the appellant told him that they had consensual sex after which they dressed up and sat on the bed chatting. They heard a knock on the door and the door was broken. The complainant's mother immediately accused him of raping the complainant.

[16] P[...] B[...] is the uncle of the complainant. He testified and confirmed that on the 25th of December 2017, the complainant was left alone at home as he left with her parents to visit their sister. On their return, they could not find the complainant in the house. They went looking for her at her friend's house but could not find her. Her mother was shouting her name and they saw the light go off at the appellant's place, at which point they became suspicious and decided to approach and knocked. When no one answered they decided to break the door and found the appellant standing next to the door, the complainant came out underneath the bed and she was crying. He asked her how many times this had occurred, and she told him that this had occurred three times.

[17] He further explained that at the time he was confused as he did not understand the complainant to mean that she had been raped three times.

[18] The last witness for the state was the mother of the complainant. She testified about the events of 25 December 2017. Her testimony was to the effect that on the day in question they went out looking for the complainant. She was screaming her name and then she saw the light of the appellant's room being switched off. They entered the yard and knocked on his door. There was no response and they decided to go back to call the father and the brother. When all three returned, the light was on but when they knocked the light was switched off again. They knocked for a long time but nobody answered. They went to the appellant's neighbor, who informed

them that the appellant was sleeping. The neighbour accompanied them to the appellant's room and knocked. She further testified that she heard the sound of a mattress and she told the father that there was somebody in the room. They broke the door open and the appellant stood at the door and asked them who told them to break his door. It was dark inside the room, but she heard the complainant calling her. She called the complainant's father and took the complainant.

[19] She also testified about the day when the appellant went to buy eggs accompanied by the complainant. The complainant had gone away for a long time and when they returned, the complainant was angry and did not want to talk to them.

[20] The appellant testified on his behalf and did not call any witnesses. He denied raping the complainant and stated that he knew nothing about the incident in count 1 and 2. In relation to count 3, he admitted that he found the complainant alone at her home on that day. He further admitted that he asked the complainant to accompany him to his residence. Once they were there, the complainant's parents came looking for her. He did not open the door and switched the lights off. This he said was a joke. He denied that he had sexual intercourse with the complainant.

[21] In his evidence-in-chief, he denied that he made the warning statement that was handed up as part of the evidence. He told the court that he never told the constable what he wrote in the statement. He further alleged that the statement was not read to him and that he was simply asked to sign, which he did.

[22] However, under cross-examination, he admitted the statement but denied that he told the officer that he had consensual sexual intercourse with the complainant.

[23] The complainant is a single witness insofar as the actual rape is concerned. Further, at the time that she testified in the court a quo, she was only 13 years old, and the service of an intermediary had to be utilized.

[24] The evidence of the complainant therefore had to be approached with caution because the complainant was a single witness who was a child.

[25] It is trite that a court may convict on the evidence of a single witness as provided also in terms of section 208 of the Criminal Procedure Act, 51 of 1977.

[26] In S v Saul[1], the appellate division stated the following:

"There is no rule of thumb test or formula to apply when it comes to the consideration of the credibility of a 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 his testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 (R v. Mokoena), may be a guide to a right decision but it does not mean 'that the appeal must succeed if any criticism, however slender, of the witness' evidence where well-founded....' ...It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[27] The magistrate in the court a quo, was alive to these facts and the principles applicable and thus cannot be faulted in this regard as she applied them to the case at hand.

[28] It was her finding that the complainant made a good impression as a witness. She stated that the complainant was able to deliver her evidence logically and coherently and stood up well in cross-examination.

[29] The court a quo further acknowledged the fact that the complainant's testimony was not without any contradictions and was therefore not free of criticism.

[30] Contradictions per se do not necessarily lead to the rejection of a witness' evidence and may simply be indicative of an error and not every error made by a witness affects his/her credibility.[2]

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[1] 1991 (3) SA 172 (A).
[2] See S v. Makole 1991(1) SACR 90 (SCA at 98F-G and S v. Oosthuizen 1982(3) 571(T) at 756.

[31] The trier of fact must make an evaluation, taking into account such matters as the nature of the contradiction, the importance thereof, and the bearing on other parts of the evidence.

[32] The court a quo considered all the above and made its observations about the complainant. Its impression was that the complainant did not deliberately mislead the court about the aspects that it highlighted as contradictions in her evidence and found same not to be material.

[33] It is also trite that the court of appeal would normally not interfere with the credibility findings of the trial court for obvious reasons. The trial court would have had the opportunity to observe the witnesses and assessed them then which the court of appeal would not have had.

[34] The court a quo also made adverse findings on the credibility of the appellant in this matter. It further rejected the version of the appellant for reasons that cannot be criticized if one has regard to the record of the proceedings.

[35] The appellant in his warning statement, admitted sexual intercourse with the complainant and alleged that it was consensual.

[36] Surprisingly during the trial, he denied having made this statement. He sought to allege that Constable Koko, the person who took his statement, simply wrote a statement and asked him to sign which he did without it being read back to him.

[37] It was also alleged in the same breath that he indeed gave the statement but sought to deny the part that refers to his admission that he had sexual intercourse with the complainant albeit by consent. The trial court admitted the statements against him based on the probative value of the evidence and that the interests of justice required its admission[3].

[3] S v Molimi (CCT 10/07) [2008] ZACC 2; 2008 (3) SA 608 (CC); 2008 (2) SACR 76 (CC) 2008 (5) BCLR 451 (CC) (4 March 2008).

[38] The change of heart in this regard is not surprising. The complainant was a child and could not legally consent to sexual intercourse.

[39] The above is but one of the reasons that the court a quo relied upon to reject the evidence of the appellant. The other reason that the court a quo referred to is the allegation relating to the door. The appellant stated that he opened the door on the day in question when the parents of the complainant came knocking at his door. He alleged in court that he opened the door for them when the evidence of all other witnesses indicated that they had to break the door to gain access.

[40] The explanation that he gave was that he was playing a joke on them. The appellant's justification that he was merely playing a joke by claiming to have opened the door when in fact it had to be forcibly broken is quite implausible.

[41] The idea of playing a joke is highly inappropriate and unlikely. All other witnesses testified that they had to break the door to gain access. It is improbable that multiple witnesses would have the same incorrect recollection of such a significant event.

[42] This court is satisfied with the reasoning of the court a quo why it rejected the appellant's version and preferred the version as provided by the complainant and the other witnesses.

[43] In the circumstances, this court is of the view that the appellant's appeal against both conviction and sentence must fail. The legislature has ordered life imprisonment for the offence committed by the appellant unless there are substantial and compelling circumstances that would allow the court to deviate from the prescribed minimum sentence.

[44] A court of appeal will not interfere lightly with the trial court's exercise of its discretion. In Du Toit's well-known commentary[4], the learned authors observe that:

[4] E du Tait (et al), Commentary on the Criminal Procedure Act (Jutastat, RS 66, 2021), at ch30-p42A.

'A court of appeal will not, in the absence of material misdirection by the trial court, approach the question of the sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court... '[5]

[45] Case law supports the cautious approach to be adopted by a court of appeal in this regard.

[46] In the circumstances, the following order is made:

1. The appeal against both conviction and sentence is dismissed.

KHUMALO MP
Judge of the High Court
Gauteng Division, Pretoria

I agree and it is so ordered.

KHWINANA ENB
Acting Judge of the High Court
Gauteng Division, Pretoria

Counsel for the Appellant: Adv MR Maphutha
Counsel for the Respondent: Adv LA More

[5] See, too, S v Malgas 2001 (1) SACR 469 (SCA); S v Fielies (2014] ZASCA 191 (unreported, SCA case no 851 / 2013, 28 November 2014); S v Mathekga and another 2020 (2) SACR 559 (SCA); and S v Gebengwana and another (unreported, ECG case no CA&R 186 / 2015, 21 September 2016.