INTHE HIGH COURT OF SOUTH AFRICA
LIMPOPO LOCAL DIVISION-THOHOYANDOU

CASE NUMBER: A27/2020

KHULISO MATSILA **APPELLANT**

And

STATE **RESPONDENT**

JUDGEMENT

AML PHATUDI J

Introduction

[1] Khuliso Matsila, the appellant, appeared in Sibasa Regional Court (Mr. J Mukwevho presiding) on one count of Rape as defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007[1](the Act). The trial court convicted the appellant as charged and imposed a sentence of imprisonment for life. The appellant, dissatisfied with the trial court's verdict, appeals against both the conviction and sentence.

[2] The appellant delayed to lodge and prosecute the appeal. He applies for condonation for late filing and prosecution of the appeal. Counsel for the State places on record that the State is not opposing condonation application and submits that, in the absence of any issues this appeal court may have pertaining to the application, the condonation application be granted.

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[1] [1] That the accused is/are guilty of the crime of contravening the provisions of Section 3 read with sections 1,2,50, 56(1), 57,58,59,60 and 61 of the Criminal Law (Sexual offences and related matters) Amendment Act 32 of 2007 as amended. Further, read with sections 94, 256 and 261 of the Criminal Procedure Act 51 of 177. Further, read with section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended. Further, read with Section 120 of the Children's Act, 38 of 2005.
In that on or about the **09 December 2014** and at or near Vuwani, in Malamulele Regional Division-Limpopo the said accused did unlawfully and intentionally commit an act of sexual penetration with the female person, complainant to wit, **[xxx], a 7 year old,** by **inserting his penis into her vagina and had sexual intercourse with her**.

Grounds of appeal in respect of the conviction

[3] The appellant opines that the trial court erred in finding that the State succeeded in proving the identity of the appellant as that of the perpetrator. He further opines that the trial court erred by its failure to "appreciate material contradictions" between the evidence of the complainant and that of M[....]. The statement M[....] made to the police shortly after the commission of the offence was accepted as evidence. The appellant contends that the trial court erred in rejecting the appellant's version as reasonably possibly true.

Factual background

[4] The complainant testified through the intermediary that the appellant summoned her to the bathroom for bathing. She was watching TV. She complied and followed the appellant. The appellant undressed her, made her to lie on her back facing upward. The appellant took off his trousers up to his knees. He pulled out his penis and penetrated her vagina. She cried out loud because of pain. M[....] heard the complainant's cry and rushed towards the bathroom. M[....] saw the appellant when he stood up, pull his trousers up and zipped the zip-fly.

[5] M[....] could not enter the bathroom because of the boots that blocked the doorway. M[....] walked past the bathroom door. The appellant walked behind following M[....]. She entered her room and the appellant walked past her to his room. M[....] went back to the bathroom. She assisted the complainant to stand up. She took the complainant by hand to her (complainant) grandparents who were sitting outside. The grandparents, M[....] and the complainant went to the police and immediately thereafter to the hospital.

[6] The appellant denies all allegations. He testified that he came back home from a nearby tavern at dusk around "to six-past six" on the day in question. He, at that time, had already had two 750 ml of flying fish. On entering the house, he found M[....] with the complainant on the passage leading to the bathroom. He walked past M[....] and went to his bedroom. He slept until the following day when he went for his driver's licence test.

[7] It is common cause that a male person sexually penetrated the complainant, who was seven (7) years of age, on 9 December 2014. The offence took place inside the bathroom. The complainant denies having ever consented to a person to have sex with her. In any event, section 1(3) (d) (IV) of the Act provides that any person below the age of 12 years is irrefutably presumed to be incapable of consenting to sexual intercourse.[2]

The issue

[8] In short, the issue in dispute is that the State failed to prove the identity of the appellant as the perpetrator beyond a reasonable doubt. The evidence lead is circumstantial in nature.

The law

[9] As a point of departure, the principle set in *R v Dlhumayo and another*[3] is that 'A court of appeal must bear in mind that a trial court saw the witnesses in person and could assess their demeanour. If there was no misdirection of facts by the trial court, the point of departure is that its conclusion was correct. The court of appeal will only reject a trial courts assessment of evidence if it is convinced that the assessment is wrong. If the court is in doubt, the trial court's judgement must remain in place. The court of appeal does not zealously look for points upon which to contradict the trial courts conclusions, and the fact that something has not been mentioned does not in itself mean that it has been overlooked.'[4]

[10] It is trite law that an appeal court decides the appeal on facts before it as contained within the four corners of the record of appeal. The appeal court is thus duty bound to establish from the record, if the trial court either has misdirected itself on facts or has applied the law erroneously to the facts. The appellant bears the

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[2] (3) Circumstances in subsection (2) in respect of which a person ('B') (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5 (1), 6 and 7 or any other act as contemplated in sections 8 (1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21 (3) and 22 include, but are not limited to, the following: (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act- (iv) a child below the age of 12 years

[3] 1948 (2) SA 678 (A)

[4] See: S v Robbinson 1968 (1) SA 666 (A) @675 H; S v Hadebe and Others 1997 (2) SACR 641 (SCA) @ 645; S v Mononyane and Others 2008 (1) SACR 543 (SCA) [15]

onus of proving misdirection on the part of the trial court or that it erred when assessing the evidence based on the facts and the law before it[5].

Evaluation

[11] The complainant testified that when appellant was on top of her penetrating her vagina with his penis, she cried loud out. She saw M[....] coming towards the bathroom. M[....] saw the appellant through the slightly opened bathroom door rise from the ground. The appellant zipped up his pair of trousers and went out of the bathroom. He followed M[....] "warning her not to tell the elder sister". The appellant went into his room.

[12] It is perhaps an opportune time to clarify why the perpetrator is found to be the appellant as placed on record. The complainant, subjected to two days cross-examination, acquitted herself as follows on the issue of identity:

In examination in chief

Prosecutor: Okay, when M[....] came in there… when she entered there… what did she do?

Complainant: He see Khuliso rising from the ground… it is then that she followed him in his room"

During cross-examination:

Mr Ramakuwela- When she opened the door what was the accused doing to you.

Complainant: When she opened the door Khuliso, rise up… and put on his trouser.
Seeking clarity from the complainant, counsel for the accused pursued the issue in the following way.

Mr Ramakuwela: When the door was being opened you could see that.

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[5] See: Pillay v Krishner and Another 1946 SA 946 (A) page 941- G-h

Complainant "yes, your worship yes.

Ramakuwela: And when the door was being opened that is when accused stood up and start to wear his pant, his clothes?

Complainant: yes, your worship.

This version was partly corroborated by the accused when asked during the cross-examination:

Prosecutor: Okay, when you met M[....] in the passage, where was the victim?

Accused: it seems she was in the bathroom

Prosecutor: What was M[....] doing when you met her in the passage?

Accused: she was from the bathroom…

Prosecutor: So when you were walking on the passage, she came out of the bathroom.

Accused: She was from the passage leading to the bathroom".

The statement made by M[....] rubs the evidence in as follows:

"On Tuesday 9 December 2014 at about 18h00 I was at my kraal in the kitchen when I heard my sister's daughter [-] seven-year-old who was bathing… at the bathroom crying. I ran to the bathroom to have a look on what was happening. When I opened the bathroom I found Khuliso who is my brother zipping his trouser and [complainant] was lying on the floor being naked and she was crying".

[13] It is common cause that the complainant, M[....] and the appellant lived together under the same roof for a period at least not less than 10 months. They are

related to each other. The appellant is an uncle to the complainant. The incident occurred around 18h00 on 09 December 2014. The day was clear. It is accepted that around 18h00 during December, the sun is still up and visibility is clear.

[14] In *S v Mthethwa*,[6] Holmes JA penned that 'it is not enough for the identifying witness to be honest. The reliability of his/her observation must also be tested. This depends on various factors, such as lighting, visibility, the proximity of the witness, her opportunity for observation… the extent of prior knowledge of the accused… the accused voice, gait and of course the evidence by or on behalf of the accused…" [par 10].

[15] The complainant spelt out her evidence identifying the appellant as demonstrated in paragraph [12] above. The complainant knew the appellant very well. As I indicated, they lived together in the same house for period of not less than 10 months. The complainant knew the appellant by name and who, as demonstrated through evidence, is her uncle.

[16] The evidence led demonstrates how the appellant lured the complainant from her comfort of watching a television to the bathroom. It is undisputed fact that the complainant was in the bathroom naked when she cried loud out due to a pain she felt when a penis penetrated her vagina. M[....] came and saw the appellant wear his pair of trousers and zipping same. There is no other fact proven of any person, a male for that matter, being in or near the bathroom other than the appellant and M[....]. M[....] is a female person.

[17] In *R v Blom*[7], Watermeyer JA settled the principle relating to circumstantial evidence- He penned that "in reasoning by inference in a criminal case there are two cardinal rules of logic, which cannot be ignored. The first rule is that the inference sought to be drawn must be consistent will all the proved facts: if it is not, the inference cannot be drawn. The second rule is that the proved facts should be such that they exclude every reasonable inference from the proved facts save the one sought to be drawn: if these proved facts do not exclude all other reasonable

[6] *S v Mthethwa* 1972 (3) SA 766 (A) at 768A-C
[7] 1939 AD 188 @ page 202 -203

inferences, then there must be a doubt whether the inference sought to be drawn is correct *(see Sesetse 1981 (3) SA 353 (A) at 369–370)*.

[18] In *S v Essack*[8] the Appellate Division developed the principle further by distinguishing between conjecture and speculation from positive proved facts from which the inference can be drawn. The court stated that '[i]nferences must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which is sought to be established. In some cases other facts can be inferred, which as much practical certainly as if they had had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation as conjecture.'

[19] Rubbing it in, the court in *S v Reddy and others*[9] added that circumstantial evidence must to be considered in its totality. The court stated, "in assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration whether it excludes the reasonable possibility that the explanation given by an accused is true".

[19] On perusal of the record, the magistrate analysed the evidence tendered with distinction. He perfected all cautionary rules found in our law books. I have no reason to fault the magistrate's findings that the appellant is the person who perpetrated the offence set out in the charge sheet.

[20] I, after having evaluated the evidence tendered and the magistrate's findings, am of the view that there is no other inference to drawn from the proven facts other than that the appellant is the person who penetrated the complainant's vagina with his penis in the bathroom on 09 December 2014. The appellant's appeal against conviction falls to fail.

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[8] 1996 (2) SACR 1 (A) @ page 8 C-D see as well S v Geasa. 1400/2016 (2017) ZASCA 92 (9 June 2017)
[9] 1974 (1) SA 1 (A)

Ad sentence

[21] The appellant's ground of appeal is, summarily, that life imprisonment sentence imposed is shockingly inappropriate, disproportion to the offence committed and that no reasonable court could have imposed it.

[22] Counsel for the appellant opines that the trial court erred by not considering the appellant's personal circumstances as substantial and compelling to warrant deviation from imposing a lesser sentence other than the one prescribed. He submits that he relies on *S v Malgas* 2001(1) SACR 469 SCA (quoted in his heads of argument, to which he indicated that he stands and fall by) where he says it is stated that "[i]n the process of determining whether a departure is called for, the court should weigh all considerations traditionally relevant to sentencing".

[23] Ms Ratshibvumo, counsel for the State, rebuts the contention and opines that the principle is, as set in *Malgas* through the pen of Marais JA, that when a court imposes a sentence in respect of an offence referred to in the **Criminal Law Amendment Act 105 of 1997**, such a court is no longer given a "clean slate on which to inscribe whatever sentence it thought fit". Instead, it is required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence, which should ordinarily be imposed, for the commission of the listed crimes in the specified circumstances. I agree. It has since been trite law.

The Law

[24] The jurisdiction of a court of appeal to interfere with the sentence imposed by a trial court is limited. Khampepe J penned in *S v Bogaards* **[2012] ZACC 23**; **2013 (1) SACR 1** (CC) para 41:

'Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is

vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[25] It must be borne in mind that the offence the appellant is convicted of is read with the provisions of section 51(1) of CLAA. The trial court is empowered in terms of Section 51 (1) to sentence a person who is convicted of rape referred to in Part 1 of Schedule 2, notwithstanding any other law, but subject to subsection (3) and (6), to imprisonment for life when the victim is under the age of 16 years. Section 51(3) (a) provides:

'if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justified the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: …'

[26] The trial court, after considering the evidence tendered coupled with references to case law, found no substantial and compelling circumstances that warrant deviation from imposition of the prescribed minimum sentence- in casu- imprisonment for life.

[27] The complainant is not only presumed, irrefutably so, not to appreciate the consequences that flow with sexual activities. I cannot agree more with counsel for the State that the complainant's age, injuries she sustained, the appellant's abuse of position of trust and tipping the scales-lack of remorse on the part of the appellant aggravates.

[28] I perused the record and having considered submissions tendered by both counsel, I find no reason to fault the sentence imposed by the trial court. The appeal against sentence must as well fail.

[29] I, in the result, would make the following order

ORDER

The appeal against the conviction and sentence handed down by the Regional Magistrate Mr J Mukwevho at Sibasa Regional Court is dismissed.

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AML PHATUDI

JUDGE OF THE HIGH COURT

I agree and it is so ordered

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NF KGOMO

JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPELLANTS	**:**	**Adv. M.M APHANE**
INSTRUCTED BY	**:**	**A.J MASINGI Attorneys**
		Pretoria
FOR THE STATE	**:**	**RATSHIBVUMO M**
INSTRUCTED BY	**:**	**DPP. Thohoyandou**

JUDGEMENT DATE : Judgment handed down electronically by circulation to the parties' legal representatives by email and publication through SAFLII. The date deemed handed down is 17 June 2022.