

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG SOUTH LOCAL DIVISION, JOHANNESBURG**

CASE NO: A127/2011

DPP REF NUMBER: 9/2/5/1 (2013/0565)

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

In the matter between:

BALOYI, BEN ABEL

Appellant

and

THE STATE

Respondent

JUDGMENT

MABASA AJ

[1] This is an automatic appeal against conviction and sentence. The appellant is a 25 year old male convicted on a charge of raping a twelve year old girl on three separate occasions during the period of June 2007 to September 2007. He was sentenced in the Protea Regional Court on 19 June 2009 to life imprisonment, the prescribed minimum sentence in terms of section 51 (1) of the Criminal Law Amendment Act 105 of 1997. He was also declared unfit to possess a firearm.

[2] The complainant L, was born on 11 October 1995 and was 12 years old at the time of the rape. She is the biological daughter of the second state witness, Selina Phakathi. She testified *in camera* and through an intermediary when she was 14 years old.

[3] She testified that she knew the appellant because he resided with his girlfriend Thelma in the same yard as her mother and herself. She referred to the appellant as Ben.

[4] She testified that Ben raped her on three separate occasions. The first incident occurred when Thelma came to her mother and asked if she could sleep over at Ben's place, under the false pretext that Ben was not at home. When she entered his room, Thelma closed to her mouth with a cloth, undressed her and Ben raped her. She was then threatened by him that he would kill mother if she disclosed what happened. Thelma also repeated the threat.

[5] About one month later Ben called her to his room again, saying that he wanted to send her to the shop to buy bread for him. When she was inside he

closed the door and raped her again. She did not go home after this incident but went to her grandmother's house instead. She was afraid and cried.

[6] The third rape occurred sometime in September 2007 when Ben asked her to go and buy cold drink for him. He instructed her to fetch the bottle from his room and once she was inside he locked the door and raped her again. She was crying and he told her to go home.

[7] When she arrived at her grandmother's house, the grandmother asked why she was crying and she started vomiting. Only the next day, when she was confronted by her grandmother about her deteriorating school performance, did she confide in her grandmother about what Ben was doing to her. Her grandmother then told her biological mother what was happening, and the matter was reported to the police.

[8] The second state witness was the aunt of the complainant. The complainant refers to her as her grandmother (according to Tsonga custom). She testified that she noticed that the complainant was sick and that she was not doing well at school. She did not see the complainant crying. When she confronted her, the complainant told her what Ben was doing to her. She then informed the mother of the complainant, who is her sister and together they reported the matter to the police. The complainant was then taken for a medical examination.

[9] The third state witness was the biological mother of the complainant. She testified that she had a good relationship with the appellant. There were no ill feelings between them. They resided in the same yard. She confirmed that the appellant lived with his girlfriend Thelma.

[10] When the first incident occurred Thelma called the complainant and she only came back home around 23h00pm, when she was already asleep. She denied having any sexual relationship with the appellant. She is married and her husband lives in Mozambique. She could not tell the court her age, only that her oldest son was already married and that she has a grandchild.

[11] A medical examination was conducted on the complainant on 28 September 2007 at Lenasia South Clinic. The gynaecological examination noted an old healed injury, healed cuts and bumps at three different places, and the hymen was not intact. The conclusion was that forceful vaginal penetration could not be excluded. The doctor who completed the report was not called to testify.

[12] The appellant pleaded not guilty. At the commencement of the trial when the charges were put to him, it was placed on record by the prosecution and regional magistrate that each of the three charges against him carried a minimum sentence of life imprisonment if he was found guilty.

[13] He denied that he had raped the complainant. He testified that the third state witness was his lover. He claimed that she instructed the complainant to call him “dad” and that the child did not like it. That is the reason why they conspired to have him arrested. He claimed that the child was influenced by her mother to falsely implicate him.

[14] The essence of the appellant’s argument on appeal is that there are contradictions between the testimony given by the complainant and the state witnesses. There is also a discrepancy in the medical history given to the doctor who completed the J 88. The doctor noted that the applicant reported

that after the first incident involving Thelma, the appellant raped her again on three other occasions.

[15] Counsel for the applicant also submitted that the magistrate misdirected herself by not having regard to the cautionary rule applicable to a single witness such as the complainant.

Evaluation of the evidence

[16] There are conflicting versions between the complainant and the appellant. She is a single witness who was only 12 years old at the time of the rape. The *court a quo* correctly noted that her testimony has to be approached with caution.

[17] The magistrate found that the complainant gave her evidence in a consistent and coherent manner. Taking into consideration her tender age and the fact that she testified two years after the incident occurred, the contradictions between her evidence and that of the two state witnesses were considered minor and not material. In *S v Francis* 1991 (1) SACR 198 (A) at 204c it was held that the trial court's findings of fact and credibility are presumed to be correct because the trial court has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies. Also in *R v Dhlumayo and Another* 1948 (2) SA 677 (A) Davis AJA held that the trial court had the opportunity of observing the demeanour of the witnesses, their appearance and personality. This should never be overlooked.

[18] The magistrate's evaluation of the evidence was correct. She applied the necessary caution. She had due regard for the youthfulness of the complainant. She accepted that the complainant feared that the appellant was capable of carrying out his threats of killing her mother and that is why she did not immediately report the rapes. She was also satisfied that the medical evidence corroborated the complainant's version.

[19] The magistrate found that the appellant was an untruthful witness. His claim that the mother of the complainant influenced her to falsely implicate him because he refused to buy her television set was dismissed as untruthful. The appellant's claim that she was his lover was also disbelieved because she appeared to be much older than the appellant, is a married woman and also grandmother. She did not initiate proceedings against the appellant and the magistrate was of the view that it was unlikely that the complainant was being manipulated by her to falsely implicate the appellant.

[20] There was no misdirection on the facts by the trial court. In my view the appeal against the conviction cannot succeed.

[21] With regard to the sentence, section 51(1) read with part 1 of Act 105 of 1997, provides that if a person is convicted of a crime of rape where the victim is under the age of 16 years old, the court is required to impose a sentence of life imprisonment unless there are substantial or compelling factors. It was stated by Cameron JA in *S v Abrahams* 2002 (1) SACR 116 (SCA) at para 29 that ' the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust.

[22] It was submitted on behalf of the appellant that he was 25 years old, he was single without any dependents, and prior to his arrest he was employed and earned R900.00 per fortnight. He was also a first offender. He spent 21 months in custody awaiting trial.

[23] Counsel for the appellant submitted that these factors together with the fact that the rape in this case cannot be classified as the worst category of rape, since the complainant did not suffer any physical injuries, constituted substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment.

[24] The trial court found that the following aggravating circumstances were present: the complainant was raped when she was only 12 years old; she was raped repeatedly on three separate occasions by the appellant; she was and still is a vulnerable, innocent and defenceless child who carried the burden of her ordeal with her for three months because the complainant threatened to kill her mother. The appellant, being a neighbour, was in a position of trust over the complainant and had a duty to protect the complainant instead of sexually abusing her. Even though no victim assessment report was requested by the court *a quo*, there was unchallenged evidence that her school work was affected by the rape. She was also physically sick. The second and third rapes were aggravating factors in themselves.

[25] *In S v Mako* 2005 (2) SACR 223 (E) it was held that various elements are considered in imposing sentence, namely the interests of the community, the personal circumstances of the accused and the nature of the offence. These considerations have become trite when courts are imposing sentence.

[26] Our society is experiencing an alarming level of gender-based violence. In this regard the Supreme Court of Appeal noted in *Director of Public Prosecutions, Western Cape v Prins and others* 2012 (2) SACR 183 (SCA) Wallace JA (Mpati P and Navsa, Brand and Malan JJA)concurring that :

‘No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity... These rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone...

They are many judgments in which our courts have emphasised the need for the rights of vulnerable people, in particular women and children to be respected and protected .One of the ways in which that needs to be done is by the effective prosecution of those who infringe those rights.’

[27] The appellant showed no remorse. The fact that he was 25 years old at the time when he committed the offence can be regarded a neutral factor as stated in *S v Matyityi* 2011 (1) SACR 40 SCA where the Supreme Court of Appeal made it clear that the respondent’s age at 27 was at best a neutral factor. It was also emphasised in this case that our courts have a duty to implement minimum sentences prescribed by the legislature. There must be truly convincing reasons to depart from them. I have not found such convincing reasons. There are no substantial or compelling circumstances factors.

[28] Having regard to the repeated nature of the rapes and the fact that the complainant was under the age of 16 at the time, the sentence of life imprisonment is not shockingly disproportionate. In the absence of

misdirection or disproportionality, there is no reason for this court to interfere with the sentence.

[29] I propose making the following order:

The appeal against the conviction and sentence is dismissed.

MABASA AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

I concur

MAYAT J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

Counsel for the Applicant: Adv Gaurneri

Instructed by: Legal Aid South Africa

Counsel for the Respondent: Adv Coetzee

Instructed by: Director of Public Prosecution

Date of Hearing: 20 May 2014

Date of Judgment: 20 May 2014