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

CASE NUMBER: A110/16
REPORTABLE
OF INTEREST TO OTHER JUDGES
REVISED
2/6/2017

In the matter between:

SAMUEL SIPHO NKUNA — APPELLANT

and

THE STATE — RESPONDENT

JUDGMENT

DOSIO AJ:

INTRODUCTION

[1] The Appellant was arraigned in the Regional Court, sitting in Nelspruit, on a count of rape as envisaged in terms of section 3 of the Sexual Offences and Related matters Act 32 of 2007 ("Sexual Offences Act"). The charge sheet stated that the offence of rape was to be *"(read with the provisions of section 51 and/or*

section 52 and Schedule 2 of the Criminal law Amendment Act 105 of 1997) Lifelong imprisonment compulsory or 15 years".

[2] The Appellant pleaded not guilty and was convicted on 1 July 2011. He was sentenced to life imprisonment and was also declared unfit to possess a firearm. Accordingly the appellant has an automatic right to appeal against conviction and sentence, against which this appeal is directed.

AD CONVICTION

[3] It is trite law that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. If the version of the Appellant is reasonably possibly true, he must be acquitted.

[4] In considering the judgment of the Court a *quo,* this court has been mindful that a Court of Appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong.[1]

[5] It was not disputed that the Appellant was well known to B S ("the complainant"), or that the medical report was correct. What was placed in dispute was whether the Appellant raped the complainant. The medical report was handed in by consent and marked as exhibit B.

[6] Counsel for the Appellant submitted that the court *a quo* erred in finding the Appellant guilty in that;

i. The Court *a quo* failed to apply the cautionary rule that applies to the evidence of a single witness, and that the complainant was not a satisfactory witness.
ii. There were material contradictions as well as inconsistencies in the State's

[1] See S v Francis 1991 (1) SACR 198 (A) at 198 J - 199A and S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645 E-F

case.

The Court *a quo* failed to apply the cautionary rule

[7] In the decision of *S v Mahlangu and another* 2011 (2) SACR 164 (SCA) the court held that;

> "Section 208 of the Criminal Procedure Act 51 of 1977 provides that: 'An accused may be convicted of any offence on the single evidence of any competent witness.'
> The court can base its finding on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration."

[8] The learned Diemont JA in *S v Sauls and Others* 1981 (3) SA 172 (A) held at page 180E-G:

> "There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the 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 the testimony, he is satisfied that the truth has been told."

[9] In *R v Abdoorham* 1954 (3) SA 163 (N) it was decided that;

> "The Court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true."

[10] This Court finds that the Court *a quo* was alive to the cautionary rule and found that the complainant's evidence was reliable and trustworthy. There is corroboration for the complainant's evidence, in that T M ("T"), and I T ("I"), both saw the complainant walking with difficulty. The medical evidence also depicted a

fresh tear at 6 o' clock of the hymen, coupled with findings of tenderness to the clitoris, urethral orifice and inflammation to the abia majora. T. corroborated the complainant that her pantie was soiled with blood. T. and I. both confirmed that the complainant was afraid to reveal the identity of her attacker. I., the school principal, was only able to elicit the identity of the Appellant from the complainant after calming her. T. also corroborated the complainant that the Appellant had been transporting her to school since 2009.

[11] The Appellant's version is one of a complete denial. The Appellant indicated at the end of his evidence that the complainant and T. conspired against him because they did not want to pay his fees. This is in sharp contrast to his evidence in chief where he stated he knew of no reason why they would point him out[2], and that he was not aware of any complaints or problems lodged against him.[3] Counsel for the Appellant argued that this version was never put to the State witnesses as it came out only after the court a *quo* questioned him, and that it was mere speculation on the part of the Appellant, that he thought this may have been the reason to falsely implicate him.

[12] The version of the Appellant stating that the complainant fabricated this evidence against him, or falsely incriminated him is highly unlikely. This complainant was very clear about the sexual intercourse that transpired, the location where it occured, and who the perpetrator was. She continually referred to him as "Jomo". This is a nickname which the Appellant admitted using. A child of twelve (12) years old, cannot vividly explain the sexual acts that transpired, or undergo vigorous cross-examination over two days, unless she witnessed it herself. In addition, the Appellant was en-tasked in driving this complainant to school and looking after her due to her chronic illness.There is no reason why the complainant or T. would end this very useful relationship, unless something had occurred to end it. If either the complainant or T. wanted to falsely incriminate the Appellant , they could have done so sooner. The fact they did it when there were fresh injuries on the private part of this complainant, corroborates the fact that the

[2] Page 131 line 16-17
[3] Page 132 line 17-20

rape had recently occured.

[13] The version of the Appellant that when he dropped off the complainant she looked normal, is not reasonably possibly true. If she was normal, it would mean someone raped her after she was dropped off. This is not reasonably possibly true, as she was dropped off a short distance from her house, and no questions were posed to her regarding the possibility that someone else may have raped her.

Material contradictions and inconsistencies in the State's case

[14] Counsel for the Appellant stated that there are contradictions which were material and that the complainant was untrustworthy. The contradictions and inconsistencies alluded to by the Appellant are:

1. The complainant testified that the Appellant took her out of the vehicle and raped her inside the bushes, whereas in her statement there is no mention that the Appellant took her out of the vehicle.
2. The complainant testified in the office of the school principal that it was a mad person who had raped her. This was never mentioned in her statement.
3. The complainant testified that immediately after the rape she was bleeding profusely and her panty was full of blood. Nothing of this nature was mentioned in her statement.
4. According to the complainant her aunt washed her panty on the Friday after she finished bathing the complainant, yet T. testified that she kept the panty and threw it in a pit toilet after some months. There are differences between the complainant's evidence and that of T. as to who bathed the complainant.
5. The complainant testified that after the Appellant dropped her off she went home, got inside the house and slept. T. testified when the complainant arrived home she went to play with the other children.
6. The complainant testified that her clothes were dirty and the Appellant

dusted it. This was never mentioned in her evidence or in her statement to the police.

7. Counsel for the Appellant contended that the complainant was pushed for a name and that is why she came up with the Appellant's name.

[15] The Appellant's counsel contended that the above-mentioned contradictions and inconsistencies, are material .and affected the credibility and trustworthiness of the complainant's evidence, and that the Court a *quo* erred in finding the guilt of the Appellant was proved beyond a reasonable doubt.

[16] As stated in *S v Mkohle* 1990 (1) SACR 95 (A),

> "Contradictions *per se* do not lead to the rejection of a witness's evidence, they may simply be indicative of an error. Not every error made by a witness affects his credibility: in each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradiction, their number of importance, and their bearing on other parts of the witnesses' evidence."

In the case of *S v Bruiners and Another* 1998 (2) SACR 432 (SE) at 435 a-b, it was stated that two or more witnesses hardly ever gave identical evidence with reference to the same incident or events. It was thus incumbent on the trial court to decide, having regard to the evidence as a whole, whether such differences were sufficiently material to warrant the rejection of the State's version.

[17] This Court does not find that these contradictions are of such a material nature to disregard the evidence of the complainant as being false.

[18] Counsel for the Appellant argued that Constable Nkosi, who wrote down the statement of the complainant, read back each paragraph to the complainant. Accordingly, it was argued, had this rape occurred outside the car, the complainant would have corrected Constable Nkosi. The complainant was adamant that the rape occurred at the forest, inside the bushes and not in the

car. If this discrepancy was not cleared up by Constable Nkosi, who only had two years experience as a police officer, then such omission, cannot be a reason to disregard the complainants evidence. One must bear in mind that Constable Nkosi testified that when she took down the statement of the complainant, the complainant could not remember everything because she was crying. Sight should also not be lost that the statement before a police officer is not subject to cross-examination.

[19] It is very common for witnesses to recall in much greater detail what transpired when they are asked to testify in court. This is one of those instances. This complainant gave a very detailed account of what happened in her evidence in chief which she repeated during cross-examination. Accordingly, this Court does not find this contradiction material.

[20] In respect to the omission in the complainant's statement to the reference "a mad person" who allegedly raped her, this Court refers to its comments expressed in paragraphs [18] and [19] *supra.* The complainant explained that she referred to the Appellant initially as a mad person, as the Abpellant himself had told her to say that. Accordingly this Court does not find this contradiction material.

[21] The omission in the complainant's statement pertaining to the blood stained pantie, the disposal thereof, as well as to who bathed the complainant is not material, as it was never placed in dispute in the court a *quo* that the complainant had indeed been raped, and accordingly, it has no relevance to the final conclusion reached by the Court a *quo* as to the Appellant's guilt.

[22] The difference between the complainant stating that after the rape she went home to sleep, as opposed to T. saying, the complainant went to play with the children, is not material. This child was confused and traumatised as she had been threatened by the Appellant that he would kill her if she implicated him. It is natural for a child of this age to possibly not remember this minor detail. The evidence is however clear that this child was in pain after the rape. Whether or

not she went to lie down or went to play, is immaterial.

[23] The fact that the complainant never mentioned it in her statement that the Appellant dusted off her clothes after the alleged rape, corroborates her version that this rape occurred outside the vehicle and not inside the vehicle. Accordingly, this Court does not find it material.

[24] The complainant through-out her evidence repeated that it was Jomo Nkuna who raped her. The fact that the name was coerced out of her, all corroborates the fact that she had been threatened by the Appellant not to mention his name.

[25] The Appellant's counsel argued that there was no clear finding by the doctor that the child had been raped. To the contrary, this Court finds, that the medical evidence and the graphical account of the complainant as to how the Appellant raped her, are all indicative that rape was successfully proven by the State beyond reasonable doubt.

[26] After a thorough reading of this record, this Court has no doubt as to the correctness of the Court a *quo's* factual findings. I can find no misdirection which warrants this Court disturbing the findings of fact or credibility that were made by the court *a quo.* The State proved the guilt of the Appellant beyond reasonable doubt, and the Court *a quo* correctly rejected the version of the Appellant as not being reasonably possibly true.

AD SENTENCE

[27] It is trite that in an appeal against sentence, the Court of Appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the Court of Appeal should be careful not to erode that discretion.

[28] A sentence imposed by a lower court should only be altered if;

i. An irregularity took place during the trial or sentencing stage.
ii. The trial court misdirected itself in respect to the imposition of the sentence.
iii. The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.

[29] The trial court should be allowed to exercise its discretion in the imposition of sentence within reasonable bounds.

[30] As was stated in the decision of *S v Malgas* 2001 (1) SACR 496 SCA;

> "A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial court."

[31] In the case of *S v Pi/lay* 1977 (4) SA 531 (A) at page 535 E-G, the court held that;

> "..the essential inquiry in an appeal against sentence, ...is...whether the court in imposing it, exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably."

[32] In *S v Salzwedel* and other 1999 (2) SACR 586 (SCA) at 588a-b, the Supreme Court of Appeal stated that an Appeal Court can only interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate.

[33] The following aggravating factors are present;

i. The Appellant maintains he is innocent and shows no signs of remorse.
ii. The complainant was very young when this happened and she was threatened that she would be killed if she told anyone.
iii. This child was extremely traumatised during the reporting stage as well as during the presentation of her evidence in court.
iv. The Appellant abused the trust the complainant had in him. It is clear that a child of this age will not forget this incident. It will affect her in future years.
v. The medical report shows that the private parts were inflamed and tender with a 6 o' clock fresh tear.

[34] The personal circumstances of the Appellant are the following;

i. He is a first offender and thirty-eight (38) years of age.
ii. He is married and has ten (10) children from different mothers. The children range from eighteen (18) years to nine (9) years.
iii. Prior to his arrest he was doing piece jobs at different houses. He was earning R5000-00 per month.

[35] All these factors must be taken into consideration in determining whether a sentence of life imprisonment is appropriate. So too must the factors that aggravate the crime be considered.

[36] The charge of rape of a child below the age of sixteen (16) years falls in the category of offences listed in Part I of Schedule 2 of the Criminal law Amendment Act 105 of 1997. A minimum sentence of life imprisonment is prescribed for a first offender.

[37] In *S v Ndlovu* 2003 (1) SACR 331 (SCA) Mpati J at paragraph [12] stated that;

> "...it is implicit in these observations that where the State intends to rely

upon the sentencing regime created by the Act, a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences ..."

[38] In the case of S *v Makatu* 2006 (2) SACR 582 (SCA) paragraph 7 the learned Lewis JA stated that;

"As a general rule, where the State charges an accused with an offence governed by section 51 (1) of the Act, ….it should state this in the indictment. ..an accused faced with life imprisonment. ..must from the outset know what the implications and consequences of the charge are".

[39] It is clear that the charge sheet referred to both section 51 and section 52. Even though the Court a *quo* failed to bring the provisions of this Criminal Law Amendment Act to the attention of the Appellant at the beginning of the trial, the charge sheet stated that the offence of rape was to be *"(read with the provisions of section 51 and/or section 52 of the Criminal law Amendment Act, 105 of 1997,* as *amended) Lifelong imprisonment compulsory or 15 years".* The Appellant was represented throughout the trial and the attorney representing him, as well as the Appellant himself, were aware of the applicable prescribed minimum sentence of life imprisonment, as the Court a *quo,* recalled the Appellant back to the accused bench during the sentence proceedings and expressly requested the Appellant to address him as to whether there were substantial and compelling circumstances to deviate from imposing a term of life imprisonment.[4]

[40] Accordingly this Court finds that the state's intention to rely on and invoke the minimum sentencing provisions was made clear at this trial and that the Appellant did not have an unfair trial.

[4] Page 193 and 194 of the transcript from line 24 (page 193) to line 4 (page 194).

[41] The substantial and compelling circumstances alluded to by the Appellant himself, after being questioned in this regard by the Court a *quo* were that, his children are still young and needed to be maintained by him, and that he was building a house for them. These are not substantial and compelling circumstances to deviate from the minimum term of life imprisonment.

[42] The offence for which the Appellant has been found guilty is a serious offence. Rape constitutes a humiliating, degrading and brutal invasion of the privacy, dignity and person of the victim. As stated in the case of *S v Nkunkuma and others* 2014 (2) SACR 168 (SCA) at paragraph [17];

> ''Rape must rank as the worst invasive and dehumanising violation of human rights".

[43] Rape is a crime that threatens many children in this country and it occurs far too frequently. The Legislature and community at large, correctly expect our courts to punish rapists severely.

[44] In the premises, it cannot be said that the sentence imposed is disturbingly inappropriate.

[45] This Court finds no misdirection on the part of the Court *a quo.* The sentence imposed does not induce a sense of shock and neither is it out of proportion to the gravity of the offence.

[46] In the result, having considered all the relevant factors and the purpose of punishment I consider a term of life imprisonment to be an appropriate sentence.

[47] In the premises I make the following order;
The appeal is dismissed both in respect to conviction and sentence.

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D DOSIO

ACTING JUDGE OF THE HIGH COURT

I agree

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J TEFFO

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the Appellant: Adv. R. KRIEL

Instructed by P.J Lourens Attorneys
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On behalf of the Respondent: Adv. C.P HARMZEN

Instructed by: Director of Public Prosecutions
Pretoria

Date Heard 30 May 2017

Handed down Judgment 2 June 2017