REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A71/2018

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

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SIGNATURE **DATE**

In the matter between:

MUSIWA JAFTA MOKHAHLE **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

(IN CORAM MABESELE J AND REYNEKE AJ)

REYNEKE AJ

Introduction

[1] The appellant, age 28 at the time, was charged in the Germiston Regional Court with rape, read with the provisions of subsections 51 and 52 of the Criminal Law Amendment Act 105 of 1997 (the minimum sentencing legislation). It was alleged that he had raped the complainant who was ten years old, by inserting his penis into her vagina.

[2] The appellant had legal representation and pleaded not guilty. The state called eight witnesses. The complainant and A testified through an intermediary due to their ages. The appellant testified and denied the state's version. The magistrate accepted the evidence of the state witnesses and rejected the appellant's version. The magistrate, having found that there were no substantial and compelling circumstances to deviate from the minimum prescribed sentence in terms of the Criminal Law Amendment Act, imposed a sentence of life imprisonment and declared the appellant unfit to possess a firearm. It was ordered that his particulars be included in the National Register for Sex Offenders.[1] The appellant exercised his automatic right of appeal against both conviction and sentence.

Facts

The State's version

[3] The complainant testified that she was in grade five in 2016. In that year, on a Friday afternoon, she and A, her friend, were on their way to Mashaba-shop in Dukathole to buy chips. The appellant was known to them as 'Socks'. As they passed his shack, he called them and sent A away to buy cigarettes. The complainant waited on the stoep because the appellant said the two of them together will walk too slow. The appellant pulled the complainant inside the house and closed

[1] In terms of Section 50 (2) of Act 32 of 2007.

the door. He threw her on her back on top of the bed, lifted her skirt and pulled down her panties. He unzipped his pants, took his penis out and put it into her vagina. He kept on putting it in and pulling it out. She was unable to say how long the intercourse lasted.

[4] Thereafter the appellant dressed himself. He was wearing a blue overall, with trousers and a torn vest underneath. She then noticed that A was peeping through a hole. This hole, as big as a 50 cent piece, was in the wall, next to the door. A cigarette came through the hole. The appellant ordered her to dress and to go away.

[5] It was already dark. She went into a passage and ran towards A, who was standing in the street. The complainant started to cry. A asked her why she was crying and she told her that the appellant had raped her and threatened to kill her if she should tell anybody. Thereafter the two girls played hopscotch in the street. This game involved much jumping. A's mother was home, but the complainant did not make a report as she was threatened not to speak.

[6] The following day, a Saturday, the complainant went to her grandmother's place. There was a ritual during which girls were examined. When it was her turn, she ran away to avoid the examination. She was caught and examined by Sister Nonhlanhla. The former put a finger on her vagina. She was questioned, but was afraid to speak.

[7] On the Tuesday, she first told A's mother and then her own mother that she was raped. The police were called. She pointed the appellant's shack to the police and she and A pointed out the appellant to the police without entering the shack. The appellant was wearing shorts at the time. She described the shack as being rusty and painted in red and pink. There was a fridge, a sofa, a small carpet and a bed with clothes at the foot end of the bed.

[8] A was ten years old and in grade four when she gave her testimony. She testified that they were on their way back from Mashaba-shop. She noticed that Socks, who was standing outside his shack, was peeping in their direction. They both ran away, but Socks caught the complainant and took her inside his shack.

[9] She did not see what happened in the shack. She was standing at KMG-shop when the complainant came running to her. The complainant told her that Socks had grabbed her and raped her and that he will kill them if they tell their parents. They went and played a game, named ‘Mafrotane’, where they had to run around. They also played with O, the landlord’s daughter.

[10] P N testified that Nonhlanhla Sibisi was at her house on Saturday, 19 March 2016, to conduct a virginity test on a group of children. When the complainant was called to be examined, she ran away. She was caught, but at first resisted the examination. When she finally gave her cooperation, they discovered that she was no longer a virgin. She refused to relate what had happened.

[11] In 2016 and at the time of the hearing, Nonhlanhla Sibisi was the president of Mbabazani Cultural Group. This cultural group issues certificates to children who are still virgins. She examined the complainant. She opened her vagina without putting her fingers inside and discovered that the white fat was damaged. From the deep red colour she could see that it was a fresh incident, between one and three days old. In the event of an old incident the red colour would be faded and there would be a white discharge. She called P N to witness the damage.

[12] N H testified that the complainant, who is her daughter, was born on […] August 2005. P N is her aunt, but the complainant regarded her as her grandmother. On 19 March 2016 she received a phone call by a person who identified himself as Jafta, also known as Socks, from Extension 9. He said he wanted to discuss something with her. She indicated that there was nothing to discuss and ended the call. She thought he had romantic intentions with her.

[13] Later the very same Saturday, P N made a report to her, causing her to question the complainant, but the complainant, crying, refused to speak. She left it there. Eventually on Thursday, the complainant told her that it was Socks and that A knew about the incident. She questioned A about the incident, who related a version. A said that she had put the cigarette under a carpet because the door was closed. Then she questioned the complainant, who related the same version. The complainant reported that she kicked as Socks was raping her on the bed, causing

him to loose balance. He then made her lay on the floor and raped her a second time.

[14] She called the police and they went to the appellant's place, which had a faded pink colour. The door of the shack was painted blue. The two children pointed him out to the police. On Thursday, after the pointing out, the complainant was taken to a doctor.

[15] Shortly after the incident, but before the complainant made her report, she complained that it was painful to urinate. The complainant had to wash her underwear herself. If it was not clean, she would assist. There was a burned colour on her panties.

[16] A medico-legal-examination report (J88), completed by Dr Masango after examination of the complainant, was admitted into evidence. He testified that a circular cleft or old scar was found on the hymen, indicating that there was a laceration which has healed. Penetration was not excluded. The cleft indicated that penetration with a blunt object caused damage to the hymen and left the scar. There was no bleeding or fresh lacerations, thus the time of the penetration could not be established. Any wound takes four to seven days to heal.

[17] Lindiwe Kenke testified that A, her daughter, was born on […] July 2007. On 24 March 2018 at 19h30 N H, who is her neighbour, called. She went to the house and tried for over an hour to probe the complainant about the incident. Eventually the complainant agreed to tell her mother what had happened to her. The complainant then whispered into her mother's ear. Kenke could not overhear the whispering. Kenke proceeded to question the complainant in the presence of her mother, who explained that Socks raped her on the bed. She did not ask how many times the girl was raped. The complainant described that there was a blanket on the sofa. Kenke knew the appellant for many years by the name "Socks", but was not familiar to the name "Jafta". She was present when the two girls pointed Socks out to the police.

[18] Lawrence Madimetja Mabusela is a Sergeant with 12 years' service in the Police Service. On 24 March 2016 at 22h15 he attended to a complaint. The complainant

told him in Xhosa that she was raped by Jafta. She pointed a shack out. The appellant opened the door and he eventually arrested him. He did not enter the shack.

[19] An affidavit in terms of section 212(8) of the Criminal Procedure Act 51 of 1977 was accepted, showing that swabs were taken from the complainant and buccal samples were taken from the appellant. A further document was handed in by consent, indicating that no semen or blood was detected on two panties.

Evidence for the appellant

[20] Mosiwa Jafta Mokhahle, the appellant, testified that he is known as 'Socks'. He knew the complainant and A by sight. They are neighbours. He knew the complainant's mother very well, since 2002. KG Spaza shop is next to the complainant's house. Right in front of his shack is another spaza shop, facing his house. Mashaba-shop is across the street, also facing his shack.

[21] He worked during the day in Wadeville and knocked off at 14h30. He was wearing a green overall to work, which he did not usually take off when he arrived home. He denied that the complainant had ever entered his shack, except for the day when he was pointed out.

Common facts

[22] Socks is the appellant's nick name. He and the two children knew each other for quite some time. Their houses are situated in close proximity and they used to visit the same spaza shops. The pointing out is admitted. There is no doubt about identity.

[23] The medical evidence by Dr Masango, albeit six days after the incident, corroborates penetration, while the evidence by P N, who examined the complainant the day after the incident, clearly shows that the child was sexually tampered with.

Issues

[24] The court a quo correctly found that the only issue is whether it was indeed the appellant who was the perpetrator and that this issue revolves around the credibility of the witnesses.

Evaluation of the evidence

[25] The magistrate applied her mind to whether the evidence was sufficient to show beyond reasonable doubt that penetration had occurred. The doctor testified that the cleft that he had found was consistent with penetration by a blunt object. Therefore I cannot fault the finding that rape was committed.

[26] Treating the complainant as a single witness, the court a quo was mindful of the cautionary rules as set out in *S v Mokoena.*[2] It is trite that a court should approach the evidence holistically.

[27] The same version which the complainant related in the court a quo, was also related to her mother. In court, the two girls related the same version in essence, but there were indeed contradictions. The first ground of appeal is based on the contention that the court a quo erred in finding that the state had proved its case beyond reasonable doubt, as there were material contradictions between the testimony of the girls as to what the appellant did on the day of the incident.

The contradictions

[28] A. testified that they were on their way back from the shop, while the complainant testified that they were going to the shop to buy chips. It was not canvassed what happened to the chips, if it was indeed bought. The fact is, however, that the girls were in close proximity to the appellant's shack, in order to visit Mashaba shop.

[29] Counsel for the appellant submitted that there is a contradiction in that A. informed the court that the appellant caught the complainant in the street and pulled

[2] 1932 OPD 79.

her into his shack. On the other hand, the complainant said that they were called by the appellant and both of them proceeded into appellant's yard.

[30] The record shows that there was some confusion about what the complainant had said: whether it was cold, or whether she was being scold for sitting on a stoep, or whether she was getting soiled as she was seated on a stoep, and therefore being scolded. Further evidence is that there are streets and shacks with passages in between, where people freely moved. The complainant testified that she was seated on the stoep of a shack; not that of the appellant. He told her that it was cold and took her into his shack. A. testified that she told the complainant that they should run away, but that the appellant had grabbed the complainant.

[31] Although A. did not testify that she was sent to buy a cigarette and what she did with it, she indicated to the complainant's mother that she had put the cigarette under a carpet at the door.

[32] The appellant suggested that the reason why the complainant is able to describe the inside of his shack, is because she had entered the shack during the pointing out. The complainant contradicted herself on this point during cross-examination. All the people present at the shack, including Sargent Mabusela, denied that they have entered the shack during the pointing out. Therefore I do not regard this contradiction as inherent. The complainant was able to describe the inside of the shack with clarity, even referring to clothes stacked at the foot-end of the bed, because she was inside and had the opportunity to make her observations.

[33] I agree with the conclusion of the court a quo that the discrepancies are not material as they were a matter of detail and as such do not impact on the credibility of the witnesses. The contradictions are not essential. Nothing turns on it.

[34] It was further submitted on behalf of the appellant, that his version was reasonably possibly true and that the trial court erred in rejecting it. The magistrate found that the appellant 'demonstrated an ability to tailor his evidence to his advantage', that there is overwhelming evidence against the accused and that the appellant's version is highly improbable. She based this finding on the inexplicable

situation, (where the complainant was undoubtedly sexually assaulted), as to why these two children would accuse the appellant as the perpetrator in circumstances where they knew him well. They had no motive to falsely incriminate him. If the perpetrator was somebody else, they could say so.

[35] Contradiction per se does not necessarily lead to the rejection of a witness' evidence. Contradictions may simply be indicative of an error, not every error made by a witness affects his credibility. The trier of facts has to make an evaluation, taking into account such matters as the nature of the contradictions, their number and importance.

[36] Nestadt JA in *S v Mkohle*[3] expressed as follows: 'It need hardly be stressed that where a trial court's findings on credibility are in issue on appeal, as in this matter, then, unless there has been a misdirection on fact, the presumption is that the conclusion is correct, the appellate court will only reverse it if convinced that it is wrong.'

[37] In my opinion the magistrate correctly concluded that the inconsistencies and differences there were of a relatively minor nature and "the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction." In my opinion the court a quo did not misdirect itself.

[38] In *S v Chabalala*[4]*,* Heher J enunciated that a court has to weigh up all the elements which point towards the guilt of the accused, against all those which are indicative of his innocence, taking proper account of inherent strength and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.

[39] I therefore come to the conclusion that the state has proven beyond reasonable doubt that the appellant had sexual intercourse with the complainant. The court a

[3] 1990 (1) SACR 95 (A) at 100 E.
[4] 2003 (1) SACR 134 (SCA).

quo, rejecting the appellant's bare denial as not reasonably possible true, did not misdirect itself.

The appeal against the sentence

[40] An appeal court should be mindful that the power to interfere with the trial court's discretion in imposing a sentence is limited unless the trial court's discretion was exercised wrongly. The essential enquiry is whether the trial court exercised its discretion properly and judicially. Only if the answer is no, this court will interfere with the sentence imposed. If the sentence imposed is disturbingly inappropriate and/or where there is a gross disparity between the sentences which the appeal court would have imposed, had it been the trial court, this court can interfere.[5]

[41] In *S v Sadler*[6], it is emphasised that, for interference to be justified, it is not enough to conclude that one's own choice of penalty would have been *an* appropriate penalty. Something more is required; one must conclude that one's own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Sentencing appropriately is one of the more difficult tasks which face courts and it is not surprising that honest differences of opinion will frequently exist. However, the hierarchical structure of our courts is such that where such differences exist it is the view of the Appellate Court which must prevail.

[42] In *S v Pieters*[7], the decisive question facing a court of appeal on sentence was formulated as: '(W)hether it was convinced that the court, which had imposed the sentence being adjudicated upon, had exercised its discretion to do so unreasonably. If so, the court of appeal was entitled to interfere, and, if no, not.… (E)ven if the court of appeal is of the view that it would have imposed a much lighter sentence, it would not be free to interfere if it were not convinced that the court below could not reasonably have imposed the sentence which it determined.'

[5] *S v Nyaki* 2014 JDR 0461 (GSJ), S v Salzwedel and others 1999 (2) SACR 5; 86 at 588A-B).
[6] 2000 (1) SACR 331 (SCA), para [10]
[7] 1987 (3) SA 717 (A), at 734 D-F.

[43] The magistrate was mindful that the seriousness of the offence is compounded by the age of the complainant. The complainant was still in her formative years. She expressed that child sexual abuse exposes a child to sexual activities that they do not fully comprehend. The event was a life changing experience and will probably continue to impact negatively on her. The appellant was her senior in age and social standing as a neighbour.

[44] The age of the complainant brings this offence within the purview of section 51 (1) of the Criminal Law amendment act, which calls for a minimum sentence of life imprisonment unless the court found that substantial and compelling circumstances existed which justified a lesser sentence in terms of section 51(3).

[45] Marais JA in *S v Malgas*[8] described the substantial and compelling circumstances as those that reduce the moral guilt of the offender which, when taken cumulatively, justify the imposition of a less severe sentence than the one prescribed. The Court of Appeal warned that those prescribed sentences should not be deviated from for flimsy reasons.

[46] In *S v Mofokeng and Another*[9] Stegmann J said that ‘for substantial and compelling circumstances to be found, the facts of the particular case must present some circumstance that is so exceptional in its nature, and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case, that it can rightly be described as "compelling" the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified'. However, the Court of Appeal in *Malgas* disavowed the suggestion that for circumstances to qualify as substantial and compelling they must be 'exceptional'. Such requirement does not appear from the legislation.

[47] The personal circumstances of the appellant were related to the court by mouth of his legal representative. He has one previous conviction of housebreaking with intend to commit an offence unknown to the state, committed in 2010. The appellant was born on […] July 1986. He was 28 when the offence was committed and 29 at

[8] 2001 (1) SACR 469 Z (SCA) (2001 (2) SA 1222 [2001] 3 ALL SA 220; [2001] ZASCA 30) para 24.
[9] 1999 (1) SACR 502 (W), at 523*c* – *d*.

time of sentence. He is single and has no children or dependants. He attended school up to grade six. At the time of his arrest he had been working as a welder for a period of four months and earned R1 000 per fortnight. He was in custody since his arrest on 24 March 2016. He rented his shack at […] S Street, Extension 9, Germiston.

[48] The state again called N H, to testify in aggravation of the sentence. The complainant was born on 19 August 2005. From age four to seven she was raised by her fraternal grandmother in Matatiele. After her fraternal grandmother passed away she stayed with her mother.

[49] The complainant was teased by other children for being raped, which continuously brought her to tears. She often complained about the teasing. She would still go out to play and she willingly went to the shops when ordered to do so. Her mother sent her to her aunt in Kokstad, where she attends school. Her younger brother still stays with her mother. He misses her, although the three have daily telephonic contact. Her behaviour towards male persons familiar to her, did not change.

[50] After this incident the complainant was having difficulty to fall asleep. Once asleep she had nightmares, often waking up in tears. Her scholastic performance is satisfactory.

[51] There is no doubt about the seriousness of this offence and that it warranted a long term of imprisonment. In *S v Tshoga*[10], the court expressed as follows: 'Rape is generally degrading, humiliating and a brutal invasion which is a violent infringement of a person's fundamental right to be free from all forms of violence, and not to be treated in a cruel, inhumane or degrading way. Furthermore, it infringed the complainant's fundamental right, as a child, to be protected from maltreatment, degradation and abuse.'

[10] 2017 (1) SACR 420 para [32].

[52] The complainant and A, within minutes after the rape, played hopscotch, which involves jumping. The complainant testified that she felt pain in her stomach and in her vagina which complaints were confirmed by her mother. When the doctor examined her, six days later, no injuries were recorded. Importantly, the fact that she went to play after she was raped, demonstrates that she did not sustain severe injuries.

[53] I am mindful of the provisions of section 51 (3)(aA)(ii) of the Criminal Law Amendment Act, stating that when imposing a sentence in respect of the offence of rape, an apparent lack of physical injury to the complainant shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. In cases such as *Rammoko v The Director of Public Prosecutions*[11]*, S v Mahomotsa*[12] and *S v Abrahams*[13]*,* it was held that the objective gravity of the offence plays an important role in sentencing.

[54] The degrees of seriousness were explained in *S v Mahomotsa*[14]. It was held that 'If substantial and compelling circumstances are found to exist, life imprisonment is not mandatory nor is any other mandatory sentence applicable. What sentence should be imposed in such circumstances is within the sentencing discretion of the trial court, subject of course to the obligation cast upon it by the Act to take due cognisance of the Legislature's desire for firmer punishment than that which may have been thought to be appropriate in the past. Even in cases falling within the categories delineated in the Act, there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the *caveat* that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. Some rapes are worse than others and 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. Of course, one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must

[11] 2003 (1) SACR 200 (SCA) [2002] 4 ALL SA 731.
[12] 2002 (2) SACR 435 (SCA) ([2002] 3 All SA 534; [2002] SASCA 61
[13] 2002 (1) SACR 116 (SCA) para [29].
[14] 2002 (2) SACR 435 (SCA) paras [18] and [19].

follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit.'

[55] It is important to bear in mind the chief objectives of criminal punishment, namely retribution, the deterrence of criminals, the prevention of the crime and the reformation of the offender. Theron JA, in *S v Moswathupa*[15] reminded that: 'It is trite that punishment should fit the criminal as well as the crime, be fair to the accused and to society, and be blended with a measure of mercy. In *S v V* 1972 (3) SA 611 (A) at 614D – E Holmes JA emphasised that '(t) he element of mercy, a hallmark of civilised and enlightened administration, should not be overlooked'. Holmes JA added that mercy was an element of justice, and referred with approval to *S v Harrison* 1970 (3) SA 684 (A) at 686A, where the learned judge had said that '(j)ustice must be done; but mercy, not a sledge-hammer, is its concomitant'.

[56] The appellant is a first offender. The seriousness of the rape is to be distinguishable for the reasons mentioned above. I propose to set the sentence of life imprisonment aside and to substitute it with a sentence of 20 years' imprisonment.

[57] I therefore make the following order:

1. The appeal against the conviction is dismissed.
2. The appeal against the sentence is upheld.
3. The life sentence imposed by the Regional Court is set aside and is substituted with the following:
   'The accused is sentenced to 20 years' imprisonment.'
4. The sentence is antedated to 15 March 2018.

[15] 2012 (1) SACR 259 SCA at para [8] – [10].

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C REYNEKE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

I Agree.

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J MABESELE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Counsel for the Appellant: Adv A Mavatha

Instructed by: Legal Aid SA

Counsel for the Respondent: Adv V H Mongwana

Date of Hearing: 3 September 2018

Date of Judgment: 20 September 2018