REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A 158/2018

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
(4)

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DATE **RAMAPUPUTLA AJ**

R J M **APPELLANT**

Versus

THE STATE **RESPONDENT**

JUDGMENT

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[1] The appellant stood trial on three counts of rape in the Regional Court at Protea, Soweto. He was legally represented and pleaded not guilty to the three charges. He did not give any explanation in terms of section 115 of the Criminal Procedure Act 51 of 1977.

[2] The appellant was convicted of two counts of rape in terms of section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 read with the provisions of section 51(1) of part 1 of schedule 2 of the Criminal Law Amendment Act 105 OF 1997. He was acquitted on count 3.

[3] The complainant was 10 years old at the time the alleged offences were committed. She is the appellant's physically handicapped daughter and is epileptic.

[4] The appellant was sentenced as follows:-

Count 1 – to life imprisonment; and

Count 2 – to 10 years imprisonment.

The sentences on count 1 and 2 run concurrently. The effective sentence is therefore life imprisonment. This is an appeal in terms of section 309(1)(a)(ii) of the Criminal Procedure Act 51 of 1977 which provides for an automatic right of appeal in the event the Regional Court convicts an accused person and sentences that person to life imprisonment. Before us is an appeal against conviction and sentence.

BRIEF OVERVIEW OF THE FACTS

[5] The complainant is a physically handicapped minor who was 11 (eleven) years oId at the time of the trial. She is regarded as mentally slow.

[6] It is alleged that during June and September 2010, the specific dates unknown, the appellant unlawfully and intentionally committed an act of sexual penetration with Z M, by inserting his penis into her vagina. At the time of the incidents the complainant was only 10 years old. The appellant is the complainant's

biological father. It is alleged that both incidents happened at the appellant's house. The complainant and the appellant were sleeping in the same bedroom. The appellant was sleeping on the bed and the complainant on a sponge on the floor.

[7] The first incident happened in the night when the complainant had finished urinating in the bucket they use for that purpose. The appellant instructed complainant not to put her panties back on and he penetrated the complainant in a standing position. At the time of this incident her mother and sister were sleeping in another bedroom because the appellant and her mother were not on speaking terms. The second incident happened on the bed when the complainant's mother went to buy a cell-phone for complainant's sister.

[8] The complainant informed her mother about the incidents and the mother took her to the clinic where-after they went to report the incident to the police who referred them to Doctor V.

[9] Dr V examined the complainant and found that there was an injury to her hymen. The doctor concluded that the injury could only have been caused through sexual penetration. The doctor further confirmed the complainant suffered from a sexually transmitted disease.

[10] She started experiencing an increase in epileptic seizures after the rape. Her personality changed because she began to be very aggressive. She had a tendency to imitate sexual movements to men visiting her parental home.

STATE WITNESSES

[11] The state called, in addition to the complainant, two further witnesses, being the complainant's mother and Dr V. The complainant's mother testified that the complainant had informed her of the two rape incidents. The mother also testified that the complainant's sister had raised doubt on whether the appellant was capable of raping the complainant and had suggested that the complainant be taken to the clinic for examination. The mother did so where-after they went to report the incident to the police who referred them to a doctor.

[12] Dr V examined the complainant and found that there was an injury to the complainant's hymen. The doctor concluded that the injury could only have been caused through sexual penetration.

APPELLANT'S TESTIMONY

[13] The appellant testified in his own defence. The appellant's defence was that of a total denial.

GROUNDS OF APPEAL

[14] It was submitted that the trial court had erred in finding that the State had proved its case beyond reasonable doubt and had not applied the required standard of proof; that the trial court had misdirected itself in accepting that the State witness' evidence was satisfactory despite discrepancies and contradictions and that the trial

court had erred in finding that the appellant's version of the two incidents in June 2010 and 26 September 2010 respectively, were not reasonably possibly true.

[15] The appellant further submitted that the complainant had been told what to say and that he did not know anything concerning the allegations. He testified that he had never raped the complainant. The appellant testified that he was diagnosed with HIV and has never told anybody including the mother of the complainant.

[16] Counsel for the appellant argued that:- " The most crucial aspect of this case with respect is based on the following:- (Q) The accused will deny ever raping you. (A) I am not disputing that". This honest answer, so the argument ran, completely destroyed the State's case against the appellant.

[17] I don't agree. Such construction of the evidence is wrong because what the complainant was simply saying, in the quoted portion, was that she cannot dispute that the appellant was going to deny that he had raped her. Not that such denial was factually accurate.

STATE'S CONTENTION

[18] It is argued for the state that the state proved the charges against the accused beyond reasonable doubt. It was submitted that the state witnesses were credible and that even if there were inconsistencies, those were not material. It was argued that the appellant's evidence was full of improbabilities.

ISSUES

[19] The issues which fall for determination are:-

(i) whether the state has proved beyond reasonable doubt that the appellant was the person who raped the complainant.

(ii) Whether the trial court misdirected itself in accepting that the State witnesses' evidence was satisfactory despite discrepancies and contradictions;

(iii) Whether the trial court erred in finding that appellants version of the two incidents in June 2010 and September 2010 respectively were not reasonably possibly true.

ASSESSMENT OF THE EVIDENCE

[20] The state's evidence hinges upon the complainant who is said to be slow in mind, is physically disabled, and who suffers from both epilepsy and cerebral palsy. A psychologist confirmed that the complainant is competent to testify as long as the court is patient with her and follows the procedure she recommended. The defence did not challenge the complainant's competence to testify. The complainant is a single witness in respect of who, how and what caused the injury to her hymen. She is the only witness who can lead evidence to prove who raped her.

IDENTIFICATION

[21] The complainant testified that the reason why she was in court was because her father had raped her. She mentioned her father's name as K. She described rape as when someone takes you into the blankets, gets on top of you, the bed

starts moving, the people get sweat and thereafter they get dressed. She was also demonstrating with side to side body movements.

[22] The first incident happened in June in the night when the complainant had finished urinating in the bucket they use for that purpose. The complainant saw something that looked like a ghost. She was about to put her panties on and it was at that time that the appellant said the complainant must not put her panties back on. It was at that time that the complainant realised the ghost-like figure was her father.

[23] She could see her father because the lights of the outer rooms illuminated the bedroom. This fact was not disputed by the appellant.

CONSISTENCY

[24] The complainant told her mother that her father had raped her. They went to the police station to report the rape incidents.

RAPE

[25] The complainant was 10 (ten) years old at the time of the rape incidents.

[26] The appellant bent his hips forwards and backwards and was caressing her. She said her father was naked. The complainant felt pain and she saw a spot of blood on the front part. She saw her father's penis when the appellant was making front and backwards movements. The complainant testified that her father was moving her with his penis. The complainant pointed that the appellant's penis was in

her vagina. The appellant penetrated the complainant in a standing position. She also testified that it took a long time and the appellant told her to go back to bed. She did not touch her vagina and she slept.

[27] The second rape incident happened on the bed when the complainant's mother went to town to buy a cell-phone for complainant's sister. The appellant locked her in the bedroom, told her to undress and opened the blankets. Appellant said she must lie facing upwards. Appellant climbed on top of her. He was naked at that time. Then the bed shook. The complainant said there was a discharge that looked like mucus that came out of the appellant's penis. She says the appellant was moving his penis inside her vagina while on top of her. She was feeling pain. The required sexual penetration has therefore been established.

[28] In *S v AM*[1] the physical and emotional condition of the victim some six hours after the incident and as described by the aunt to whom the victim had reported the rape, was also treated as corroboration of the victim's evidence that her stepfather had raped her. Dr V examined the complainant and found that there was injury to the complainant's hymen. The doctor concluded that the injury could only have been caused through sexual penetration. The doctor further confirmed the complainant suffered from a sexually transmitted disease.

[29] The complainant informed her mother about the incidents and the mother took her to the clinic. This clearly proves that the complainant is consistent and she is a credible witness. In *S v Gentle*[2] Cloete JA (Farlam and Ponnan JJA concurring) refused to treat as corroboration the alleged victim's complaint made to her sister-in-

[1]2014 (1) SACR 48 (FB) (at [6]).
[2] 2005 (1) SACR 420 (SCA)

law, who had arrived on the scene when the victim was without her panties and in what appeared to be an injured state. At [19] it was said that the complaint ‘is not corroboration’ and only proves consistency: ‘It is relevant solely to her credibility. The complaint cannot be used as creating a probability in favour of the State case.

COMPLAINANT’S MOTHER’S EVIDENCE

[30] The complainant’s mother’s evidence does not allege any penetration by the appellant and therefore does not assist much in the rape charge faced by the appellant.

DOCTOR’S EVIDENCE

[31] The undisputed evidence of Dr V is that there was an injury to the hymen. That constitutes clear corroboration of the testimony by the complainant that a penis penetrated her. The penis is the cause of the injury to her hymen. Dr V is qualified to make such a finding and the evidence has not been gainsaid.

INCONSISTENCIES

[33] Evidence was led by the mother that the complainant forgets dates. Therefore, the exact time at which these incidents occurred is not, in the context of this case, material.

DEFENCE

[34] MOTIVE

The appellant's evidence that the complainant's mother had a motive to lay false criminal charges over a dispute for a house is improbable because the complainant's mother has her own house and appellant knows that fact. Furthermore, the doubt (about the appellant having raped the complainant) raised by the complainant's sister with her mother clearly indicates that there was no motive to lay false criminal charges against the appellant.

CONCLUSION

[35] The onus rests on the State to prove all of the elements of the offence of rape. In this case the state had to prove sexual penetration of the complainant.

[36] The State has successfully proven the identity of the appellant and that he is the person who raped the complainant. The complainant's testimony is that she has seen her father's penis. The appellant is the complainant's father so she knows him very well and even refers to him by his first name (K). The complainant is able to identify the appellant as the person who raped her on two different occasions.

[37] The Doctor's findings that there was an insult to the hymen which is consistent with sexual intercourse not only corroborates the complainant's testimony that there was penetration, but also that she felt pain. The complainant was infected

with a sexually transmitted disease. Such factors are clearly proven beyond reasonable doubt.

[38] Counsel who appeared for the appellant, never disputed that the acts of sexual penetration testified to by the complainant had been established by the State. The fact that sexual penetration was not cross-examined means that the complainant's version in that regard stands. In the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[3] the court made it clear "that the institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct". Failure to cross- examine on the above facts is acknowledged by Counsel for the appellant who alleges that the appellant "was not, with respect not properly represented".

[39] Counsel for the appellant was unable to point to any misdirection in the trial court's consideration of the facts. No misdirection is indicated in the conclusion that the State had indeed proved that there was sexual penetration on the part of the complainant's vagina.

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[3] 2000 (1) SA 1 (CC) at 5.

[40] In the light of the medical evidence and the appellant's Counsel's failure to cross-examine the complainant on the appellant's penis penetrating the complainant's vagina, the trial court had no choice but to convict the appellant. The trial court was entitled to convict. In the case of *Rex v Difford*[4] it was held that for the court to be entitled to convict, it must be satisfied that not only is the accused explanation improbable but it must be false beyond any reasonable doubt. The appellants version is improbable and false beyond reasonable doubt.

[41] Having regard to the totality of the evidence, the inconsistencies in the testimony of the complainant, the evidence led by the appellant and his lack of disputing the essential elements of the offence, I confirm that the State has proved beyond reasonable doubt that the appellant is guilty of the offences of rape in respect of counts 1 and 2.

[42] The trial court was correct in finding that the identity of the appellant was proven and that the appellant is the person who penetrated the complainant with his penis.

AD SENTENCE

[43] It is now established that in passing sentence, the trial court must consider the personal circumstances of the accused, the interests of society and the seriousness of the crime.[5]

[4] 1937 AD 370 at 373
[5] *Zinn v The State* 1969 (2) SA 537 (A)

[44] The trial court considered the fact that the appellant was 49 years old. He is mentally healthy. He was gainfully employed and later became self-employed as a panel-beater. He was taking care of his other children. At the time of the incidents he was working as a painter and was earning enough money to take care of his family. He was brought up in a positive upbringing. He was never exposed to any violence. He had to drop out of school in standard 9 due to financial constraints.

[45] The trial court further considered that the appellant was aware that it was illegal and punishable by law to rape someone. He tested HIV positive in 2009, that is one year before the two rape incidents. He did not disclose his status to anyone including the complainant's mother. He shows no sign of remorse. The rape incident occurred more than once. The triial court considered the seriousness of the offence of rape an the fact that the complainant was only ten years old when the rapes occurred. It also correctly considered the mental state of the complainant and the *sequelae* of the rape incidents. Amongst others, it considered the fact that the complainant was infected with a sexually transmitted decease, that she began to suffer more epileptic fits and that she suffered from recurring nightmares. The court also had regard to the prevalence of the offence of rape in the community of Soweto, the fact that the appellant abused the trust the complainant had in him and the fact that the complainant is his daughter. The complainant started being very aggressive. She started imitating sexual movements to men who visited her parental home.

[46] In balancing the above factors, the trial court concluded that there were no substantial and compelling circumstances on the part of the appellant that warrant a deviation from the prescribed minimum sentence and imposed a sentence of life

imprisonment on count 1. The trial court despite believing that a term of direct imprisonment is appropriate in respect of count 2 only imposed a sentence of 10 years and ordered that the 10 years run concurrently with the life imprisonment imposed on count 1.

[47] As regards the period spent in prison before sentencing it must be recalled that any sentence contemplated in section 51 of the amendment act shall be calculated from the date of sentence.[6] In the case of S v S v Radebe[7] the court held that the pre-sentence period in detention is only one of the factors that should be taken into account "in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. The test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one" .

[48] There is no indication that, in the imposition of the sentences on the appellant, the trial court exercised it's discretion improperly. In the case of *S v Matlala*[8] it was held that in an appeal against sentence the test is whether the trial court in imposing it exercised its discretion properly or not.

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[6] Section 51(4).
[7] 2013 (2) SACR 165 (SCA) at paras [13] and [14]
[8] 2003 (1) SACR 80 (SCA) at 83d-e.

[49] There is also no indication that a disparity exists between the sentence imposed by the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as shocking, startling or disturbingly inappropriate.

[50] In the case of *S v Malgas*[9] per Marais JA restated the principle and said "a court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of 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. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate'

[51] It was argued that the appellant's personal circumstances and other factors mentioned, constituted substantial and compelling factors justifying a departure from the prescribed minimum sentence.

[52] The fact that the appellant has other children to support cannot be regarded as justifying a departure from the prescribed minimum sentences.

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[9]2001(1) SACR 469(SCA) at 478D.

[53] In the case of *S v Malgas*[10] it was held that "the specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances."

[54] The above sentences are appropriate for the crimes committed and only lead me to conclude that the Learned Magistrate exercised his discretion judiciously and properly. I see no reason to tamper with the sentence imposed by the trial court.

[55] In the result, the appeal against conviction and sentence must fail. I confirm the sentence imposed by the trial court.

ORDER

The appeal against the convictions and sentences imposed is dismissed.

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NE RAMAPUPUTLA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

I agree

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I OPPERMAN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

[10]Supra.

APPEARANCES

Appellant's Counsel	: Mr B.P Ndaba
Instructed by	: BP Ndaba Inc
Respondent's Counsel	: Adv P. Marasela
Instructed by	: Director of Public Prosecution
Date of hearing	: 27 November 2018
Date of judgment	: 21 February 2019