IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED: ***Yes***

Date: ***20th October 2020*** Signature: _____

APPEAL CASE NO: A66/2020

COURT *A QUO* CASE NO: VSH142/2017

DPP REF NO: 10/2/5/1-2020/050

DATE: 20th October 2020

In the matter between:

MNGWANGO: THULANI INNOCENT Appellant

- and -

THE STATE Respondent

Coram: Adams J *et* Khumalo AJ

Heard on: 19 October 2020 – This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 20 October 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 12H30 on 20 October 2020.

Summary: Criminal law and procedure – evidence – kidnapping and rape charges – sexual assault and rape of child complainant – multiple contradictions

and inconsistences in the evidence of appellant – the evidence of appellant wholly unsatisfactory as compared to the evidence on behalf of the State, which was sufficient to prove the offences beyond a reasonable doubt – appeal dismissed.

Sentence – minimum sentence regime applicable – effective sentence of imprisonment for life – rape of a child complainant – no compelling and exceptional circumstances justifying a deviation from the minimum sentence – sentence not disturbingly inappropriate – no misdirection – appeal dismissed.

ORDER

On appeal from: The Vosloorus Regional Court (Regional Magistrate Harichand sitting as Court of first instance):

(1) The appellant's appeal against his conviction is dismissed.

(2) The appellant's appeal against his sentence is dismissed.

(3) The appellant's conviction and his sentence by the Vosloorus Regional Court be and are hereby confirmed.

JUDGMENT

Khumalo AJ (Adams J concurring):

[1]. The appellant was arraigned before the Regional Division of Gauteng, held at Vosloorus, on charges of kidnapping and rape. It was alleged that on 10 April 2017 and at Villa Liza, the appellant: (1) unlawfully and intentionally deprived one MS, a fourteen year old female ('the complainant') of her freedom of movement by means of forcefully taking her to his place of residence; and (2) unlawfully and intentionally committed an act of sexual penetration with the complainant by inserting his penis in her vagina without her consent.

[2]. The Appellant pleaded not guilty to both charges. He was convicted on 25 June 2019 and sentenced on 28 August 2019 to six years' imprisonment on the kidnapping charge and imprisonment for life on the rape charge.

[3]. The appellant appeals against both the conviction and sentence.

[4]. The State called as witnesses the complainant, her mother, her older sister and the medical doctor who examined the complainant shortly after the alleged rape.

[5]. The Appellant testified in his defence and also called his two brothers to give evidence corroborating his version.

[6]. The facts giving rise to this appeal are as set in the following paragraphs.

[7]. On 10 April 2017, the complainant, who was fourteen years old at the time, was sent by her mother to the shops at approximately 15:00. According to the mother, the complainant only came home at 20:00 that evening and when she arrived home, she was crying and was carrying her panties in her hand. Her skirt was torn, she was shaking uncontrollably and struggling to walk. The police and an ambulance were called on the same evening.

[8]. According to the evidence of the complainant, she met the appellant, whom she knew well, having grown up in front of him, at the shop. The appellant grabbed her by her hand and dragged her to his place. She was screaming and shouting but nobody assisted her. The appellant said to her that her pride would fall that day. The appellant dragged her to his house, where there was no one at home. After they arrived at his home, the appellant pushed her onto the bed. She tried to fight him off and they struggled as he tried to undress her. In the process some of her clothes were torn. When the complainant screamed the appellant threatened her. The appellant raped her by penetrating her several times without using a condom.

[9]. After the appellant was done, his younger brothers knocked on the door, whereafter they and the appellant had a discussion at the door. The appellant requested his brothers to take her home. She then saw an opportunity to escape and took her chance and ran to her home, where she immediately reported to her mother on what had happened.

[10]. The medical doctor who examined the complainant testified that there were genital injuries noted which were consistent with penetration with a sharp object.

[11]. The appellant testified that he met the complainant at the shop at approximately 16:00 that day and he asked the complainant to visit him. She agreed. On their way to his house, they were holding hands and kissing. This was apparently witnessed by a certain pastor who was never called to give evidence. When they arrived at his house, they found his brothers there, and the appellant and the complainant right away made their way to the bedroom, where, so the appellant testified, the complainant asked him to switch off the lights.

[12]. The evidence of the appellant went as follows:

'After that all was well. Even her skirt was raised up so well. There was no problem, your Worship. I do not want to lie, tell lies against her because she opened a case against me. Mbali at the time was a virgin, and when I realised she was a virgin I did not have sex with her. After she woke up, we sat on the bed and then Sandile arrived. He was coming back from work. He came in the back room. He greeted and then another brother of mine came. He also greeted me and Mbali and he asked where the other boys were.'

[13]. When asked by his counsel to clarify what he meant, the appellant said:

'What I meant is that when I realised that she is a virgin, I did not want to break her virginity. I was under the impression she use – she used to have sex, but then because I saw she was a virgin, I have decided to leave her.'

[14]. After that the complainant sat with him and his brothers chatting and she then said she wanted to leave and she left.

The Trial Court's findings

[15]. The trial Court rejected the appellant's version as highly improbable and found that it falls to be rejected. The trial Court found that the totality of the evidence led by the State was sufficiently corroborated and satisfies the cautionary rules applicable to evidence of a single child witness.

[16]. The trial Court found that the State had proved counts 1 and 2 beyond a reasonable doubt and convicted the appellant on both charges. It then imposed the sentences referred to above.

On appeal

[17]. In our view, the trial Court was correct to reject the appellant's version. During his plea explanation, the appellant, through his counsel, informed the court that his defence would be that he and the complainant had consensual sexual intercourse on the day in question.

[18]. The appellant was asked by the Court to confirm the explanation his counsel was furnishing and the appellant duly confirmed that version. This version was also put to the complainant during cross-examination and she denied that she had consensual sex with the appellant.

[19]. In his evidence in chief, the appellant did an about turn, and claimed that he did not want to have sex with the complainant after he found out that she was a virgin. The appellant's counsel also put to the complainant that the appellant had on a previous occasion in 2016 told the complainant that he loved her. In his evidence in chief, the appellant surprisingly testified that it was the first time he and the complainant met. This was in stark contrast to his evidence earlier that he asked the complainant to 'visit me at my home as lovers do'. He also testified that the complainant was his girlfriend.

[20]. The evidence of the appellant was wholly unsatisfactory. He simply could not explain why, if he and the complainant were lovers, as alleged by him, he would let her walk home all by herself at 20:00 at night and why, when she arrived at home, her clothes were torn. He was also not able to explain why he did not know her age, when, on his version, they were boyfriend and girlfriend. And then importantly, he could not explain why his supposed girlfriend would accuse him of rape.

[21]. It is trite that in criminal cases the onus rests on the State to prove its case against the accused beyond reasonable doubt. In *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448F-G, this Court explained the test as follows:

'The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent.'

[22]. In *Livanje v S* (378/2018) [2019] ZASCA 126 (27 September 2019) at para 8, the SCA reaffirmed the relevant principles that:

(a) In criminal proceedings, the State bears the onus to prove the accused's guilt beyond a reasonable doubt;

(b) The accused's version cannot be rejected only on the basis that it is improbable, but only once the trial court has found on credible evidence, that the explanation is false beyond a reasonable doubt;

(c) The corollary is that, if the accused's version is reasonably possibly true, the accused is entitled to an acquittal; and

(d) It is trite that the appellant's conviction can only be sustained after consideration of all the evidence, and his version of the events if found to be false.

[23]. At para 18, the SCA had this to say:

'[18] In general, a court of appeal would not be inclined to reject the factual findings of the trial court. In *S v Hadebe & Others*, the Court stated that "... in the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong".'

[24]. This Court can find no material misdirections on the part of the trial Court.

[25]. The Appellant was 30 years old at the time the offence was committed. His claim that the 14-year-old was his girlfriend, and yet he did not know her age, need only be mentioned to be rejected. The evidence of the complainant was corroborated by all the witnesses for the State, and is only consistent with the appellant having raped her.

[26]. What other explanation could there be for the complainant arriving alone at home, at 20:00, with her panties in her hands and screaming and shaking? If the appellant and the complainant were lovers as he claimed, why would he let her walk home alone, at 20:00, with her panties in her hands?

[27]. We are satisfied that the State has proved the appellant's guilt, on both counts, beyond a reasonable doubt, and reject the Appellant's contradictory versions as false.

Sentence

[28]. The appellant has been sentenced to a minimum sentence of life imprisonment.

[29]. In *Director of Public Prosecutions: Gauteng Division, Pretoria v Hamisi* 2018 (2) SACR 230 (SCA) at para 15, the SCA held as follows:

'[15] It is trite that a wide discretion is allowed to a trial court in the assessment of punishment. In the absence of material misdirection by the trial court, the appeal court cannot approach the question of sentence as if the appeal court were the trial court, and then simply substitute the sentence of the trial court with that which it prefers. On the other hand, where the court of appeal finds sufficient disparity between the sentence imposed by the trial court and that which it would have imposed, the court of appeal is obliged to interfere.'

[30]. In its judgment on sentence, the trial Court considered the factors referred to in *S v Zinn* 1969 (2) SA 537 (A), being the interests of society, the personal circumstances of the accused and the nature of the offences that have been committed. The trial Court also considered the recognised objectives of sentencing being prevention, rehabilitation, deterrence and retribution.

[31]. It noted that the minimum sentence of life imprisonment is applicable in this case and considered whether there were substantial and compelling circumstances justifying a departure from the prescribed minimum sentence. In the end, the trial Court found that there were none.

[32]. We cannot find any misdirection on the part of the trial Court with regards to sentencing.

[33]. The appellant, a 30-year-old man, targeted and kidnapped and raped a 14-year-old girl. He then let her walk home alone at night, thus exposing her to more danger. This is unconscionable. The appellant did not show any remorse for his actions.

[34]. On consideration of the matter as a whole the court found that there were no 'substantial and compelling circumstances' to deviate from the imposition of the minimum sentence in respect of count 2.

[35]. The test to be applied, when considering sentence on appeal is set out in *S v Kgosimore* 1999 (2) SACR 238 (SCA) at paragraph 10 – 'It is trite law that

sentence is a matter for the discretion of the court burdened with the task of imposing sentence. Various tests have been formulated as to when the Court of appeal may interfere. These include whether the reasoning of the trial court is vitiated or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the Court of appeal would have imposed. All of these formulations, however, are aimed at determining the same thing; *viz* whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence.'

[36]. Having considered all the evidence led at the trial as well as the arguments advanced in respect of both mitigation and aggravation of sentence, I am unable to find that the trial Court failed to properly consider all the personal circumstances of the appellant and to properly and justly weigh these against the interests of society and the community in which the offences occurred.

[37]. I am of the view that the sentence imposed in respect of count 1 was appropriate and that in respect of count 2, similarly, the imposition of the minimum sentence was also appropriate. There is no basis for this Court to interfere with the sentence imposed.

Order

In the circumstances, I propose the following order:-

(1) The appellant's appeal against his conviction is dismissed.

(2) The appellant's appeal against his sentences is dismissed.

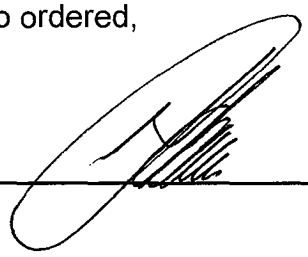
(3) The convictions and sentence imposed by the Vosloorus Regional Court be and are hereby confirmed.

S KHUMALO

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

I agree, and it is so ordered,



L R ADAMS

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

HEARD ON:	19th October 2020 – no oral hearing.
DATE OF JUDGMENT:	20th October 2020 – Judgment handed down electronically.
FOR THE APPELLANT:	Advocate Andile Mavatha
INSTRUCTED BY:	Legal Aid South Africa
FOR THE RESPONDENT:	Adv Deon Van Wyk
INSTRUCTED BY:	The Office of the Director of Public Prosecutions, Gauteng Local Division, Johannesburg

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