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

CASE NO: A72/2021
DPP REF NO: 10/2/5/1(2021/056)
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
16.08.2022

In the matter between:

PIYOSE, MTHOKOZISI Appellant

and

THE STATE Respondent

JUDGMENT

CRUTCHFIELD J:

[1] The appellant appealed against his conviction and sentence on two counts of rape of a minor female in the Regional Court for the Regional Division of Gauteng held at Protea, Soweto.

[2] The prosecution charged the appellant with two counts of contravening the provisions of section 3 of the Sexual Offences Act 32 of 2007 read with the provisions of section 51(1)(a) of the Criminal Law Amendment Act 105 of 1997, in that the appellant unlawfully and intentionally inserted his penis into the vagina of a

minor female, the complainant, 11 years of age, without her consent. Count 1 allegedly occurred on 4 July 2015 and count 2 on 5 July 2015.

[3] The Regional Court convicted the appellant on both count 1 and 2 on 11 November 2016 and sentenced the appellant to 20 years' imprisonment on both counts on 15 March 2017.

[4] The court *a quo* discharged the appellant in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the 'CPA'), on count 3, being one count of contravening the provisions of s 5(1) read with s 156 and ss 1, 57, 58, 59 and 60 of Act 32 of 2007, being sexual assault.

[5] Leave to appeal both convictions and sentence was granted on 11 August 2017.

[6] The appellant pleaded not guilty to all three charges, did not provide a plea explanation and invoked his right to remain silent. The appellant's version was that he did not commit the crimes of which he was found guilty and was falsely implicated.

[7] The appellant was represented throughout the proceedings.

[8] The respondent sought condonation for the late filing of the heads of argument. The respondent provided a reasonably satisfactory explanation for the delay and it is in the interests of justice that this Court grants condonation in respect of the late delivery of the respondent's heads of argument.

[9] The record of the proceedings in the court *a quo* was incomplete in that it omitted a section of the cross-examination of the complainant. The trial was postponed on 6 July 2016 to 14 July 2016 for further cross-examination of the complainant. The record commenced again, however, on 16 August 2016.

[10] An affidavit by the administration clerk of the Protea Magistrates' Court dated 22 July 2021, stated that the resumed cross-examination of the complainant, being the first witness, on 14 July 2016. was missing. A search was done of the filing

rooms, the court where the matter was heard as well as the DOJ and CD central recording media server but to no avail.

[11] The magistrate was unable to assist in reconstructing the missing portions of the record as her notes had been misplaced. The administration clerk requested that the matter be heard in the absence of the missing record.

[12] The respondent noted that the prosecutor had not been approached for assistance with the record and that more could and should have been done in order to reconstruct the cross-examination of the complainant on 14 July 2016.

[13] The respondent contended that the magistrate should have deposed to the affidavit and explained the attempts made by her to reconstruct the record, her inability to do so and whether the prosecutor and the applicant's legal representative during the trial were approached to assist in that reconstruction. The State stated further that absent a proper explanation from the magistrate, it could not be concluded that it was impossible to reconstruct the record.

[14] Counsel for the appellant requested that the appeal proceed as a postponement might be detrimental to the appellant. Furthermore, the defence argued that the appellant should be discharged on the relevant charges as the missing portion of the record was vital given that the complainant was a single witness in respect of counts 1 and 2. If it was impossible to reconstruct the record or if the missing portions contained material evidence that could not be reconstructed, the proceedings must be set aside.[1]

[15] The Supreme Court of Appeal in *Bushi Mike Machaba & Another v The State*,[2] set out the legal position in respect of an incomplete record with reference to *S v Chabedi*,[3] in which Brand JA said the following regarding the record on appeal:

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1 *S v S* 1995 (2) SACR 420 (T) 424b; *S v Ndlovu* 1978 (3) SA 533 (T) 535; *S v Collier* 1976 (2) SA 378 (CPD) 378H – 379; *S v Marais* 1966 (2) SA 514 (T).

2 *Bushi Mike Machaba & Another v The State* (2041/2014) [2015] ZASCA 60 (8 April 2015).

3 *S v Chabedi* 2005 (1) SACR 415 (SCA) paras 5 and 6.

'[5] On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of Appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible (see *S v Collier 1976 (2) SA 378 (C) 379A-D and S v S 1995 (2) SACR 420 (T) 423b-f).*

[6] The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, *inter alia*, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.'

[16] In the event that the adjudication of the appeal on the incomplete record will not cause prejudice to the appellant, the appeal can proceed. It will become apparent hereunder that the imperfect record did not serve to prejudice the appellant, notwithstanding that the resumed cross-examination of the complainant was missing from the record.

[17] The appellant's evidence as well as that of the State's witnesses and the closing arguments were reproduced in full. The imperfect record was consistent as a whole. No allegations were raised in the testimony of the witnesses, the closing arguments or the trial court's judgment that served to indicate that the record omitted material and relevant averments. Accordingly, the appeal proceeded before us.

[18] The appellant contended that the State did not prove the two rape charges beyond a reasonable doubt. More particularly, the identity of the appellant was disputed and the overall credibility of the State's case was questionable.

[19] The appellant argued that the identity of the perpetrator was not proven, that the complainant was not a reliable or a credible witness and that her version was not confirmed in Court.

[20] The appellant argued that the court *a quo* erred in rejecting the appellant's version and in finding that the State had proved its case against the appellant beyond a reasonable doubt.

[21] The complainant was a single witness on the two charges of rape. She was 11 years old at the time of the assaults on her and 12 years of age as and when she testified at the trial. The court *a quo* found that the complainant's evidence was satisfactory in all material respects.

[22] The trial proceedings were held in camera, the complainant was assisted by an intermediary and gave evidence by way of closed circuit television. The magistrate questioned the complainant on the difference between the truth and falsehoods and cautioned the complainant to tell the truth. The court *a quo* sat with two assessors and delivered a unanimous judgement.

[23] The State led the evidence of the complainant, S [....] K [....], the doctor who examined the complainant and the complainant's mother. The appellant gave evidence in his own defence.

[24] The factual background to the matter was that the complainant and her family visited her aunt's family from Friday 3 July 2015 to Monday or Tuesday 7 July 2015. The complainant and approximately four other children, slept in one room whilst the adults and other children slept in a second bedroom and in the dining / sitting room.

[25] The complainant testified that on the night of 4 July 2015, she was on top of the bed occupied by approximately four other children, including a young baby and the witness S [....] K [....].

[26] The appellant entered the room, after he had been drinking alcohol, stood at the side of the bed and asked the complainant to sleep with him in return for money.

She refused to do so. Thereafter, the appellant produced a knife. The appellant lay on top of the complainant, put his hand over her mouth and threatened to kill her if she told anybody.

[27] The complainant tried to cry but was unable to do so. The appellant then released his hand, removed the complainant's underwear and proceeded to rape her. Subsequently, the appellant placed the baby between him and the complainant. The latter woke in the morning in pain and found blood and a white substance in her underwear, which she washed.

[28] The complainant testified that the light in the room was off when the alleged rape occurred on 4 July 2015 but that she recognised the appellant from his voice and saw him in the light of his mobile telephone that was on.

[29] In respect of the second count of rape, on 5 July 2015, the complainant's evidence was that she went to sleep wearing her tights, woke up with something heavy on top of her and in pain as the appellant was penetrating her already when she awoke. The complainant opened her eyes and saw the appellant who threatened to kill her and her family if she told anybody.

[30] Once again, the appellant placed the baby between himself and the complainant after he was finished.

[31] Counsel for the appellant argued that the complainant did not testify that the appellant removed her tights prior to penetrating her on 5 July 2015. Accordingly, counsel contended that the complainant's evidence on the second count of rape was insufficient to sustain the conviction and that it ought to be reduced to one of indecent assault.

[32] The complainant's evidence that she woke up in pain with the appellant already penetrating her, was unequivocal. In the face thereof, the absence of evidence in chief as regards the complainant's tights was not material.

[33] In any event, it was put to the appellant in cross-examination that he tore the complainant's tights[4] and referred to by the appellant's legal representative in his closing argument.[5] The learned magistrate referred to the tights being cycling shorts[6] and that the appellant tore the complainant's panties and tights.[7]

[34] The appellant's contention that the evidence in respect of the second count was insufficient, was without merit.

[35] The complainant underwent a medical examination on 8 August 2015. The medical evidence before the court *a quo* indicated that the complainant was subject to penile penetration that caused injuries to the complainant's posterior fouchette (the lowest part of the vagina), and a healed injury to the complainant's hymen.

[36] The complainant did not report the alleged rapes until 7 August 2015, more than one month after they occurred. The defence argued that the delay in reporting served to diminish the credibility of the state's case.

[37] The complainant testified that she did not report sooner as she was afraid that the appellant would kill her and her family, as he threatened to do. The complainant gave evidence, however, that she informed S [....] K [....] ('K [....]'), on 5 July 2015, that the appellant wanted to sleep with her the previous night. The complainant did not testify that she informed K [....] that the appellant in fact raped her.

[38] The defence argued that the report to K [....] was inconsistent with the child's alleged fear of reporting, that the complainant's evidence (as well as that of the witness K [....]) was inconsistent and insufficient.

[39] The complainant's report to K [....] on 5 July 2015 and that made to the complainant's mother, were materially different. The report to K [....] was not in respect of the alleged rape the previous evening, but only that the appellant wanted

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4 Caselines 003-155 lines 1 to 5.
5 Caselines 003-162 lines 18 to 20.
6 Caselines 003-169 lines 1-2.
7 Caselines 003-169 line 5.

to sleep with the complainant. Accordingly, the complainant's fear of reporting due to the appellant's threats was not inconsistent with the report made to K [....].

[40] As to the delay in the complainant reporting to her mother, the complainant was 11 years old. The appellant produced a knife at the time of the first rape and threatened to kill the complainant and her family in the event that the complainant reported the assault to anyone. That was the reason for the complainant not reporting the rapes.

[41] The circumstances under which the complainant reported the incidents to her mother on 7 August 2015 were material. On that day, the complainant's school class participated in a debate on sexual abuse. The children were told that they must report any such incidents notwithstanding threats made to them by the abusers. The debate upset the complainant. She told her teacher that she was unwell, left school early and returned home to her mother, crying and visibly distressed.

[42] The complainant thereupon informed her mother of the alleged rapes, when they occurred and that the appellant was the perpetrator. The mother and the complainant then reported the alleged rapes to the SAPS and the mother pointed out the appellant, as the perpetrator, to the SAPS.

[43] The school debate served as the reason for the complainant reporting the rapes to her mother on 7 August 2015.

[44] The appellant's version was that the complainant's mother pointed him out as the perpetrator to the SAPS (in circumstances where the complainant did not point the appellant out to the SAPS), as the mother was jealous of the appellant. The alleged jealousy was because the appellant was popular in the home of the complainant's aunt, a frequent visitor to that house and had been asked to keep the keys for the house.

[45] The complainant's mother denied the alleged jealousy and testified that she treated the appellant as a child of the household. The appellant's version that the mother labelled the appellant as her daughter's rapist to the police because she was

jealous of the appellant was lacking in credibility and correctly rejected by the court *a quo*.

[46] The prosecution established a direct nexus between the complainant's report to her mother on 7 August 2015 and the school debate on sexual abuse held on that day. Given that the complainant was 11 years of age together with the threats made by the appellant to kill the complainant and her family, it cannot reasonably be found that the weight of the complainant's evidence was reduced as a result of her delay in reporting the alleged rapes.

[47] As to corroboration of the complainant's version, K [....] and the appellant himself placed the appellant in the bedroom where the complainant testified that she was raped on 4 July 2015. Furthermore, K [....] testified that he left the bed and the bedroom in order to sleep on the couch in another room as a result of the disturbance being caused by the appellant and the complainant, with the appellant begging the complainant and the latter saying 'no no'. The doctor's evidence and that of the complainant's mother corroborated the material aspects of the complainant's evidence.

[48] The respondent tendered K [....]'s evidence on the rape charges only in so far as it served to corroborated the complainant's testimony. The respondent relied on K [....]'s evidence that the appellant was in the bedroom and that the complainant said 'no, no, no' and did not consent to the appellant's assault on her. The prosecution did not use K [....]'s evidence in order to corroborate the complainant's evidence that she was raped or in respect of the identity of the perpetrator.

[49] Counsel for the appellant argued that the intervention of the complainant's mother in pointing out the appellant to the police together with the complainant's delay in reporting the assaults upon her, raised the possibility that the complainant was open to suggestion by the mother as to the identity of the perpetrator. This was relevant in that there were multiple males in the house at the time of the two incidents.

[50] The complainant, however, was unequivocal that it was the appellant who raped her on both occasions.

[51] The appellant acknowledged that he knew the complainant as she and her family visited regularly. The complainant recognised the appellant's voice and saw his face in the light of his cell phone immediately prior to the rape on 4 July 2015, when he asked her to sleep with him for money. The complainant also saw the appellant when he raped her on 5 July 2015. Furthermore, the complainant knew the appellant as their families were friends and the complainant and her family visited regularly.

[52] The complainant's evidence overall, given that she was not contradicted or undermined materially and that her evidence correlated with the respondent's witnesses, was reliable in all material respects. The defence did not sustain any reason not to accept the complainant's version. The court *a quo* was correct in accepting the complainant's version, despite her being a single witness.[8]

[53] The appellant's counsel argued that K [....]'s evidence was unreliable and that the court *a quo* erred in placing reliance thereon given that the charge on count 3 (in respect of which K [....] was the complainant), was dismissed. The appellant's criticism was not sustainable. The court *a quo* accepted that the complainant was a single witness in respect of the two counts of rape and dealt with the complainant's evidence accordingly. K [....]'s evidence was relevant only insofar as it served to corroborate the appellant's presence in the children's bedroom and the disturbance between the complainant and the appellant on 4 July 2015.

[54] The complainant was steadfast in her version. The lacunae and contradictions between the complainant's testimony and that of the witnesses were minor. They did not detract from the complainant's evidence overall regarding the rapes and the identity of the complainant. In the circumstances, the court *a quo* cannot be criticised for concluding that the complainant's evidence was credible and acceptable in all material respects and rejecting the appellant's highly improbable version.

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8 *Jansen v The State* (236/2015) [2016] ZASCA (133).

[55] The appellant's counsel argued that any one of the males sleeping in the same bed as the complainant on the night of the rapes could have raped her and that the respondent failed to exclude any of those males including the stepfather, in respect of whom one of the assessors posed questions during the trial. Counsel's submission is contrary to the authority quoted by her in *Rex v Mlambo*[9] that:

> "… there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused."

[56] Given our Constitution, I am inclined to replace the words 'morally certain', with the words 'certain upon the overall evidence'. Furthermore:[10]

> "An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

[57] The appellant's doubt arose from speculation that it may have been another of the male persons in the house or sleeping in the bed at the relevant time/s. No reasonable or solid foundation based on evidence or reasonable inference was placed before the trial court by the appellant in this regard.

[58] In the circumstances, on the evidence considered as a whole, and, in the light of the complainant's testimony on the rapes and the identity of the appellant as the perpetrator on 4 and 5 July 2015, I am of the view that the court *a quo* correctly convicted the appellant on both counts 1 and count 2.

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9 *Rex v Mlambo* 1957 (4) SA 727 (A) ('*Mlambo*'), footnotes removed.
10 Id.

[59] The appellant also appealed against the sentence of 20 years' imprisonment imposed by the court *a quo.* Counsel for the appellant was of the view that in the event that the appeal against the convictions on count 1 and 2 did not succeed, the sentence was fair and should stand.

[60] It is trite that sentencing is pre-eminently a matter that falls squarely within the purview of the trial court's discretion, and that it should not lightly be interfered with. A court of appeal is, however, entitled to interfere with a sentence where there has been a material misdirection by the trial court, or when the sentence imposed by the trial court is shocking, startling or disturbingly inappropriate.[11]

[61] The appellant was charged with rape read with section 51(1) of the Criminal Law Amendment Act 105 of 1997. The court *a quo* found that there were substantial and compelling circumstances warranting a deviation from the imposition of a life sentence. It took the two counts of rape together for the purposes of sentencing and imposed a sentence of 20 years' imprisonment.

[62] The court *a quo* considered, as was required, the personal circumstances of the appellant, the gravity of the offences of which he was convicted and the interests of society, before imposing the sentence. Counsel for the appellant correctly conceded that the sentence imposed by the trial court was appropriate. In my view it cannot be argued that the trial court misdirected itself, or that the sentence imposed was so shockingly heavy that interference is warranted.

[63] By reason of the aforementioned, I propose the following order:

1. The late delivery of the respondent's heads of argument is condoned.

2. The appellant's appeal on conviction and sentence is dismissed.

CRUTCHFIELD J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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[11] *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12.

GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree and it is so ordered

MDALANA-MAYISELA J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **16 August 2022**.

COUNSEL FOR THE APPELLANT:	Adv J Henzen-Du Toit
INSTRUCTED BY:	Legal Aid South Africa
COUNSEL FOR THE RESPONDENT:	Adv L R Mashabela
INSTRUCTED BY:	National Department of Public Prosecutions
DATE OF THE HEARING:	10 March 2022
DATE OF JUDGMENT:	16 August 2022