SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

CASE NO: A 165/2014

DATE: 18 AUGUST 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

RONNIE MOAGI MOTSHABA Appellant

and

THE STATE Respondent

JUDGMENT

J W LOUW. J

[1] The appellant was arraigned on two counts of rape as contemplated In s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (the Sexual Offences Act). The victim in the first count was a 5 year old girl to whom I shall refer as G. The victim in the second count was an 8 year old boy to whom I shall refer as N. The appellant pleaded not guilty to both counts. The trial court convicted him of rape on count 1 and of indecent assault on count 2. He was sentenced to 10 years imprisonment on count 1 and to 2 years imprisonment on count 2. The appellant was granted leave to appeal against both the convictions and the sentences.

[2] The first state witness was Ms Gladys Mlangeni, a social worker who does forensic work. She assessed both children and prepared reports which were handed in as exhibits. She found that G's language skills were fully developed and that she was able to verbalise in detail the information of the alleged incident in a consistent but not in a chronological manner. She did not know the name of the offender but was able to give

a verbal description of him. She recommended that G should be given the opportunity to testify in court through an intermediary. She found that N was also able to give detailed information of the alleged incident and that he was able to verbalise the incident in a consistent and chronological manner.

[3] The second state witness was G's mother. She testified that on the day in question the police came to her house and informed her that G had been raped. She was then taken to the police station where she found her. She asked G what had happened and she told her that she had been in the company of N when they met a person to whom G referred to as "a certain brother". The brother took them and said he was going to buy them ice cream suckers. The brother then went with them to what she called a ditch where he started undressing IM and found that he was a boy. He then told N to dress up and sit and watch. The brother then undressed her and tried to put his penis into her vagina but could not. He then put his finger into her vagina.

[4] The third state witness was N's mother. On the day in question she received a call from the police while she was driving home. She immediately drove to G's parental home, where she was told that the children had been taken to the police station. What N told her at the police station corresponded in all material respects with what G had told her mother. N also referred to the perpetrator as a certain "brother" and told his mother that he "tore" N's yellow track suit and then found out that N was a boy. What N added further was that the two children started crying while the perpetrator was busy with G and that, luckily for them, students from a nearby school walked past and heard the screams of the children. The two children then managed to run away. One of the students chased the two children to find out why they were crying. N told the student that there was someone in what he called a tunnel who was busy undressing them. Fortunately there was a police van driving in their direction and the students then informed the police officers what was happening. By that time, the perpetrator had gone back into the tunnel but the police knew where the tunnel ended and apprehended him at that end when he was trying to run away.

[5] The next witness called by the state was G. She gave her evidence through an intermediary from a separate room. She demonstrated what the perpetrator had done to her by pointing it out on a female and a male doll. She also indicated on the female doll that she was injured on her private parts.

[6] The next state witness was N, who also gave his evidence through the intermediary. He testified that the perpetrator tore his trousers and that he then undressed G and raped her by putting his penis inside G. He demonstrated this by pointing to the private part of the doll. The perpetrator then said he was going to put the two children in a dark place but they managed to run away.

[7] The state then called A[...] M[...], who was one of the students who arrived on the scene. He testified that as he and two of his friends were walking past what he called a drain, they heard children crying and when they reached the place, the appellant emerged. They asked him what was happening and the appellant said

they must leave him alone. A small boy then emerged and a small girl followed him. They were both crying and the little girl had only her panty on. The students then chased the appellant and apprehended him in the school yard. They took him to the principal's office and kept him there until the police arrived.

[8] In cross-examination, it was put to the witness that the appellant would testify that he did not try to rape the children but that the three students threatened to rob him and that he ran away to the school. This was denied by the witness. When the appellant testified, he did not say that the students tried to rob him. His evidence was that when the three boys approached him, he realized that they were trying to put him "into their middle". He wrestled with one of the boys and they fell to the ground. He stood up and ran away towards the school. He then came across the principal who asked him what was happening. He told the principal that the three boys were chasing him. The principal apparently then spoke to the three boys and he then told the appellant that the boys said that they had seen the appellant raping someone. The police were then phoned and they arrested the appellant. The appellant did not call any other witnesses to testify in his defense.

[9] The court then called warrant officer Oosthuizen as a witness. He was the police officer who took the appellant's warning statement. He confirmed that he explained the appellant's rights to him and that he read the statement back to him. According to the statement, the appellant said that he was drinking at a tavern with friends, that he then went to a lady's house to watch DVD's and that he then went to a shop to buy cigarettes. On his way, he went to urinate behind the tavern, where he was attacked by males for urinating in public. They took his wallet and his money. He ran away from them across the open field towards the school. There he fell and was attacked by those males. He was later arrested for rape. This version also differs in many respects from the one which the appellant gave in court.

[10] The two children corroborated each other in all material respects. Their evidence in court was further consistent with what they reported to their respective mothers and told the social worker. Adv van Rooyen, who appeared for the appellant, conceded, in my view correctly so, that the two children corroborated each other and that N's evidence made G's evidence more credible. He further conceded that no value could be attached to the appellant's story that he was attacked by robbers. In my view, the learned magistrate did not err in accepting the evidence of the state witnesses and in rejecting that of the appellant.

[11] In respect of count 1, the court found that at least the appellant's finger penetrated G's vagina and accordingly convicted the appellant of rape. In my view, the magistrate's finding was correct and the appeal against the conviction on count 1 must accordingly fail.

[12]In respect of the second count, the court found that the pulling off and tearing of N's track suit pants and forcing him to watch the incident with G could only amount to indecent assault. The appellant was

accordingly convicted of indecent assault on count 2.

[13] Mr. van Rooyen submitted on behalf of the appellant that the trial court erroneously convicted the appellant of indecent assault on count 2 as the common law crimes of rape and indecent assault were repealed by s 68(l)(b) of the Sexual Offences Act. This was conceded by Adv Ngcobo on behalf of the respondent. The appellant was charged in both counts with rape as contemplated in s 3 of the Sexual Offences Act. This section must be read with s 261 of the Criminal Procedure Act, 51 of 1977, as amended, which makes provision for competent verdicts should the evidence not prove rape as contemplated in s 3 of the Sexual Offences Act. Mr. van Rooyen submitted that the evidence presented by the state did not prove any of the competent verdicts for which s 261 provides. This was also conceded by the respondent.

[14] It follows from the aforegoing that the conviction and sentence of the appellant on count 2 must be set side.

[15] I proceed to deal with the sentence of 10 years imprisonment imposed by the trial court in respect of count 1. The minimum sentence prescribed by s 51(1) of Act 105 of 1997 for rape where the victim is a person under the age of 16 years, in the absence of a finding of substantial and compelling circumstances which justify the imposition of a lesser sentence, is imprisonment for life. The court took into account that only a finger was used by the appellant for penetrating and that there were no injuries caused to G, and therefore deviated from the prescribed minimum sentence.

[16] It was submitted by Mr. van Rooyen that it appeared from the medical evidence, especially that G's hymen was absent, that this was not the first time that G had been raped and therefore that it would not have had such a great physical impact on her. In my view, there is no merit in this submission. Surely a little girl of 5 years will be traumatised each time she is raped, should she be so unfortunate for it to happen more than once. It was further submitted that the state failed to obtain a victim impact report which could, for example, have indicated that G was not doing well at school. If such a report had been obtained, it would have made matters worse rather than better for the appellant. It was finally submitted that the court should have taken into account that the appellant was a first offender and that he had family members to support.

It appears from the court's judgment that it did take into account that the appellant had no previous convictions, that he could not be described as a hardened criminal, that he had fixed employment, that he was unmarried but had one child and that he would lose his income if imprisoned.

[17] It is trite that a court of appeal's power to interfere with the sentence imposed by a trial court is limited and that it will only do so if the trial court has misdirected itself or if the sentence imposed was startlingly inappropriate. In my view, this cannot be said in the present matter. In fact, the appellant should, in my view,

consider himself fortunate not receiving a sentence of longer than 10 years.

[17] In the result, I propose that the following order be made:

(a) The appeal against the conviction and sentence on count 1 is dismissed.

(b) The appeal against the conviction and sentence on count 2 is upheld.

(c) The conviction and sentence on count 2 is set aside.

I agree, and it is so ordered.

M.W.MSIMEKI, J