IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Appeal Case No: A740/2015

Case: 29/11/2016

In the matter between:

ANDREW MATSANE Appellant

and

THE STATE Respondent

JUDGMENT

HF JACOBS, AJ:

[1] The appellant, a 36 year old man, was convicted on a charge of rape of a minor (Ms T) who was at the time of the offence between 9 and 12 years old. He was charged for having raped the complainant four times. He was however only convicted for two of the incidents. The appellant was informed at the commencement of the proceedings a *quo* that the prosecution would rely on the minimum sentence provisions of Act 105 of 1997. The appellant had legal representation during the hearing and was sentenced at its conclusion to life imprisonment and declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000. The appellant appeals in terms of section 1O of the Judicial Matters Amendment Act 42 of 2013 against his conviction and sentence.

[2] The appellant pleaded not guilty to the charge and explained his plea by stating that Ms T is the [....] of the appellant's [....] deceased [....] and that he knows Ms T. Ms T stayed with the appellant but denied that he ever raped her. Ms T testified via closed circuit television in terms of section 170A of the Criminal Procedure Act of 1977 with the help of an intermediary. The first State witness was Ms M. who worked for a community project in Atteridgeville. She knew Ms T as a child who does not have parents. At a function of the community on or about 15 March 2011 which was a Saturday, attended by Ms T with other children, Ms T waved at Ms M. and other staff members and told them that she (Ms T) would see them the following day (the Sunday). The next day and at conclusion of the function there was a church sermon and after that there was a lunch for those who attended. After Ms T had lunch she entered the kitchen and said that she has a problem. On further enquiries Ms T said she wanted to explain her problem to female persons. She said that she was having a problem at home with the husband of her [....] and that the husband of her [....] is abusing her and has had sexual intercourse with her. She also stated that it started long ago and that the accused used to take her during the night to have sexual intercourse with her. Ms T was, according to Ms M., crying while narrating the events. Ms T told Ms M. further that the last incident took place the previous Saturday, which was 5 March 2011.

[3] The prosecution then called Dr Mojabelo. Ms T was brought to Dr Mojabelo on 18 March 2011 when she interviewed and examined Ms T and, while doing so, completed the medical Form J88. Dr Mojabelo stated that she assessed the mental status of Ms T and found her to be withdrawn. Dr Mojabelo did so after having been informed that Ms T had since March 2009 until 5 March 2011 (13 days earlier) been sexually assaulted by a male person known to her. Dr Mojabelo found no evidence of external injuries and proceeded with a gynaecological examination. The doctor found that Ms T had not yet started menstruation

and had never been pregnant and was not using any contraceptive at the time and said she has never had consensual intercourse since or before. The doctor found Ms T's hymen to be torn and that she displayed an odorous vaginal discharge. Dr Mojabelo found that possible penetration beyond the vulva and vagina had occurred. Dr Mojabelo handed in the Form J88 and confirmed the correctness of her notes thereon during evidence. The cross-examination of Dr Mojabelo was very brief after which the Magistrate put a number of questions to Dr Mojabelo. Dr Mojabelo described the vaginal discharges she observed as yellowish to greenish, consistent with the presence of a sexually transmitted infection. The Magistrate then asked Dr Mojabelo as follows:

> *"If the child had been penetrated in the about* a *week prior to the examination which she had, would that be, would your findings be consistent with that, that there were no remaining fresh injuries? -*
>
> *Within* a *week we definitely see some injuries, we age them you*
>
> *know* as *I assess them.*
>
> *Right. [Indistinct] Well after, it is well after the day which she told somebody else that she has been penetrated,* so *that would be [indistinct]. It was* a *couple of weeks before [indistinct] penetration, fresh tears from [indistinct] - Within the week period we are likely to get the fresh injuries.*
>
> *Right and if it is after* a *week, more than* a *week? - If it is more than* a *week depending and if it had been done repeatedly, you know healing does not take slow in the, on the genitals.*
>
> *Yes - you know like repeated exposure, there will be those injuries initial and depending how it is done and with time they heal completely. It is difficult you know*

to pick them up, more especially it is almost two years later that this has been going on.

From the evidence that we have [indistinct] the child made a report to somebody on the 5th or the 6th of March. She said she [indistinct] last, the last occasion was a week the Sunday [indistinct] would have been about the 26th of February and then you examined the child on the 18th of March. - Yes.

So *would it be surprising then that there were no remaining, well I suppose it is not surprising, any injuries would have healed by then? - Yah, just to add to that. A hymen is like a membrane structure, you know it can be torn even when the child is riding a bicycle, but when you examine that kind of a child you know you would still get the remains, you can visualise it so clearly but with repeated penetration beyond the vulva vagina, you know that membrane was already gone and it was not an easy examination as I was [indistinct] examining the [indistinct].*

Right so just so that I understand that part doctor, how much of the hymen was still there, or was the whole hymen [indistinct]? - It is what we call [indistinct] you know it is small, small flaps.

Right. Tiny little [intervenes] - that indicated, usually we do not see this in young children you know. We see it in women who have been repeatedly exposed to sexual intercourse and even after child birth.

Right so, so the lack of, the state of the hymen or the lack thereof as I understand he was consistent with repeated, possible repeated penetration? - Penetration.

Thank you I understand [indistinct] perhaps more clarity now."

[4] The prosecution then called Ms T, the complainant, who gave evidence *in camera.* The Magistrate questioned Ms T to determine her competence as a witness and she testified that she knows the appellant as her [....], [....]. Ms T stated that the appellant raped her four times. She could not remember the date on which the first rape took place. She was asked which year it was but stated that it happened in March. Ms T could not remember the year it occurred. She could remember, however, that she was 9 years old and that she was in Grade 5 at the time.

Ms T's recollection of the last rape which she said took place on 5 March 2011 was more vivid. On the 5th of March her [....] went to M.'s place. Ms T played at the neighbours with her friend V.. The appellant called her around 5pm while she was still at V.'s to send her to M.'s. When she got home the appellant took her into the bedroom of his house. She was wearing a dress and a panty. The appellant undressed her and himself and climbed on top of her and raped her. After the appellant raped her, he told her to get dressed and to leave and not tell anyone. The appellant's [....] (Ms T's [....]) later returned. Ms T said nothing about the rape to her [....]. On the question why she did not tell her [....] she said: *"Because he said to me if I tell anyone the police are going to arrest him and are also going to arrest me to."*

[5] Ms T's first report about the rape on 5 March took place according to her evidence the next day when she reported it to Ms M.. This part of Ms T's evidence contains a contradiction. Ms M. said that Ms T made a report to her on Saturday 15 March while Ms T said it was the day after the last rape (6 March). According to the Form J88 and the evidence of Dr Mojabelo she examined Ms T during the early evening of 18 March. I will return to this aspect and the first report of the rape presently. Some days later Ms M. came to Ms T's [....]'s house. Present was her [....] and a friend of her [....], L.. Ms M. then spoke to L. and after that Ms T was taken to the clinic by L.. At the clinic Ms T was examined and,

according to her evidence, found to have been raped. After that L. and Ms T returned to Ms M. whom they informed of the doctor's finding that Ms T had been raped whereupon they called Ms T's [....]. Thereafter Ms T, her [....] and L. went to the police station. From the police station Ms T, her [....] and L. went to the [....]'s house. The police then arrested the appellant at home.

[6] During cross-examination Ms T said that during the first rape, she slept with three other children of her [....] (her cousins) in a room. The appellant and Ms T's [....] had an argument after which the appellant chased her [....] out of the house. The appellant, according to Ms T then came and took her from the bed. Her cousins, (age between 9 and 12) were with Ms T in the room when the appellant took her and muffled her with his hand. The cousins did not wake up. It was late in the evening. The appellant then according to Ms T raped her. The distance between the room where she was raped and where she was taken from is not far - there is a dining room between the two rooms. Ms T made a noise she said when the appellant raped her and the noise was audible. After that rape Ms T went back after she dressed herself and slept. The next morning Ms T woke up and saw that

[7] I now return to the first report of the rape and the examination of Ms T on 18 March. Our Courts recognise that reluctance on the part of rape survivors, or some of them, to report the rape at the first opportunity is a firmly recognised fact. It is also generally accepted that with young children the reluctance is compounded. In the present case Ms T testified that she was told by the appellant to keep quiet about the incident. Ms T's fear to expose the incident was, so I infer, compounded by her belief (justified or unjustified) that her [....] would not believe her if she reported the rape to her [....]. An important feature of the first report of the rape to Ms M. was that it was not induced and was done by Ms T spontaneously. I am further of the view that the lack of date and detail about the earlier rapes is understandable in a complaint

of a young child such as Ms T. It was submitted on behalf of the appellant that the lack of particularity in that context should have compelled the Trial Court to find that the prosecution failed to prove the crime of rape beyond a reasonable doubt. I do not agree. Section 84(1) of the Criminal Procedure Act 51 of 1977 provides that a charge must set forth the relevant offence in such a manner and with such particulars as to the time and place at which the offence is alleged to have been committed as may be reasonably required to enable the accused to plead. In an offence such as the present where the exact time when the offence occurred is not a material element of the offence, failure to specify the time does not render the charge defective. In the present case the appellant knew in no uncertain terms what the case he had to respond to was. In Du Toit *et al* [1] the learned authors say: *"An accused who wishes to raise an alibi will not necessarily be prejudiced by the fact that the charge only mentions* a *period during which an offence was allegedly committed, nor by the State's inability to provide further particulars in respect of the dates. If such uncertainty will in fact hamper him in his defence, he may reserve his cross-examination of State witnesses until after completion of the State case and then apply for an adjournment to prepare* ...".[2] *In casu* the appellant's defence was a denial of any involvement in the rape of Ms T.

[8] He was, as the Trial Court observed, an unsatisfactory witness. His explanations were unconvincing and, so the Magistrate found, patently false and rejected it as such, while on the other hand, Ms T was found to be a reliable witness and that it was *"impossible that she came across so well as* a *witness"* if she was lying. The Trial Court thus accepted the version of the prosecution above that of the appellant on grounds of credibility. The appellant challenged the Magistrate's credibility findings before us. The challenge is two-pronged. First, it was submitted that the evidence of Ms T was accepted without subjecting her

testimony to the required measure of scrutiny and, secondly, that the Magistrate subjected the appellant to questioning which amounted to cross-examination on the appellant's affidavit presented during bail proceedings without first establishing whether the appellant's rights have been explained to him in that context.

[9] A credibility finding by a trial court can never be entirely discounted on appeal. It is, however, the result of a subjective assessment. Its force in any given case depends, as Heher JA stated in *Gardener*[3], upon the strength and cogency of the objective probabilities opposed to it. The more such probabilities accumulate the less persuasive it becomes. Demeanour and apparent candour are tricky yardsticks and not less so when a witness testifies through close circuit television and with the assistance of an intermediary, as was the situation in the present case.

[10] During the evaluation of evidence a Court should remain mindful of its obligation to exercise caution in appropriate cases. In S *v J*[4] the Supreme Court of Appeal, when ruling that there is no room for a general cautionary rule in our law, accepted with reference to *Easton*[5] that a Court should, before acting upon the unsupported evidence of a witness, exercise caution. In my view no objective probabilities appear from the record to justify rejection of Ms T's evidence on grounds of credibility.

[11] The Magistrate rejected the appellant's denial of involvement in the rape as not being reasonably possibly true. In *Van Aswegen* [6] the Supreme Court of Appeal approved the statement of the law in *Van der Meyden*[7] to wit:

> *"It is difficult to see how a defence can possibly be true if at the same time the* State's *case with which it is irreconcilable is 'completely acceptable and unshaken'. The passage seems to suggest that evidence is to be separated into compartments, and the 'defence case' examined in isolation, to determine whether it is so internally*

contradictory or improbable as *to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A Court does not base its conclusion whether it be to convict or acquit on only part of the evidence. The conclusion, which it arrives at must account for all the evidence.*

I am *not sure that elaboration upon* a *well-established test is necessarily helpful. On the contrary, it might at time contribute to confusion by diverting the focus of the test. The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of the test in any particular case will depend on the nature of the evidence which the Court has before it. What must be borne in mind however is that the conclusion which is reached (whether to convict or to acquit, must account for all the evidence).* Some *of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."* ***[8]***

[12] Before rejecting an accused version on the probabilities a Court must be able to find, as a matter of probability, that the accused version is simply not reasonably possibly true. In *Shackell* ***[9]*** it was held that the mentioned requirement should be applied in the following terms:

"Although I am not persuaded that every one of these suggested inherent improbabilities can rightfully be described as such I do not find it necessary to dwell on each of them in any detail. There is a more fundamental reason why I do not agree

with the line of reasoning by the Court a quo. It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of the standard of proof in a criminal case, a Court does not have to be convinced that every detail of an accused version is true. If the accused version is reasonably possibly true in substance the Court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable

possibility remains that the substance thereof may be true. This conclusion is strengthened by the absence of any apparent reason why the appellant would, without any motive, decide to brutally murder the deceased by shooting him in the mouth at point blank range. As a consequence the matter must be decided on the appellant's version."

[13] The evidence that was Ms T penetrated, suffered from a sexually transmitted disease after the incident, was not sexually matured and only 13 years of age at the time of the last incident have been proved beyond any doubt. That she reported the rape spontaneously and without being induced to do so is clear from the evidence. That she only complained of the rape to Ms M. at the church is explained by her as the result of the

appellant's threats that she should remain quiet about the rape. This explanation is plausible. A further aspect that is of relevance is the unchallenged evidence of Ms T that she thought her [....] would not have believed her allegations of rape. That evidence explains why Ms T did not confide in her [....] about any of her rapes and why her [....] was not called to give evidence and that her [....]'s friend L. assisted Ms T in processing her complaint against the appellant. The criticism levelled on behalf of the appellant against the trial court's acceptance of the evidence of Ms T fades away when measured against her evidence and the wider factual matrix.

[14] I accept for purposes of the appeal that the appellant is an uneducated person and less articulated than his much younger accuser. What remains absent from the appellant's evidence is a plausible explanation as to his whereabouts during the events of the night of 5 March 2011 when the fourth alleged rape took place. During his evidence in chief he tendered no explanation. He failed to do so while he faced clear and direct testimony of his accuser that he raped her on 5 March 2011. That the appellant was unable to recall his exact whereabouts during the rapes prior to 5 March is understandable, but his evidence in that context is less than satisfactory. Ms T's evidence in that respect is not detailed and the probative value thereof uncertain. But her evidence about the rape of 5 March is clear, detailed and one would have expected the appellant to have supplied detailed evidence to rebut his accuser's testimony. His explanation and evidence in that context is wholly unacceptable and was rightly rejected by the trial court, when measured against the inherent probabilities and the principles explained in *Van Aswegen.*

[15] In view of the absence of credible evidence by the appellant the probabilities accumulated against him to such an extent that his denial of involvement in the rape should be dismissed. In my view the appellant's conviction on the charge of rape cannot be

faulted.

[16] A court of appeal will only interfere with the imposed minimum sentence of the trial court if it can be found that substantial and compelling circumstances exist to do so. The purpose of the dispensation imposing minimum sentences has been described in *S v Malgas* [10] as a measure aimed at dealing with an *"alarming burgeoning in the commission of crimes of the kind specified resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best* efforts *to stem the tide of criminality which threatened and continues to threaten to engulf society".* [11] In my view the appellant's crime falls squarely within the category our law seeks to eradicate from society.

[17] The trial court recorded the personal details of the appellant in its judgment. No evidence in that regard appears from the record or the exhibits forming part thereof. It appears that the trial court listed the personal circumstances of the appellant but that the relevant part of the record was not transcribed. The particular aspect was raised with counsel for the appellant. Application was not made to present evidence in that context or to supplement the record. In *Malgas* [12] it was pointed out that all factors traditionally taken into account in sentencing continue to play a role. The ultimate impact of all the circumstances relevant to sentencing must be measured against the *"composite yardstick"* (substantial and compelling) and must be such as cumulatively justify a departure from the sentence prescribed by law. The appellant's personal circumstances which were recorded in the trial court's judgment do not constitute substantial and compelling circumstances. The actions of the appellant (his denial and the absence of conduct that displays remorse or any other form of contrition) do not assist in the present matter. No evidence was tendered of what motivated the appellant to commit this wicked deed and in view of the

seriousness of the offence that he raped an orphan child who is under the care of her maternal [....] shows, in my view, that the ultimate penalty is imperatively called for. It was submitted on behalf of the appellant that the trial court misdirected itself by not taking into account that Ms T sustained no physical injuries and that the appellant could, as first offender, be a sound prospect for rehabilitation. The submissions cannot be accepted. S 53 of Act 105 of 1997 expressly exclude the absence of physical injuries of a victim as a reason for deviation from the minimum sentence regime. The appellant has not shown any remorse for his wicked deed. He denied having had any part in it. He has not convinced the trial court or this court that his prospects for rehabilitation are good.

[18] The appellant was in the position of a close male relative of Ms T. Our courts are under a duty to punish the despicable behaviour that fathers and those in parental authority turn their backs on what is their natural duty to ensure the safety of their [....]s, and themselves pose a danger towards their own vulnerable children and children they are expected to care for. Dealing with a similar incident in *S v Abrahams,* Cameron JA stated the following:

> *"Of all grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a [....]. But it is a position to be exercised with reverence, in a [....]'s best interest, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his [....]'s body constitutes a deflowering in the most grievous and brutal sense.... rape within the family has its own peculiarly reprehensible features, none of which subordinate it in the scale of abhorrence of other crimes."* ***[13]***

[19] The appellant has been in custody from his arrest on 19 March 2011. Counsel for the

appellant proposed that his sentence should have been antedated to that date. I agree

[20] Under the circumstances the appeal against the conviction and sentence must fail subject to the amendment to the commencement date of the imposed sentence and the following order is made:

[20.1] The appellant's appeal against his conviction and sentence is dismissed.

[20.2] The appellant's conviction on the charge of rape is confirmed and so is the sentence of life imprisonment imposed on him for that conviction. The sentence of life imprisonment is antedated to 19 October 2011.

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H F JACOBS

ACTING JUDGE OF THE HIGH COURT

PRETORIA

I agree, and it is so ordered

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J W LOUW

JUDGE OF THE HIGH COURT

PRETORIA

Date 29 November 2016

[1] *Commentary on the Criminal Procedure Act* at p 14-37.

[2] See also *V.* Samuel *Vilakazi v The* State Case No 636/2015 [2015] ZASCA 103 (15 June 2016) at[21].

[3] S *v Gardener* & *Another 2011* (4) SA 79 (SCA) at [51].

[4] 1998 (2) SA 984 (SCA).

[5] *R v Makanjuolo, R v Easton* [1995] 3 All England Reports 730 (CA).

[6] S *v Van Aswegan* 2001 (2) SACR (SCA).

[7] S *v Van der Meyden* 1999 (2) SA 79 (W).

[8] S *v Mbuli* 2003 (1) SACR 97 (SCA); S *v Hadebe* & *Others* 1998 (1) SACR 422 (SCA).

[9] S v Shackell 2001 (2) SACR (SCA)

[10] 2001 (1) SACR 469 (SCA) par [7].

[11] See also S *v Matyityi* 2011 (1) SACR 40 SCA at par (23]; *Mthethelwa Dube v The* State Case No 89/16 (2016] ZASCA 123 (22 September 2016) at [4].

[12] *Supra.*

[13] See also *Mthethelwa Dube v The* State Case No 89/16 (2016] ZASCA 123 (22 September 2016) at [17].