IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

4/5/16

CASE NUMBER A 576/15

Not reportable

Not of interest to other judges

Revised.

In the matter between

MOSES RADINKO NTSHABELE APPELLANT

AND

THE STATE RESPONDENT

JUDGMENT

THULARE AJ

[1] The appellant, a 37 year old male was convicted of rape of a six year old girl child and sentenced to life imprisonment, declared unfit to possess a firearm and his particulars were ordered to be recorded in the Register of Sexual Offences, in the Regional Division of Gauteng held in Benoni on 14 November 2014. He was legally represented at the court *a quo.*

[2] The appeal against both his conviction and sentence is before us as automatic appeal seen against the life imprisonment imposed on the appellant by the court *a quo.*

[3] The Public Prosecutor put the charge to the appellant framed in the following terms:

> *"That the accused is guilty of the crime of contravening the provisions of Section 3 read with Sections 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32/2007- RAPE (read with the provisions of Section 51 * and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended)*
>
> *IN THAT on or about the 4th and 5th November 2007 and at or near ETWATWA in the Regional Division of GAUTENG the said accused did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, N[…] by INSERTING HIS PENIS INTO HER VAGINA.*
>
> *Section 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended is applicable in that:*
> *THE VICTIM WAS 6 (SIX) YEARS OF AGE AT THE TIME OF THE INCIDENT."*

[4] The Criminal Law (Sexual Offences and Related Matters Amendment Act. 2007 (Act No. 32 of 2007)), (Sexual Offences Act) only came into operation on 16 December 2007, that is, after the commission of the offence on 14 November 2007. The provisions of the Sexual Offences Act do not apply to the present case.

[5] The appellant pleaded not guilty, denied that he had committed the offence and put the State to the proof thereof. No objection was raised at the court *a quo* on the interpretation of the charge sheet.

[6] The test still remains whether the appellant was sufficiently informed about the case he had to meet, (*S v Badenhorst* 1991 (1) SACR 623 (T) at 624 h-l). In that case, Esselen J said that it must be kept in mind that criminal proceedings are not a game of technicalities, and that the information need not be totally detailed, but that it must be reasonably sufficient. (My own interpretation from Afrikaans).
In *S v Rautenbach* 1991 (2) SACR 700 (T) at 702 e-f, Judge Van Dijkhorst's view was

that the problem must be approached from a purposive angle, and that the criminal law and the criminal procedure must be as simple and understandable as can be, and that especially on this area it must not be allowed that legal literalism and subtle ingeniousness create a haze of uncertainty. (My own interpretation from Afrikaans).

[7] The narration, in the allegations set out in the charge sheet in the present case, that the appellant did unlawfully and intentionally commit an act of sexual penetration with the complainant, N[...], by inserting his penis in her vagina, in my view, amount to sufficient particularity for the appellant to have known the case he had to meet. I can express myself no better than Navsa JA in *S v Nedzamba* 2013 (2) SACR 333 (SCA) at paragraphs 23 and 24:

> *"[23] In the present case the appellant had legal representation and his case was conducted on the basis that he had been full y aware that he faced a charge of rape. He was adamant in his defence that he had not committed the offence.*
>
> *[24] It was accepted before us that allowing an amendment would not result in any prejudice to the accused and that it was clear that that his defence would have remained the same. South Africans would rightly be aghast if the view initially taken by the state, referred to earlier in this judgment, were to prevail. It would elevate form above substance, would have grave consequences for victims of sexual abuse and would bring the administration of justice into disrepute. "*

[8] Counsel for the appellant argued before us that the complainant was simply sworn in, and that the court *a quo* did not enquire into her capacity to understand the nature and import of the oath and to distinguish between the truth and a lie.

The complainant was six years old at the time of the commission of the offence and 13 years old and in Grade 8, when she testified on 8 September 2014. The magistrate, in exercising the necessary care in dealing with children, asked the complainant a few questions, to which intelligible answers were given by the complainant. The magistrate also asked if the complainant knew what it is to take the oath, indicating that it is fine if the complainant did not know what to take the oath is. The complainant indicated that she knew what it is to take the oath, and then the complainant was sworn in. In my view, the magistrate questioned the complainant to determine whether the complainant understood what it meant to tell the truth. The magistrate was satisfied that the complainant understood what it meant to be required to relate what happened and

nothing else. There is nothing to suggest that the complainant did not understand the nature and importance of the oath, taking into account her age at the time she testified, her standard of education, the way she gave evidence in chief and cross- examination.

[9] The complainant's testimony is that she was in Etwatwa playing alone outside, during the day, when she was called by a young man who asked her to go with him to get some toys by the nearby veld. The complainant pointed the appellant out, referring to him as China, as that young man who called her to go with him for toys in the veld. She did not know the appellant before the day of the rape. They walked together to the veld, which she estimated at about 400m from her home. There are no houses where the appellant took her to. When they reached the veld, the appellant forcefully undressed her. She cried and the appellant threatened to kill her and that she would never see her family again. They were far away from any people so no one came to her rescue. He undressed her of her panties and pants, lowering them to her knee high. He made her lie down on the ground, facing upward. He unzipped his pants and drew his penis and inserted it into her vagina forcefully. She did not agree to what he was doing to her. She urinated, wetting herself and defecated as well because of the pain. She felt pains in her stomach as well.

[10] The appellant thereafter made her cross the street and left her all by herself. She immediately went to her Sister Z[…] who was home. The complainant informed her sister that she wet herself and soiled herself. Z[…] asked her why she was crying and she said this happened because she had left with a young man who wanted to sleep with her. She did not tell Z[…] the whole story. Z[…] instructed her to take off her clothes and rinse them in the water.

[11] The complainant did not do that, opting instead to go and report to her other sister, B[...], who was playing in the street nearby her home with her friend at the SNs. She went there crying and told B[...] that she needed to speak to her. B[...] listened and the complainant narrated what had happened to her. After she told B[...], they both went to Z[...], the first sister the complainant made a report to. The complainant's mother was also called and she took the complainant to the Police Station. She was later taken to the clinic where she was examined by a nurse. She does not recall what happened to

her clothing, all that she can recall is that she never wore those pants again.

[12] The complainant knows SN. The complainant saw SN when the complainant was walking with the appellant to the veld on the day of the rape. SN did not say anything when the complainant was in the company of the appellant.

[13] The complainant learned to know that the appellant's name was China when she was about 12 years old, because her mother would constantly talk about him. The complainant was adamant that the appellant was the person who raped her. When she was told in cross-examination that the appellant will say he did not know her, her response was that he knew her as he raped her, and acknowledged that she he did not know him at the time of the rape.

[14] The mother of the complainant, C[…], testified that the child was born on […] 2001 and that on the 4th of November 2007 she received a cellphone call from Z[...], her first born child, to come home. Upon her arrival at home she found the complainant wrapped around her waist with a blanket. She was crying and looked frightened. The complainant's other sister, B[...], then reported to her what had happened. C[...] then immediately went to the police station. Z[...] went with her. C[...] took the complainant to the clinic the next day, on the 5th of November 2007. The complainant was examined and it was reported to C[...] that the child was raped. Her child was six years old at the time.

[15] C[...] did not know the appellant before the incident. She was however aware that he was the person arrested for the rape of her daughter. She met SN when she was from the police station. SN gave her a report about what she saw on the day of the rape.

[16] SN knew the complainant and her family as they stayed in the same neighbourhood and in the same street. On the 4th of November 2007, round about 11 to 12:00 during the day she saw the appellant, China, passing by with the complainant. SN was seated outside a house with two other ladies, D[…] and E[…]. She did not know where the appellant and the complainant were coming from or going to, but the direction they were heading to, was towards the public phones. In that same direction, behind the houses if

you go through, you find the veld. It is a very big veld, you can go deeper into the veld. The veld is behind the public phones. It would be the public phones, then the houses, a street and after the street further down is the veld. The veld is about 30 metres, from the public phones and from the houses. There are two sets of public phones, Rastas and Cell C, in the same street. She did not see where they ultimately ended.

[17] The appellant was known to SN before the day of the rape. She knew him as China and also knew where he was staying. He was staying three streets away from where she was staying. She saw the appellant in the company of the complainant, and did not see the appellant rape the child.

[18] About an hour after she had seen the appellant and the complainat, she was phoned by Z[...], the child's sister. Z[...] asked her to come to her house quickly. She went there. Z[...] enquired of her if she had seen the young man who was walking with the complainant. She confirmed to Z[...] that she had seen the complainant and China, heading towards the direction of the public phones. Z[...] then informed her that the complainant had been raped.

[19] SN was the one who led the community to where the appellant stayed. The community gathered around his house. They wanted to go in the house where the appellant was hiding. The appellant peeped through to check what was going on outside, and the community members saw him. They wanted to go inside the house when the police arrived and arrested the appellant.

[20] B[...], the other sister to the complainant was 17 years of age when she testified. She was playing in the street when the complainant came to her, crying, and it seemed as though she was trembling, and something was not right about her. She asked the complainant what was wrong and the complainant said that it was better that they go and speak outside. The complainant then reported to her that there was a young man that had taken her to the veld, took off her short pants and her panties and had intercourse with her. B[...] did not know the veld the child was referring to. She then took the complainant to their elder sister, Z[...], who then took the matter further.

[21] Sister G[…] examined the complainant on 5 November 2007 at lthemba Rape and Trauma Support Centre in Benoni and recorded her findings. The examination was very painful for the young child and the injuries are conclusive of rape taking place.

[22] The appellant testified in his defence and did not call any witnesses. He denied that he raped the child. His evidence was that he did not know the complainant and she did not know him. The first time he saw the complainant was in court. He admitted that SN knew him and that he knew her. According to the appellant, SN was motivated by jealousy against him, therefore she made the allegations against him. He referred to her as a witch. He accused her of changing her version to suit the case against him. The day of the alleged rape, the appellant never left his yard and was with his mother who left at about 13:00 to attend a society meeting. He was left alone in the yard and the main house was locked.

[23] The appellant was in his room watching a soccer match when two young men came and said they wanted to buy drugs. He told them that they were at the wrong place. After about seven minutes he saw, through the window, the same two young men within a group of members of the community. He saw his neighbor talking to members of the community, and the neighbor was pointing at his place. SN and Z[...] led those members of the community who were armed, to his place and came into his yard. The community tried to force his door open. He pushed a couch in his room to the door, to close it, and he tried to call the police. The police arrived as the community were trying to force the door open. SN and Z[...] were the first to enter his room, followed by the police. The appellant was handcuffed by a lady officer and taken to the police vehicle and then transported to the police station. It was at the police station that he was informed of the alleged rape of a six year old minor child, and came to know of the victim's name while he was at court.

[24] The appellant testified that he was having a lot of nicknames, amongst others China. He was called China when he was still playing soccer. He resides in the same neighbourhood as SN, around […] streets from hers. He only learnt in court that the complainant also resides in Daveyton. He first heard the name of Z[...] at court, although he noticed that she was with SN when they came to his home on the day of his arrest.

He first saw her name in the docket and then saw her in court and realized that it was the Z[...] being referred to. He noticed that Z[...] and the mother were talking about him when they were with the complainant. He testified that he also noticed that after the complainant was asked by the Prosecutor whether she can point out the person who raped, Z[...] was seated next to the Prosecutor. The complainant first looked at Z[...], and Z[...] indicated to the complainant using her head, and that was the reason why the complainant took so long to point him out in court. He did not raise this as an issue with his attorney because he heard the Court warning his attorney not to ask questions and that was why during cross-examination the attorney only asked a few questions. The attorney asked a few questions because of what the court had said to the attorney. He also heard the complainant tell the court that when she was growing up, the mother kept telling her about him and that was when he realized that the complainant did not know him. When Z[...] pointed at the appellant using her head, he thought it would be pointless for him to bring that to the attention of his attorney because of the restrictions by the court to his attorney.

[25] The issue is identity.

[26] In *S v V* 2000 (1) SACR 453 (SCA} at 454 paragraph [2] Zulman JA said:

> *"[2] In view of the nature of the charges and the ages of the complainants it is well to remind oneself at the outset that, whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution (R v Manda 1951 (3) SA 158 (A) at 163 C, Woji v Santam Insurance Co Limited 1981 (1) SA 1020 (A) at 1028 B-D); and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach (S v J) 1998 (2) SA 984 (SCA) at 10098)."*

[27] The disturbing feature of this case is that the complainant testified seven years after the incident. Commenting on the question whether the capacity of recollection of children may not be wholly unreliable as a result of a lapse of time, Diemont J answered as follows in *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1029 (a):

> *"I think not. It is well known that children often have vivid memory of an unusual*

or exciting incident."

However, I feel constrained to also repeat what Mhantla AJA said in S v Carolus 2008 (2) SACR 207 (SCA) at 214 h paragraph [33] and [34]:

> *"[33] The most disconcerting aspect relates to the delays in the commencement and finalization of this matter indicated above. Counsel for the State was unable to furnish any explanation. She invited comment by the court in this regard to ensure that law enforcement agencies and persons involved in the administration of justice act appropriately, As I have indicated earlier, the trial commenced some four years and three months after the commission of the offence. A was then 13 years old and was called upon to recall events that had occurred in 1997. ...*
>
> *[34] ... In my view an investigation must be conducted by the relevant authorities to establish the root cause of these delays and to determine how a situation of this nature can be avoided in future. It is hoped that these shortcomings will receive their prompt and proper attention."*

[28] At the time, the complainant was only six years old. She decided to go straight home immediately after her experience, making an election amongst two of her elder sisters as the first point of reporting. Z[...] did not allow the complainant to fully explain what happened to her and simply instructed her to go clean herself up. She had sufficient intelligence to know that someone who is prepared to listen to her, who is caring and to whom she would look for protection, should know what happened to her. Instead of following the instruction to clean herself, she elected to pursue the report further and approached her other sister, B[...], following B[...] to where she had gone to play. B[...] allowed the complainant to fully explain what happened to her and what she had experienced. B[...] then took the complainant back to Z[...] where a report was made to her of the child's experience, which led to Z[...] making a few calls, including to their mother and to SN.

[29] The complainant testified that the person who took her to the veld and raped her was the appellant. She identified the appellant in the dock. This identification was against the background that the appellant called her from the outside of her home where she was playing alone; the two of them walked together for about 400m, from her house to the veld; it was in broad daylight; the appellant threatened and undressed her in the

bush; the appellant raped and hurt her, such that she urinated and soiled herself and the appellant walked her back until she crossed the street and walked back home. In my view, the complainant, in broad daylight, had sufficient time to observe the appellant. She was face to face with him at close quarters. Light, proximity and duration were all favourable to a conclusion that the complainant had the opportunity to take note of the appellant.

[30] The complainant's direct evidence that she was raped is fully corroborated by the medical evidence. The State proved beyond reasonable doubt that the complainant was raped. Her evidence, that she was raped by the appellant, does not stand alone. The evidence of SN provides some measure of support for the appellant's involvement. The court *a quo,* correctly so in my view, did not look at the evidence of the complainant implicating the appellant in isolation in order to determine whether there is proof beyond reasonable doubt. The complainant's identification of the appellant as being the person who raped her, taken together with the evidence of SN, establishes the identification of the appellant as the rapist.

[31] On page 18 of the transcribed record the following is the examination of SN by the Prosecutor:

> *"On the day of 04 November 2007, there is an incident that you witnessed, that you want to tell us about. Am I right? --- Yes.*
> *What did you see? -- I saw China passing by with the child. China, I see you are pointing at the accused? --- Yes.*
> *And the child, are you referring to N[...]? --- Yes."*

Counsel argued that the prosecutor asked a leading question, and as such the evidence of SN relating to identity is inadmissible.

[32] Firstly, there was no objection to the leading question. Secondly, I do not think that it could be said that the appellant had been prejudiced thereby particularly in the light of the fact that SN had already made a report on the date of the commission of the offence that she had seen the appellant in the company of the complainant. SN is the witness who, at the time of the incident, led the family and the community to the house of the appellant, after identifying the appellant as the person that she had seen walking with

the complaint earlier that day. In my view, the magistrate correctly exercised his discretion, after careful attention to all the circumstances, and allowed the evidence to be admitted.

[33] In my view, there is no possibility of SN having been mistaken as to the identity of the appellant. She and appellant stayed in the same neighbourhood. They were known to each other. She knew his nickname. She is corroborated by the appellant that they were known to each other. There is no doubt that they knew each other well. The incident happened in broad daylight. SN was seated at a house in the street where the appellant and the complainant walked past. Her view of the persons walking in the street was not impeded. If she could observe and identify the complainant, there is no logical reason as to why she could not identify the face of somebody who was well- known to her, who was walking with the complainant in the street. SN immediately reported to Z[...], when asked if she had seen who was walking with the child, that it was the appellant that she saw walking with the child. She pointed out to the community and the relatives of the child where the appellant lived.

[34] There is no evidential basis for the possibility of a deliberately fabricated conspiracy against the appellant by the complainant and SN. There is no basis for concluding that the complainant or SN had a motive to implicate the appellant falsely. The evidence leaves no room for either a mistake or a false implication. The trial court was correct, in my view, to find that the evidence of SN was reliable.

[35] The appellant on the other hand was, correctly so in my view, found to be an unreliable witness. In my view, the attempt by the appellant to suggest that the magistrate limited his attorney in the cross-examination of the witnesses is not. The appellant's version, that Z[...] using her head, made a gesture to the complainant to assist her identify him as the perpetrator, must be seen against the background of a man who was prepared to clutch at straws to avoid the responsibility for his actions. Making a sensible use of all the evidential material placed before the court by the parties to the court, the magistrate was able to make use of the false evidence of the appellant in his overall assessment of where the truth lies. I am not able to conclude that the magistrate was wrong in the conclusion that the appellant's version was false beyond reasonable

doubt.

[36] In my view, the magistrate considered the conspectus of the evidence and weighed the pros and cons, and made a judiciously considered judgment. The magistrate was satisfied, correctly so, that the State witnesses corroborated each other in all material respects. The indisputable evidence shows that the appellant was with the complainant at about the time she said she was raped. The criticism that the magistrate did not apply the cautionary rule properly and adequately, in my view, is misplaced. Considering the evidence as a whole, there is no reasonable possibility that the version of the appellant may be true. The verdict of the trial court has not been shown to be wrong.

[37] Turning to sentence, in terms of section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), it was peremptory for the magistrate, after the conviction of the appellant for an offence referred to in Part I of Schedule 2, to sentence the appellant to life imprisonment. The question is whether substantial and compelling circumstances exist which justified the imposition of a lesser sentence than the sentence prescribed.

[38] On appeal against the sentence, the function of the court of appeal was set out by Holmes JA as follows in *S v De Jager and Another* 1965 (2) SA 616 (A) at 628fin to 629B:

> *"It would not appear to be sufficiently recognized that a Court of appeal does not have a general discretion to ameliorate the sentences of trial courts. The matter is governed by principle. It is the trial court which has the discretion, and a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the court of appeal would have imposed. It should therefore be recognized that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited."*

[39] The appellant was 37 years of age at the time of his sentencing, and was 30 years

of age when he committed the offence. He and his brother were raised by his mother. He does not have a relationship with his father. He is unmarried but has a 13 year old daughter who resides with her maternal grandparents. His mother passed away in 2002. He attended school until standard 9. He was employed in 2007 and his contract of employment as a merchandiser was terminated. He was awaiting trial for 7 years. He has a previous conviction of rape committed on 14 February 1997, for which he was convicted and sentenced on 9 December 1997 to eight (8) years imprisonment of which 3 years was suspended for five years on certain conditions. He also has a previous conviction of theft.
The appellant showed a remarkable lack of insight into the gravity of his conduct. There is no trace of remorse. I agree with the magistrate that the personal circumstances of the appellant are not such that by themselves, they compel a departure from the prescribed minimum sentence (5 *v Brown* 2015 (1) SACR 211 (SCA) paragraph [120]).

[40] The complainant was playing alone when the appellant saw the opportunity to strike at her innocence. The choice of the scene of crime, walking the child out of its neighbourhood to an open veld, and the promise of toys to the child, sustains a conclusion that the execution was premeditated. The conduct of the appellant was cool, calm and calculated. In the walk of about 400m, and the cries of the child in the veld, the appellant had an opportunity to reconsider.

[41] I have no doubt that the community expected that conduct such as that of the appellant must be seriously sanctioned. In my view, the element of retribution and deterrence must play a decisive role and even be allowed to overshadow rehabilitation in punishment in the eyes of informed, reasonable, law-abiding and balanced members of society who are looking up to the courts and expect of the courts to view serious offences as such and punish offenders appropriately. Rape of a minor child is a serious offence. It is one of the most invasive offences. It was a degrading, humiliating, painful and traumatic experience for the complainant. The community expects each and every adult to protect the children, and not to harm them. The courts must be equal to the task of standing in the path of travel of those who flow against the tide of the national agenda, as regards child protection.

[42] The personal circumstances of the appellant, which were placed before the trial court, including through the pre-sentence report by the probation officer, under these circumstances, cannot outweigh the seriousness of the offence and the interests of the community. Having regard to all the aggravating factors, I am unable to conclude that there are substantial and compelling circumstances present that would justify a departure from the prescribed minimum sentence.

[43] In my view there is no basis for this court to interfere with the sentence. I would make the following order:

The appeal against both sentence and conviction is dismissed.

_____

DM THULARE

ACTING JUDGE OF THE HIGH COURT

I agree

_____

MF LEGODI

JUDGE OF THE HIGH COURT