REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

31/03/16

CASE NO: A759/2014

31/3/2016

In the matter between:

MASEKO PAULOS MFANIMPELA **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

KUBUSHI, J

Date of Hearing: 12 OCTOBER 2015

Date of Judgment: 31 MARCH 2016

[1] The appellant in this matter was charged and convicted of one count of the rape of a fourteen year old girl. The appellant was legally represented at the trial. He was released on bail pending the finalization of the matter. Pursuant to the said conviction the appellant was sentenced to life imprisonment. He was also declared unfit to possess a firearm. He is before us appealing the conviction and sentence having been granted leave on petition to do so.

[2] It is common cause that on the day the alleged rape was committed the appellant was at the complainant's home. The evidence of the complainant is that the appellant arrived at her house whilst she was busy cleaning. The appellant locked the door and proceeded to rape her. The appellant is obviously denying the rape. His evidence is that he went to the complainant's home to give her money for cold drink which the complainant had earlier asked for. According to the appellant the door was not locked but was only closed because the complainant said she did not want her boyfriend to see the appellant there or that the children who were playing outside will tell her grandmother that he came to the house. His further evidence is that he stayed in the house chatting to the complainant for about four minutes and left when Cindy arrived.

[3] The evidence of the complainant in regard to the fact that the appellant locked the door is corroborated by the evidence of the complainant's thirteen year old cousin Cindy, who arrived at the house whilst the appellant and the complainant were in the house. Her evidence is that she knocked twice at the door and found it to be locked. The door was opened by the appellant when he left.

[4] In his heads of argument the appellant raised a number of grounds on which he relied in trying to persuade this court that the conviction of the appellant by the trial court was inappropriate. However, before us only the ground of penetration – or the lack thereof, was argued by the appellant's counsel.

[5] The nub of the appeal is whether the trial court was correct to have accepted the evidence of the complainant as corroborated by that of her witness, Cindy, in convicting the appellant for rape and rejecting the evidence of the appellant. Underlying this main issue is the question of whether the appellant penetrated the complainant.

[6] Much as there is no *onus* on the appellant to prove his innocence, however, his version must be reasonably possibly true. The trial court found the version of the appellant not to be reasonably possibly true and rejected it. It accepted that of the respondent's witnesses as the truth.

[7] It is established law that a court of appeal rarely interferes with the credibility findings of a trial court. The powers of a court of appeal to interfere with the credibility findings of a trial court are limited. In the absence of any misdirection the trial court's conclusion, including the acceptance of a witness' evidence, is presumed

to be correct on the basis that the trial court had the advantage of seeing, hearing and appraising a witness.[1]

[8] When analysing the evidence, the trial court, correctly approached the evidence of the respondent's witnesses with the necessary caution required in law. It did so on the basis that it accepted that the complainant was a single witness in regard to the commission of the offence and because of the age of the respondent's witnesses.

[9] The trial court was correct in concluding that the two witnesses, despite their tender age, were telling the truth. From the record it appears that the trial court was very impressed with their evidence. The trial court stated as follows:

> 'Die feit van die saak is toe die klaagster getuig het toe is die hof beïndruk met haar getuienis. Sy maak 'n goeie indruk op die hof as getuie. Sy antwoord vrae maklik. Sy is intelligent, dit is dïudelik. Maar toe die tweede dogtertjie klaar getuig het toe is die hof nie net meer beïndruk nie, toe is ek hoogs beïndruk, sy is 'n puik getuie.
>
> Sy vertel vir die hof presies wat sy gehoor het, wat gebeur het, haar verduidelikings is 100% aanvaarbaar. As die hof hierdie twee dogtertjies se getuienis verwerp dan moet die hof bevind dat hulle vir een of ander duistere rede saam gaan sweer het met die ouma en met die, hulle twee saam en vir iemand wat vir beskuldigde vir een of ander rede wil valslik inkrimineer en dat hulle hierdie weergawe tot op 'n, amper woordeliks uitgewerk het, en dit aan die hof kom oordra het. Dit is onmoontlik.'

[1] See S v Francis 1991 (1) SACR 198 (A).

[10] It is common cause that when the offence was committed only the appellant and the complainant were in the house. It is also common cause that the respondent's witness, Cindy, saw the appellant and the respondent together after the alleged commission of the offence when the appellant opened the door at the time that Cindy had already knocked twice at the door.

[11] Although the evidence of Cindy did not corroborate that of the complainant as to implicate the appellant in the commission of the offence, however, the objective correctness of Cindy's evidence in corroborating that of the complainant on other material aspects supports the truthfulness of their evidence.

[12] The evidence of the complainant is that the appellant came into the house, locked the door and put the key in his pocket. The appellant switched the volume of the TV to high and proceeded to rape the complainant. The complainant testified further that she screamed out the name of sis Nomvula, a neighbour. After the appellant had raped her he asked the complainant why she was afraid of his penis when she was already a grown woman. The appellant further informed the complainant that she should call on him whenever she wants to have sex and he will also do likewise, that is, call on the complainant when he wanted to have sex. He also threatened her with death not to tell her father and/or grandmother.

[13] Cindy's evidence corroborates this evidence in all respects. It is Cindy's evidence that when she arrived at the house she found the door locked. On two

occasions she knocked and nobody opened the door. The door was only opened by the appellant when he left much later and by that time Cindy had already knocked twice after going around the house to check if there was anybody. Her evidence also confirms that the TV volume was very loud, she could hear it as she was coming through the gate; she heard the complainant shouting for sis Nomvula; she also heard when the appellant told the complainant about his penis and that they should call on each other when they feel like having sex. Cindy heard the appellant warn the complainant not to tell her grandmother about what happened. On that basis the evidence of the appellant that he entered the house and did not lock the door cannot be reasonably possibly true.

[14] The complainant must have been telling the truth. When Cindy went into the house she found the complainant crying with her hands covering her face. The complainant reported the rape to Cindy immediately when Cindy asked her what happened. Cindy went into the bedroom and found the bedding on the floor and she saw blood-clods on the linen. The complainant phoned her grandmother immediately after the incident. Cindy gave her R5 to phone. After phoning her grandmother she went straight to the appellant's home to report the rape to the appellant's three sisters. The fact that the appellants' sisters were not *ad idem* as to whether or not the complainant was raped does not have any bearing on the complainant's evidence. From the appellant's place the complainant went together with her grandmother to report the incident to the police.

[15] It is my view that when the evidence is weighed in its totality it amply supports the trial court's finding that the appellant's version could not reasonably possibly be true and that the evidence of the respondent's witnesses, when viewed with the appropriate caution called for because of their age and the fact that the complainant was in fact a single witness as to the commission of the offence, could be accepted. As such the trial court was correct to have convicted the appellant. The only issue is whether that conviction of rape is appropriate. That depends on whether the evidence was sufficient to show beyond reasonable doubt that penetration occurred.

[16] The appellant was charged with the offence of rape in terms of s 3 read with sections 1, 56 (1), 57, 58, 59, 60 and 61 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, as amended.

Section 3 thereof provides that:

> "Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape."

[17] In terms of the Act 'sexual penetration' includes, amongst others, any act which causes penetration to any extent whatsoever by the genital organs of one person into or beyond the genital organs, anus or mouth of another person. Whether penetration occurred is fundamental to the conviction of rape. [2]

[2] See MM v S (542/11) [2012] ZASCA 5 (8 March 2012) para 16.

[18] When proving that the complainant was raped, the respondent relied on the evidence of the medical report (J88 form) handed in court with the consent of the appellant. It is common cause that the J88 form does not indicate whether there was penetration or not. It does not even indicate any injuries that were suffered by the complainant.

[19] The contention by the appellant's counsel is that without prove of penetration it cannot be said that the complainant was raped. According to counsel, since the doctor who examined the complainant and completed the J88 form was not called to give evidence and explain the nuances appearing on the J88 form, the trial court could not on its own conclude that penetration did occur.

[20] The submission by the respondent's counsel, on the other hand is that in the circumstances of this case the J88 form is neutral since it does not state whether there was penetration or not. According to counsel the J88 form as it stands does not negate the respondent's case. I agree.

[21] It is clear from the record that the trial court did not rely on the evidence contained in the J88 form when convicting the appellant. In rejecting that evidence the trial court stated the following:

> 'Dit is maar baie kripties voltooi. . .'

'Verder is die verslag eintlik van geen hulp nie en neem dit nie die saak verder nie.'

[22] Without the medical evidence to prove penetration the trial court relied on the other evidence presented by the complainant as corroborated by Cindy. The trial court as such accepted the evidence of the complainant as the truth of what happened and rejected that of the appellant. The trial court also made a finding that the fact that there were no injuries noted in the medical report does not mean that the complainant was not raped. It based this finding on its observation of the complainant. In this case it remarked that the complainant was, at the time of the rape, not a small child but, a reasonable adult lady. It also took into account the fact that at times a woman would be raped and there would be no signs of the rape. I agree.

[23] The evidence of the complainant as to the rape is very lucid. She testified that the appellant caught her, threw her on the bed and hit her on the stomach; he put his knee between her legs and ordered her to open. When she refused to do so he hit and scratched her on her thighs; he pulled her trousers; he then put his penis in her vagina and when raping her made some movements on top of her. She testified that when the penis went in it was painful because it was the first time she was ever penetrated. She said it was burning and very painful. After he raped her blood came out of her vagina. Cindy saw blood-clods on the linen. It can be safely inferred that the blood on the linen is from the complainant's vagina.

[24] I also have to accept the complainant's uncontroverted evidence that after the incident the appellant tried to run away but could not because he did not have money. This is a sign of guilt.

[25] The appeal against the conviction stands therefore to be refused.

[26] As regards the appeal on sentence, the appellant's counsel in argument in court attacked the sentence imposed by the trial court on the basis that the imposed sentence was too harsh and that a shorter period of imprisonment would have been justified given the circumstances of the case. The submission by the appellant's counsel being that an effective sentence of 20 years would have been an appropriate sentence.

[27] The charge of rape against the appellant was read with the provisions of s 51 (1) *(a)* and Part 1 of Schedule 2 of the Criminal Law Amendment Act, 105 of 1997 ("the Act"). In terms of the provisions of the Act the trial court was obliged to sentence the appellant to life imprisonment in respect of the conviction of rape of a person under the age of sixteen years, in this instance the complainant was 14 years old, unless it found that substantial and compelling circumstances which justified the imposition of a lesser sentence exist. The trial court found such circumstances not to exist and imposed the prescribed sentence of life imprisonment. As stated earlier in this judgment, the appellant was duly represented during the trial and ought,

therefore, to have been aware of the consequences of the provisions of the relevant sections of the Act.

[28] It is trite that a court exercising appellate jurisdiction cannot approach the question of sentence as if it were the trial court and then substitute the sentence arrived at simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. An appellate court may interfere with the sentence imposed by the trial court when there is a material misdirection, irregularity or the sentence imposed by the trial court is shockingly inappropriate.[3]

[29] At the hearing of the appeal the appellant's counsel made submissions in relation to the appropriateness of the sentence. According to counsel the sentence imposed by the trial court is shockingly inappropriate in that firstly, the sentence is not proportionate to the offence committed. This is so according to counsel, because this is not the worst case since the complainant did not suffer any injuries. Secondly, by imposing the sentence of life imprisonment it means that the appellant, at 22 years of age, will have to spend the rest of his life in prison.

[30] The submission by the respondent's counsel on the other hand is that technically speaking this case is not the worst case, but for the complainant it was the worst. Someone who went through the ordeal, the rape is the worst, so counsel

[3] See S v Kibido 1998 (2) SACR 214 (SACR) 214 (SCA) at 216G-H and S v Malgas 2001 (1) SACR 469 (SCA) 478 para 12 d-g.

argued. According to counsel the lack of injuries does not also say that there should be deviation from life sentence.

[31] The Supreme Court of Appeal has expressed a view that a proper interpretation of the provisions of section 51 (3) (a) (A) (ii) of the Act does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate sentence.[4]

[32] I agree with the trial court that the personal circumstances of the appellant do not constitute substantial and compelling circumstances. Having found that there are no substantial and compelling circumstances justifying deviation from the prescribed sentence, the trial court was correct to impose the sentence of life imprisonment. But, I tend to agree with the submission by the appellant's counsel that the sentence of life imprisonment in the circumstances of this case is shockingly inappropriate. It is not proportionate to the offence the appellant has committed. Although I do not align with the view that there are degrees of rape, I, however, take note of the *Mudau*-judgment and the fact that the appellant sustained no physical injuries during the rape should be considered in the appellant's favour when imposing sentence.

[4] See Mudau v S [26] (764/12) [2013] ZASCA 56 (9 May 2013) at para [14].

[33] It is common cause that the complainant suffered no physical injuries, and when considered together with the fact that the appellant is a first offender and that he is only 22 years old, it is justified to hold that the sentence of life imprisonment is not proportionate to the offence in this instance. The sentence of 20 years imprisonment as suggested by the appellant's counsel is, in my view, appropriate and just in the circumstances of this case.

[34] In the premises I make the following order:

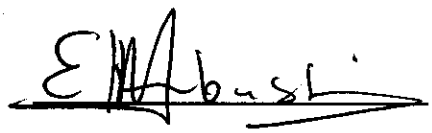
1. The appeal on conviction is refused.

2. The appeal on sentence is upheld. The sentence ordered by the trial court is set aside and replaced with the following:

   "(i) The accused is sentenced to 20 years imprisonment.

   (ii) In terms of section 103 of the Firearms Act the accused is declared unfit to possess a firearm".

3. The sentence is in terms of section 282 of the Criminal Procedure Act ante-dated to 4 September 2009.



E. M. KUBUSHI,

JUDGE OF THE HIGH COURT

I concur

R. NONYANE,

ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant:	**Adv. S. MOENG** **Instructed by:** **Legal Aid South Africa** **Pretoria Justice Centre** **2nd Floor, FNB Building** **Church Square**
On behalf of the respondent:	**Adv C. SMIT** **Instructed by:** **Director of Public Prosecutions** **Presidential Building** **28 Church Square** **PRETORIA 0001**