REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
(GAUTENG DIVISION, PRETORIA)

CASE NO: A869/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

18/03/16
DATE

SIGNATURE

18/3/2016

In the matter between:

B. N. Appellant

and

THE STATE Respondent

J U D G M E N T

TEFFO. J:

[1] The appellant was convicted in the regional court, Vereeniging, on one count of rape of a 13 year old girl, his cousin, in contravention of s 3 of the Sexual Offences and Related Matters Act, 32 of 2007. He was sentenced to imprisonment for life. He now appeals against his conviction and sentence in terms of the provisions of s 10 of the Judicial Matters Amendment Act, No 42

of 2013. The section provides that an accused person who has been sentenced to imprisonment for life by the regional court under s 51(1) of the Criminal Law Amendment Act, No 105 of 1997 may note an appeal without having to apply for leave in terms of s 309B of the Criminal Procedure Act, 51 of 1977.

The appeal against conviction

[2] Basically the issues raised in the appeal against conviction were that the trial court erred in finding that the state proved the guilt of the appellant beyond a reasonable doubt and that there were no improbabilities in the evidence of the state. It was pointed out that the evidence of the different state witnesses was riddled with material contradictions. It was argued on behalf of the appellant that the regional court's evaluation of the evidence was flawed and misdirected.

The appeal against sentence

[3] The appellant challenges the sentence imposed on him on the basis that the trial court erred in not taking into account the following mitigating factors when considering whether substantial and compelling circumstances exist: the time he spent in custody awaiting trial, the absence of previous convictions and the rehabilitation element. It was submitted that the trial court overemphasised the seriousness of the offence, the interests of society, the prevalence of the offence, the deterrent effect of the sentence and the retributive element of sentencing. It was argued that the sentence of imprisonment for life is out of proportion to the totality of the mitigating factors, is grossly excessive and that the trial court has not exercised its discretion

properly when sentencing the appellant.

[4] The state disagreed with the submissions made on both conviction and sentence. It was argued on behalf of the state that the appellant was correctly convicted and that the sentence imposed is justified.

The evidence

[5] The state called three witnesses, namely, Ms P. T. (the complainant), Ms M. J. (the complainant's mother) and Ms N. M. in support of its case while the appellant testified without calling witnesses.

(6) Ms M. J. testified that on the evening of 15 June 2013 and at approximately 18h00 the complainant went to a neighbour's homestead to give a school shirt to her friend, N.1, who had borrowed it from her. She did not return. At approximately 19h00 someone informed her that she had been raped. She went out to the street where she found the complainant in the company of some ladies whom it is alleged rescued her from her assailant who had fled. The police also arrived at the scene and the complainant was taken to a doctor for examination. A medical report, the so-called J88, was completed. She found the complainant crying, was untidy and her hair was full of grass. The complainant told her that she was raped by the appellant. According to the J88 completed by Dr Braid at Kopanong hospital, the complainant had an abrasion on her forehead which the doctor said was supportive of a history of assault. There were also tears to the hymen which the doctor concluded were an indication of a vaginal penetration.

[7] N.1 corroborated the evidence of the complainant's mother that at approximately 18:00 on 15 June 2013 the complainant brought a school shirt to her which she had borrowed. She further testified that while she was still with the complainant, the appellant arrived at her homestead and requested the complainant to accompany him to a friend where he was to collect his money. The complainant left with the appellant. She followed them but they disappeared along the way and she returned home.

[8] The complainant testified that she left with the appellant from N.1 homestead after he promised to buy her a quarter bread if she accompanied him to a friend where he was to collect his money. They went to two places, looking for the appellant's friend without success. As it was getting dark, she told the appellant that she needed to go home. The appellant walked with her. As they walked through the veld the appellant tripped her, closed her mouth as she was screaming, throttled her and took her into the veld where he ordered her to undress. She refused and the appellant undressed her pants and panties. He ordered her to open her legs and when she refused, he forced them open. He undressed his pants, let her lie on her back, inserted his penis into her vagina and made up and down movements on top of her. She felt pain and screamed. He hit her with a fist on her eye and told her to get dressed. He took out a knife and threatened kill her because her father chased him from his house. They came across some ladies whom she told that the appellant wanted to kill her. The ladies pulled her away and the appellant fled. Those ladies called the police and requested some children to

go to her house and call her mother. Unfortunately none of those ladies was called as a witness by the state.

[9] The appellant took the stand in his own defence. He denied the allegations against him and raised an *alibi.* He testified that his uncle, the complainant's father, told him to leave his homestead the following day. He did not sleep at the complainant's house that evening. He left the house an evening prior to the alleged incident and went to a drinking place where he drank alcohol with A the whole night. He did not remember what happened the next day but he thought he could have left Grasmere between 12:00 and 13:00 to Everton where he joined one N.2 and others who were drinking. Since then he never returned to the complainant's homestead in Grasmere. He contended that the complainant could have been raped by someone else and that he was falsely implicated because of his tiff with the complainant's father, which led to the latter chasing him from his homestead. He had wished to call a witness but was advised that the witness died while he was in custody. As a result, the appellant closed his case without calling further witnesses. Therefore this completes the summary of the evidence led in the regional court.

[10] Section 208 of Act 51 of 1977 *("the Criminal Procedure Act)* provides that an accused person may be convicted of any offence on the single evidence of a competent witness. It is, however, a well-established judicial principle that the evidence of a single witness should be approached with

caution, his or her merits as a witness being weighed against factors which militate against his or her credibility (S *v Stevens* 2005 (1) All SA (1) SCA).

[11] The correct approach to the application of the so-called *'cautionary* rule' was set out by Diemont JA in *S v Sauls and Another* 1981 (3) SA 172 (A) at 180E-G where he said the following:

> *"There is no* rule *of thumb test or formula to apply when it comes to* a *consideration of the credibility of* a *single witness ... The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth had been told. The cautionary* rule *referred to by De Villiers JP in R v Mokoena 1932 OPD* 79 *at BO, may be* a *guide to* a *right decision but it does not mean that 'the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded* ...'. *It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."*

[12] The evidence about the rape is that of a single witness. The evidence was short and clear and the trial court found that the complainant's evidence was credible and could be relied upon after it was corroborated by the J88 referred to above. According to the J88 medical report the complainant sustained injuries to her private parts. There were fresh tears on the hymen at 1, 3 and 9 o'clock position. Common sense dictates that where there was a tear on the hymen, there would have been some bleeding. The freshness of the tears in the hymen means that there had been blood on the hymen. It was argued on behalf of the appellant that the J88 only states that the complainant was "vaginally" penetrated and not "forcefully" penetrated. Accordingly, so was the argument that it was improbable for a child of the complainant's age not to have bled if it was for the first time she was forcefully

penetrated. This submission is without merit. No evidence was led to the effect that the complainant did not bleed as a result of the rape. A tear on the hymen is an indication of penetration. According to the complainant the appellant penetrated her vagina with his penis without her consent, she felt pain hence the presence of tears on her hymen. The complainant also testified that at the time the appellant was on top of her she screamed when she felt pain and the appellant hit her on the eye with a fist. The J88 states that she had an abrasion on her forehead which the doctor said was supportive of a history of assault.

[13] A further submission related to the complainant's evidence that the appellant did not use a condom and that the DNA results admitted into evidence were negative and/or indicated that no DNA could be obtained from the exhibits. It was argued that had the appellant raped the complainant, DNA evidence linking him would have been found, as there was no evidence that the complainant bathed before she was examined by the doctor. Further to this, it was submitted that the appellant's failure to use transport money he was given to go back home could be the reason he was falsely implicated.

[14] The appellant suggested that the complainant could have been raped by someone else and that he was falsely implicated for the reasons stated earlier. Much was made of the fact that there is no conclusive DNA result linking the appellant to the rape. Inconclusive DNA results do not mean that the complainant was not raped. Even in the absence of DNA results, there is overwhelming evidence that the complainant was raped. As I have already

indicated above, a tear on the hymen is sufficient evidence of rape. The submission by the defence regarding the DNA results does not take the appellant's case any further.

[15] It was also submitted that it is highly improbable that the complainant would have followed the appellant to see his friend whereas it was her stated wish to go home. Furthermore, so was the argument, that it is highly improbable that the appellant would just suddenly trip the complainant and rape her in the veld. It was pointed out that the complainant had an opportunity to escape at the time she said she wanted to go home but she followed the appellant. Her evidence that after the rape, the appellant threatened to kill her with a knife was also criticised. It was argued that the ladies she alleged they came across with while she was in the company of the appellant, did not see the knife and that if the appellant had a knife in his possession at the time and threatened her with it, she would not have been able to complain to the said ladies. It was further pointed out that the appellant would not have let them pull her away from him and flee the scene. According to the complainant's version, the appellant had a dangerous weapon with him which he could have used against the said ladies, so the argument went. The complainant's evidence that she disclosed to the said ladies that the appellant threatened to kill her and said nothing about the rape, was also criticised. The appellant fled when the ladies that rescued the complainant approached because he was scared to have been seen with her. Those ladies were not called as witnesses. To argue that those ladies did not see the knife he carried is baseless. In any event it cannot be said that he was carrying the

knife all the time he was with the complainant. According to the complainant's evidence he only took out the knife after the rape.

[16] The appellant's counsel also argued that there were discrepancies between the complainant's evidence, that of her mother and N.1. It was pointed out that while the complainant's mother testified that the appellant was at her homestead around14:00, the complainant said he was there around 18:00. It was submitted that if he was at the complainant's homestead around 18:00 and took the complainant away with him, the complainant's mother would have seen him. It was further pointed out that if the appellant was at the complainant's parental home at 14:00 as she had testified, the complainant would have seen him. The basis for the criticism of the evidence of the complainant's mother was that she mentioned that the appellant slept at her neighbours' house while that evidence did not feature in N.1's evidence save to say that she saw him the day he went away with the complainant. It was submitted that there was no reason for the appellant to go to the complainant's homestead and sleep at 14:00 while he was taking care of their neighbour's house where he slept the night prior to the alleged incident.

[17] Even though the appellant denied the allegations and raised an *alibi,* the state's evidence that he was with the complainant on the evening of the incident is overwhelming against him. The complainant's evidence in this regard is corroborated by both her mother and N.1. The complainant's mother's evidence that the complainant left her parental home to N.1's

homestead at approximately 18:00 that evening and did not return, cannot be faulted. She later encountered the complainant in the street, when the latter made a report about the rape to her. N.1 testified that the appellant left her homestead with the complainant. There is no suggestion that N.1 who was an independent witness, was part of an alleged conspiracy by the complainant's family to falsely implicate the appellant. The discrepancy between N.1's evidence and that of the complainant to the effect that the appellant promised to give the complainant R5 if she accompanied him to a friend as against a quarter bread as testified by the complainant is not material. If anything, it is consistent with, and supports the state's case that the complainant was in the company of the appellant during the evening of the incident. Equally irrelevant is the fact that N.1 did not mention that the appellant slept at her homestead a night prior to the incident as testified by the complainant's mother.

[18] The evidence of the complainant's mother that the appellant was at her house at 14:00 was criticised. It was argued that if that was indeed the case, the complainant could have seen him. Furthermore it was pointed out that it was improbable that the appellant could sleep at the complainant's homestead during the day while he was taking care of a neighbour's house. Those arguments are irrelevant. The same applies to the criticism of the complainant's evidence that the appellant was in the vicinity of her home at approximately 18:00. So is the argument that if the appellant was there at the time, the complainant's mother could have seen him. They could have concentrated on other things in the house which kept them busy.

[19] The appellant's version was that he does not remember what happened the day after the night he left the complainant's homestead. On page 30 of the record at line 15 the following questions were asked and his responses were as follows:

> "Where *were you on 15 June 2013? ... I was at Grasmere, I then left to Everton.*
>
> Where *at Grasmere? ... At the drinking place. The name of the drinking place? No name, just* a *shack where they* am *selling beer. When did you go to that shack to drink liquor? We were them the whole night. Do you still remember the date when you went them? I do not remember the date, because on the day in question I did not think that something might happen."*

On page 31 at line 7 the following was said:

> *'Friday after your uncle told you that you must leave, where did you sleep* [indistinct]? ... *I did not* sleep, *I drank all night.'*

Page 31 line 17:

> *'You said you* were *drinking the whole night and what happened the following day? The following day I do not remember, but I think I have left around past 12h00 to 13h00 during the day.*
>
> *Court: That was now on Saturday? Correct your worship.*
>
> *I did not have money for* a *taxi.*
> *I then used* a *train alighting them at the Residential Station, from them I walked to Everton.'*

[20] As stated earlier, the fact that the complainant was raped on the day in question is not open to any serious challenge. The question remains only as to the perpetrator, whom the complainant had identified as the appellant. I have already accepted the totality and essence of the complainant's evidence. There is no discernable reason on record why the complainant and her family

would falsely implicate the appellant in the rape, and leave out the real perpetrator. I am satisfied under the circumstances that the trial court correctly rejected his evidence as not being reasonably possibly true and accepted the complainant's evidence which had some corroboration as discussed above. The trial court correctly found that the state proved its case beyond a reasonable doubt against him and convicted him of rape. Accordingly, the appeal against conviction falls to fail.

[21] I now turn to sentence. It is trite that in every appeal against sentence, whether imposed by a magistrate or a Judge, the court hearing the appeal -

> *"(a) should be guided by the principle that punishment is 'pre-eminently* a *matter for the discretion of the trial court', and*
>
> *(b) should be careful not to erode such discretion : hence the further principle that the sentence should only be altered if the discretion has not been Judicially and properly exercised ."*

(See *S v Rabie 1975 (4) SA 855 (A) at 857 D-F)*

[22] A pre-sentence report was compiled in mitigation of sentence and handed in by agreement. From that report the following personal circumstances of the appellant appear: He is the eldest of his three siblings. His parents separated in 1994 after which he moved with his father to Milnerton, Cape Town, together with one of his sisters while his mother remained with his other siblings. Both his parents were employed but the financial situation in the family changed after their separation as his father moved in with another woman. He was 12 years old when his parents

separated and he was taken from the care of his mother to stay with his father and stepmother. Both his parents are deceased, the mother in 2005 and the father in 2012. He completed matric in 2004, was unemployed until 2007 when he was employed at a bar in Durban Westville as a dishwasher, and then worked at different restaurants until 2010 when he was dismissed for theft. He also worked at Spur restaurant in Mosselbay in 2011 but left for greener pastures. The appellant does not have regular contact with his siblings. He has a child (a girl) aged 5 who stays with her mother and he last saw her in 2011. He used to support her when he was working. He left Cape Town in 2011 to look for employment in Gauteng. He settled in Everton as he got employed in Vanderbijlpark. He was dismissed from work for abusing alcohol and not reporting to work on a regular basis. He then relocated to Grasmere in February 2013 where he stayed with the complainant's father, his maternal uncle, and his family. He has been unemployed since February 2013. At the time of his arrest he was financially supported by his extended family which included the complainant's father's family. Although he denied the rape, he had consumed alcohol on the day of the incident. He has no previous convictions. He was 31 years old at the time of the commission of the offence. The rape he had been found guilty of, is not the worst. The appellant was arrested on 27 June 2013. He was in custody awaiting trial for a period of one year and three months.

[23] The defence submitted that all factors cumulatively taken constitute substantial and compelling circumstances warranting the court to impose a lesser sentence than life imprisonment.

[24] After referring to the decisions of *S v Abrahams* 2002 (1) SACR 116 (SCA), *S v Nkomo* 2007 (1) SACR 198 (SCA) and *S v D* 1995 (1) SACR 259 (A) the defence further submitted that the sentence of life imprisonment is unreasonable and out of proportion with the sentences imposed for similar offences. Although it was also argued that the appellant's personal circumstances as stated in the probation officers' report might have led to his behaviour, the probation officer who compiled the report did not agree.

[25] In aggravation of sentence the state submitted that the victim was 13 years old when she was raped. She was very young and traumatised due to the commission of the offence. The appellant did not wear a condom when he raped the victim. He exposed her to the danger of being infected with sexually transmitted diseases, such as HIV and AIDS. The victim was raped by her cousin who was 18 years older than her and who was also given a shelter and fed by her family at the time of the incident and at the time he was unemployed. She was close to the appellant whom she trusted and respected. She looked up to him for protection but he betrayed her trust and violated her by raping her. He broke her virginity. The state after referring to the decision of *S v Chapman* 1997 (2) SACR 3 SCA did not agree that there are substantial and compelling circumstances in this matter.

[26] The appellants in *S v Abrahams* and *S v Nkomo supra* whose circumstances and facts were almost similar to the present matter although

the victim in *S v Nkomo* was raped five times during the night, were sentenced to 12 and 16 years respectively.

[27] In *S v Malgas* 2001 (1) SACR 469 (SCA) endorsed in *S v Dodo* 2001 (3) SA 382 (CC) it was held that it is incumbent upon a court in every case before it imposes a prescribed sentence, to assess upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear that what is meant by the offence in that context consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. If the court is satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then the court is bound to impose that lesser sentence. I have considered the totality of the evidence, the circumstances of the commission of the offence, the nature of the offence and the seriousness thereof, the interests of society and the personal circumstances of the appellant. All these factors cumulatively taken render the imposition of the minimum sentence of life imprisonment unjust. Under the circumstances I find that the trial court misdirected itself by finding that there were no substantial and compelling circumstances justifying it to impose a lesser sentence. I agree with the defence that the personal circumstances of the appellant cumulatively taken constituted substantial and compelling circumstances. The submission by the

defence that the accused should not be punished to a point of being broken also has merit.

[28] It is therefore my view that this Court has to interfere with the sentence imposed by the trial court. The sentence imposed by the trial court is disturbingly disproportionate with the offence committed. There is in any event, a striking disparity between the sentence imposed by the trial court and that which this court would have imposed had it sat as a trial court. The sentence therefore under the circumstances falls to be set aside.

[29] In the result I make the following order:

29.1 The appeal against conviction is dismissed.

29.2 The appeal against sentence is upheld and the sentence imposed by the regional court is set aside and the following sentence is substituted in its stead:

" The accused is sentenced to 18 years imprisonment."

29.3 In terms of section 282 of the Criminal Procedure Act, the substituted sentence is antedated to 9 October 2014, being the date on which the appellant was sentenced.

29.4 The order of the court *a quo* declaring the appellant unfit to possess a firearm is hereby confirmed.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

I agree:

T M MAKGOKA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

FOR THE APPELLANT	L W RANKAPOLE
INSTRUCTED BY	PRETORIA JUSTICE CENTRE
FOR THE RESPONDENT	M MASHEGO
INSTRUCTED BY	DIRECTOR OF PUBLIC PROSECUTIONS
DATE OF JUDGEMENT	18 MARCH 2016