

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Not reportable

Not of interest to other Judges

CASE NO: A624/15

DATE: 26 AUGUST 2016

In the matter between:

FARENCE NICLAS MNYAMBO

Appellant

And

**THE STATE
J U D G M E N T**

Respondent

SETHOLE, AJ

INTRODUCTION

1. The Appellant was convicted by the Regional Magistrate's Court of Nelspruit for rape of N T, a minor, “the complainant”. He was sentenced to life imprisonment and it was ordered that his name be placed in the Registrar for Sexual Offenders.
2. The Appellant had an automatic right of appeal in terms of section 10 of the Judicial Matters Amendment Act 42 of 2013. He is appealing against both conviction and sentence.
3. A birth certificate was handed in as exhibit “A” which reflects that the complainant was born on the 07th January 2001. The rape incident occurred around 2008 meaning the minor was 7(seven) years old at the time.
4. The complainant testified through an intermediary. She testified that the complainant was staying with her aunt and her sister N..... at M..... T..... On a date that she could not remember, her aunt had gone to work and N.....’s child got

ill and had to be taken to a clinic. It was on this day that the minor was taken to her uncle, the appellant to take care of her.

5. The appellant went to buy some liquor and when he came back, gave the minor food to eat. After eating when appellant took the complainant to his bedroom, caused her to lie on his bed, undressed her and had sexual intercourse with her. He thereafter gave the complainant R2, 00 and promised to kill her should she tell anyone.

6. It was on a different date when she made the first report to her grandmother that the appellant took her to his room undressed her and had sexual intercourse with her. She had sustained injuries on her bladder and her vagina. The complainant was thereafter taken to female forensic nurse for examination at a later date.

7. On cross examination she testified that her sister came back in the afternoon around 16h00 - 17h00 to fetch her from the appellant and she bled as a result of the incident. She further testified that it is a police woman by the name of Patricia (Hlanhlanhla) who advised her grandmother and mother to take her to the police station.

8. The complainant did not tell anyone immediately after the incident out of fear of being killed as the appellant had promised to kill her should she tell anyone.

9. The complainant's sister, though not biological, Ms N M testified that she left the complainant with the appellant at about 08h00 in the morning as she had to take her own child to the clinic on that particular day. She returned to fetch the complainant around 17h00. She found the complainant seated at the door busy crying. Upon being asked, the complainant said she had severe toothache.

10. The grandmother of the complainant, Ms L M, testified that the accused is his son in law and that on the 25th September 2009 she took the complainant to the police station. It was after the complainant complained of pains on her tummy as well as her abdomen and neck. The police officer Hlanhlanhla who is a next door

neighbour, in her presence enquired from the complainant what her problem was. The complainant did not report anything at the time, but Hlanhlanhla advised her grandmother that the complainant be investigated either by the police or GRIP. On their way to the police station, the complainant opened up and related the whole incident to her as testified, save to say that this witness's testimony is that the minor ate food and went to bed and that is where the appellant came and mounted her, undressed her and had sexual intercourse with the complainant.

11. It was her testimony that the appellant closed the complainant's mouth and threatened to kill her should she tell anyone about what happened. She noticed behavioural changes on the minor in that the minor was "*was longer playful, she would kneel on her knees or sit by her side for a long period*" P73 of the record.

12. On cross examination, she stated that the complainant was threatened to be killed by the appellant and that is the reason why she did not report the incident immediately. She further stated that, immediately after the arrest of the appellant on Friday, his family members approached the elders of the complainant and asked for forgiveness.

13. Hlanhlanhla testified that she knew the complainant since 2008 because at a certain stage, the complainant used to sleep with her as she was scared to sleep alone. She said around 25th September 2009, she interviewed the complainant who did not reveal anything relating to the alleged crime then. However, her gestures of looking down gave rise to a suspicion that something was wrong whereupon she requested the grandmother to take the complainant to GRIP at the police station but before the grandmother and the complainant reached the police station, the complainant related the whole incident to the grandmother because she was afraid to go to the police station.

14. On cross examination, she testified that the complainant's urine was abnormal in that it contained some dirt and that confirmed her suspicion that something is wrong with the complainant. She did not report the complainant's

abnormality to anyone because she wanted the complainant herself to open up and report what had been done to her. It is this witness who testified that the complainant was taking chronic medication because she was suspected of being HIV positive.

15. The forensic nurse who examined the complainant stationed at Themba Hospital was also called to testify. On the 07th October 2009 she examined the complainant and completed the J88 which was subsequently handed in as exhibit “C” during the trial of this matter. She confirmed there are certain portions of the J88 that she could not complete as the incident happened some time ago. Upon relating the incident to her, the complainants emotional state appeared to be “*sad and sobbing when telling the story*” P 62 of the record. She examined the complainant’s hymen, and noted that there was something suspicious, which appeared to be an interruption which could be caused by penetration or sometimes it could be an abnormality. The report that the complainant gave to this witness was that “*she was in grade 2 staying at her aunt’s place when her male relative put his penis into her vagina*”. The forensic nurse conclusions were that her findings are consistent with the history of previous penetration.

16. The state closed its case and an application for discharge of the accused in terms of section 174 of The Criminal Procedure Act 51 of 1977 was made and according to the record, it is not clear what the outcome was. I will assume that it was turned down as the appellant took the stand in his defence.

17. The appellant testified in his defence but his defence was just a bare denial. It is not necessary to repeat his evidence as he denied everything, including the visit by the minor ever at his house or any visit by his family at her house even though they live 100 metres apart and they are related. He indicated that he does not have an idea of the alleged incident. He was arrested on the 25th of September 2009. The police informed him that he was arrested for raping his sister’s child.

18. In cross examination the appellant introduced a defence that he was

implicated because the family of the complainant owes his wife money and as a result there was a vendetta between the two families.

19. J T M testified in defence of the appellant. She confirmed that the motive of implicating the appellant is the issue of money owed to her by the family of the complainant.

20. In convicting the appellant, the trial court made a credibility finding on the complainant and found that she was logical and did not contradict herself besides that she was a child. The trial court found the complainant to be an honest witness and accepted the complainant's explanation that she did not report the incident because she was constantly reminded almost on daily basis by the appellant, that she will be killed, should she report the incident to anyone. The trial court accepted the evidence of the state despite the delay in reporting the rape. The version of the appellant was rejected as false and a conviction followed.

21. The issue to be decided was whether the trial court misdirected itself in accepting the explanation of the complainant of delaying in reporting the rape incident? And whether the state proved its case beyond reasonable doubt.

22. On appeal it was argued, that the complainant is a single witness and her evidence should be clear and satisfactory in all material respects and treated with caution. It was further argued that there is no conclusive proof in the form of DNA. See appellant's heads of arguments.

23. I agree with appellants counsel that the complainant is a single witness and her evidence should be clear and satisfactory in all material respects and treated with caution. I found nothing unbecoming in the evidence/testimony of the complainant. The trial court already made a credibility finding on the complainant's testimony which could not be shaken under cross examination. She was consistent in her own evidence.

24. The appellants defence rely mainly on the fact that there was a delay in the report of the incident.

25. The charge sheet though refers to an incident that occurred in around 2008

and the charges against the appellant were laid on or around the 25th September 2009. I am of the view that it is impossible to expect the appellant to be linked through DNA in the current matter as it happened a long time ago. Furthermore the identity of the appellant to the complainant and her family is not in dispute as they know each other well to an extent that during the trial each of the witnesses tried to explain to the court how they are related, including the appellant and his wife.

26. The appellants defence rely mainly on the fact that there was a delay in the report of the incident: I agree with the conviction by the trial court for the following reasons:

26.1. The complainant was 7(seven) years old at the time of the incident and 11 (eleven) years old at the time she gave evidence. Due to the complainant's age at the time, there might have been contradictions in the state's case as a whole but such are not material contradiction between the complainant's testimony and that of her grandmother, the complainant testified that she was taken to the appellant's bedroom but the version of the grandmother was that after eating, she went back to bed and while lying in bed she felt appellants body onto hers.

26.2. The complainant's testimony is of a single witness regarding the actual rape itself but was corroborated by the sister who found the complainant seated outside the house of the appellant on the date of the incident busy crying. And the grandmother who at a later stage ended up taking the complainant to the police station even though the complainant opened up before they could reach the police station.

26.3. Further by the testimony of Hlanhlanhla, the neighbour who noticed a change in behaviour of the complainant and finally by the forensic nurse who testified that the complainant reported the rape incident, even though it was not recent but upon vaginal examination, her findings were consistent with penetration. See *S v Teixeira* 1980 (3) SA 755 (A) at 761 where the court in evaluating the evidence of a single witness stressed that 'a final evaluation can

rarely, if ever, be made without considering whether such evidence is consistent with the probabilities/ The fact that it is corroborated would also strengthen its probity, without which it may be rejected if it also has a litany of intrinsic probabilities, omissions and contradictions.

26.4. There was an explanation advanced by the complainant regarding the reason for the delay in the reporting of the alleged rape. The complainant was threatened by the appellant that she will be killed should she report the incident to anyone. In terms of section 59 of the Criminal Law (Sexual Offences and Related Matters)

Amendment Act 32 of 2007 it states:

“In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof

27. The trial court accepted the evidence of the state despite the delay in reporting the alleged rape. The version of the appellant was rejected as false. For the rejection of an accused's version as not reasonably possibly true Zulman JA, in *Sv K2000 (1) SACR 453 (SCA)* at 455A-C said the following:

'The accused's failure to convince the court is a further guarantee of the veracity of the evidence tendered by the State.'

*It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. The test is whether there is a reasonable possibility that the accused's evidence may be true *

28. I find it improbable (as the magistrate did) that the complainant at her age and her family, would conspire to fabricate charges of rape against the appellant and also fake a previous penetration that was noted by the nurse and hide the real perpetrator due to the fact that the family of the complainant owed money to the family of the appellant.

29. I am satisfied that the conviction of the Appellant was in order. SENTENCE

30. Whilst it is trite that the sentencing powers are pre-eminently within the judicial discretion of the court that tries and convicts the accused, the appeal court will interfere where a sentence is based on incorrect facts or it is shockingly inappropriate or where there is an irregularity or misdirection. *S v Rabie 1975(4) SA 855 (A) AT857 D-E*.

31. I now turn to consider the personal circumstances of the appellant placed on the trial record and arguments advanced on his behalf. The appellant was 46 years old at the time of the trial, married with four children. He was employed at Rob Ferreira School, has a medical condition with his testicles and his highest level of education is matric. He has no previous conviction.

32. Not only has this court to take into account the personal circumstances of the appellant, but also the seriousness of the offence and its effect on the minor. It is also on record that the child is under chronic medication as she is suspected as being HIV positive. It is not clear as to whether this condition resulted from the same incident or not but having regard to the age of the minor at the time of the incident, this court cannot totally ignore that fact. According to the psychosocial report handed in at the trial as exhibit "B" at paragraph 3.5 that is, impact of the offence on the child. It states, inter alia:

The abuse had a negative impact both physically and psychological to the child\ since the incident occurred the child complains of headache and the neck the incident also affected the child's socialization process, she could no longer play with other children and friends as she usually did though she is trying to adjust. She has shown social withdrawal as she spent more time at home than she used to do before. She is also scared of male persons, should a male visit her family, she becomes uncomfortable or she would stay in the house until that particular person leaves the child school performance has dropped.

33. This appeal court is to exercise its jurisdiction as the appeal court, is in essence called upon to oversee the fairness of the proceedings in the court *a quo*

and to determine whether the ultimate outcome was underpinned by the dictates of justice or not. We have to ensure that the personal circumstances of appellant as stated above have been properly taken into consideration and that his profile has been evenly balanced against the backdrop of the crime committed as well as the interest of society offended. The delicate balancing act demands careful and objective measure of restraint. Great care has to be taken in order to see to it that no cornerstone of the triad is overemphasised or underemphasised at the expense of another-*S v Zinn* 1969 (2) SA 537 (A).

34. Sitting as the appeal court, this court cannot, in the absence of a material misdirection by the trial court, approach the question of sentence as if this court is the trial court and then substitute the original sentence with a different sentence simply because this court reckon it is more preferable than the one imposed by the trial court - *S v Malgas* 2001 (1) SACR 469 (A) at 478d - e.

35. This court's judicial power to exercise interference is limited and for sound reasons. Where the original sentence imposed by a trial court is in all circumstances shockingly severe and thus inappropriate, the appeal court can also interfere with the sentencing discretion of a trial court ~*S v De Jager* 1965 (2) SA 612 (A).

36. In the premises, and having considered all the fact regarding sentence, I do not find the sentence of the trial court to be shockingly inappropriate or that there is an irregularity or misdirection.

37. In the results I propose the following order:

1. The appeal against conviction and sentence is dismissed.

E.E SETHOLE Acting Judge of the High Court

I agree and it is so ordered.

N.V KHUMALO Judge of the High Court

Date of judgment: 26 August 2016

For the appellant: Adv. L Augustyn (heads filed by Ms. M.M.P Masete)

Instructed by: Pretoria Justice Centre

For respondent: Adv. J.J Kotze

Instructed by: Director of Public Prosecutions