REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A850/2015
DATE: 23/9/2016

In the matter between:

MXOLISI MSIYA **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

TWALA AJ

[1] The appellant was on the 22 April 2014 convicted of rape and sentenced to life imprisonment in terms of Section 51 of the Criminal Law Amendment Act, Act 105 of 1997 ("The Act") by the Magistrate Court sitting in Benoni. He was further declared unfit to possess a firearm in terms of Section 103 of the Firearms Control Act, Act 60 of 2000. He was legally represented at the trial of the matter and now is exercising his automatic right to appeal the life imprisonment sentence.

[2] It is apparent from the record that the complainant and the appellant knew each other since they lived together in the same house. The issue that is in dispute is whether the appellant did have sexual intercourse with the complaint and without her consent.

[3] The complainant was thirteen years old when the rape incident took place. She testified that she met the appellant at a street corner. The appellant called her to join him and they walked together to the appellant's friend's house. They found the appellant's friend, Mr N, who testified in the trial as well. As they were seated in the house, Mr N walked out of the house to go and buy cigarettes from the nearby Tuckshop.

[4] Immediately Mr N walked out of the house, the appellant grabbed her and threw her on the bed. He lifted her skirt and raped her. When Mr N came back from the Tuckshop, the appellant got off her. Mr N asked the appellant what he was happening

and he said nothing was happening. Mr N then ordered them to leave his house and they left. Only a month later the complainant reported to the girlfriend of the appellant that he raped her. She even described how her private parts look like to confirm that he raped her. The appellant's girlfriend then took her to the South African Police Service to report the incident.

[5] Mr N testified that the appellant came at his house on that day accompanied by a young girl. When they got into his house, he left them for a few minutes to go to the Tuckshop. When he came back he found the girl relaxing on his bed and the appellant standing. He did not ask them what was happening but decided to chase them away.

[6] Ms M, testified that she was the girlfriend of the appellant and that the complainant was a friend to her children. Complainant reported to her that the appellant raped her. To confirm that the appellant raped her, she described her penis to her that it had pimples. She then took her to the Police to open a case of rape.

[7] The appellant denied having seen or met the complainant on that day. He denied having been to the house of Mr N on that day. He denied having raped or had sexual intercourse with the complainant. He accused his girlfriend of fabricating the rape story of the complainant to get rid of him because he is refusing to commit crimes in order to buy her nyaope.

[8] The complainant was a thirteen year old child. She was a single witness and therefore the Court has to approach her evidence with a measure of caution. In the case of **OPP v S 2000 (2) SA 711 (T) Kirk-Cohen J** stated the following:

"The proper judicial approach is not to insist on the application of the cautionary rules but to consider each case on its own merits. It is so *that children lack the attributes of adults and, generally speaking, the younger the more* so. *However, it cannot be said that this consideration ipso facto requires of* a *court that it apply the cautionary rules of practice* as *though they are matters of rote: on* a *parity of reasoning it cannot be said that the evidence of children, in sexual and other cases, where they are single witnesses, obliges the court to apply the cautionary rules before* a *conviction can take place."*

[9] The testimony of the complainant is plain and unambiguous. Her testimony is corroborated in all material respects by the testimony of Ms M and Mr N. The appellant proffered a bare denial and concocted a collusion between the complainant, his girlfriend and Mr N to get rid of him. He could not give any plausible explanation why his fried and girlfriend would lie about him. The appellant has denied meeting the complainant in the street on that day. He denied going to the house of Mr N with the complainant on that.

[10] In the case of **S v Chabalala 2003 (1) SACR 134 (SCA)** it was stated as follows:

> *"The correct approach is to weigh up all the elements which points towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call* a *material witness concerning an identity parade) was decisive but that can only be on an ex post facto determination and* a *trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture in evidence."*

[11] It is my respectful view that, having considered the totality of the evidence in this case, it cannot be said that the Court a quo misdirected itself or erred in finding that the State has proved the guilt of the appellant beyond any reasonable doubt. The only probable version before the Court is that of the complainant which is corroborated in all material respect by the evidence of Mr N.

[12] I now turn to deal with the sentence imposed by the court a quo in this case. It is trite law that sentencing is pre-eminently the domain of the

trial court. The court of appeal may only interfere with the sentence if the court a quo misdirected itself or the sentence imposed is shockingly inappropriate. It was state in the case of **S v QAMATA 1997 (1) SACR 479 € 483a** that:

"An appropriate sentence actually means a *sentence in accordance with the blameworthiness of every individual offender. The punitive sanction should be proportionate in severity to the degree of blameworthiness and seriousness of the conduct."*

[13] The appellant is convicted of serious offence for which the Legislature has prescribed that a minimum sentence should be imposed by the Courts, unless there are substantial and compelling circumstances existing which compels the court to deviate from imposing such a sentence. The Courts were warned not to deviate from imposing the prescribed minimum sentence for flimsy reasons.

[14] In the case of **S v MALGAS 2001 910 SACR 469 (SCA)** the court stated thefollowing:

"What stands out quite clearly is that the courts are a *good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such to justify* a *departure. However, in doing so, they are to respect, and not merely pay lip service to the legislature's view that the*

prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences for which minimum sentences have been prescribed."

[15] As indicated above, the appellant has committed a serious crime on a defenceless young girl child. She trusted him as a brother and called him "Buti Mxolisi" but he violated her. Worse still, the appellant knew his status that he was "HIV" positive but decided to rape this young girl without using any protection whatsoever. He knowingly and deliberately destroyed the young life of the complainant. It is not that I am unmindful of the problems that beset the complainant before this incident. She has been sexually active at a very young age. She has testified that she has a 15 year old boy-friend. However, there was no reason for the appellant to take advantage of her situation and violet her. It does not justify the conduct of the appellant towards the complainant.

[16] I agree with Counsel for the appellant that the complainant did not sustained any physical injuries and that there is no victim impact report that has been placed before the Court. However, rape on its own is an injury on the body and person of the victim. She does not have to bear physical scars to her body to show that she has been raped.

[17] I therefore conclude in the circumstances that the personal circumstances of the appellant do not outweigh the aggravating factors. In fact, the aggravating factors far outweigh the mitigating factors – hence it cannot be said that the court a quo misdirected itself in imposing the prescribed minimum sentence of life imprisonment.

[18] In the circumstances, I propose the following order:

The appeal is dismissed.

TWALA
ACTING JUDGE OF THE HIGH COURT

I agree

LHAJI
JUDGE OF THE HIGH COURT

Counsel for the APPELLANT: **Adv. S MOENG**

Instructed by: **PRETORIA JUSTICE CENTRE**

TEL: 012 401 9200

Counsel for the Defendants: **Adv. M M SONO**

Instructed by: **OFFICE OF THE STATE ATTORNEY**
TEL:

Date of Hearing: **5 SEPTEMBER 2016**

Date of Judgment: **SEPTEMBER 2016**