HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

CASE NO: A76/2016

5/12/2019

In the matter between:

SAMUEL NDALA YONA Applicant

and

THE STATE Respondent

JUDGMENT

DAVIS, J:

[1] Introduction

This is an appeal against both conviction and sentence in the following circumstances:

1.1 The appellant was found guilty in the Regional Division of Potchefstroom on a charge of rape read with the provisions of section 3 of the Criminal Law

(Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with sections 51 and 52 of the Criminal Law Amendment Act 105 of 1997. The victim was a six year old girl child.

1.2 The appellant was sentenced to 15 years imprisonment.

1.3 He unsuccessfully applied for leave to appeal but, on petition, Mavundla and Jansen van Niewenhuizen JJ granted the requisite leave.

[2] Delay

The matter took a substantial time to come on appeal as it was remitted on more than one occasion for reconstruction of the record. The appellant submitted that the record is still not complete, but elected to prosecute his appeal for the sake of finality on the record as it stands. In our view, the record has sufficiently fully been reconstructed to enable the appeal to be heard without prejudice to the appellant or his constitutional rights to a fair trial. See Schoombee & Another v S [2016] ZACC 50 (15 December 2016).

[3] The prosecution case:

3.1 The appellant's counsel in heads of argument on his behalf, summarised the evidence of the girl child (who testified via an intermediary) as follows:

> *"The complainant, E[….] M[….] was 7 years old, born on the 08th July 2003 and at the time of the trial proceedings and she testified with the assistance of an intermediary Ms Suzan Mantswe. She said that she could not remember the date that the incident occurred in but it was during the 2009 and she was playing with her friend M[….] and L[….]when her mother sends her to take "seshebo" to appellant's home. It came out that the "seshebo" she referred to was chicken heads. She knew the appellant well as at some stage he resided with him, her mother and her grandmother. She said that she went there and put it in the kitchen. According to the complainant, the appellant then called her to the bedroom saying that he want to send her to the shop. She said when she got to the bedroom, the appellant, undressed her pants and underwear, and then put his two fingers on top of her vagina. She said that her mother arrived and she saw what the appellant was doing and*

she called the police. She was taken to the doctor".

The summary omitted that the girl child has also testified that the actions of the appellant were painful and left her crying.

3.2 The difference between the evidence of the girl child and her mother, who was the prosecution's second witness, was that according to the mother the child was sent to fetch herself a jersey from a bag which had earlier the day been left at the appellant's place. This was while the mother was next door at a neighbours place. It was the neighbour that had alerted the mother that the child was crying. When she rushed to the appellant's place, she found the child at the door holding her pants and underwear. It was thereafter that she and the neighbour went with the child to the neighbour's house, examined her and saw a substance on the underwear and traces of blood on the child's private parts. Her evidence was confirmed by the female neighbour who was the prosecution's third witness who also confirmed that hereafter the police had been called.

3.3 The fourth prosecution witness was a medical doctor in psychology who had prepared a psychological report over a period of two months in respect of what the girl child had told him during the course of two consultations. He was confronted with the discrepancy between the evidence of the child and her mother as to whether she had been sent with chicken and gravy or to collect her jersey. The doctor explained that such discrepancies can occur in young witnesses. Apart from raising this aspect, very little was otherwise extracted from this witness in cross-examination.

3.4 The last prosecution witness was a medical doctor in the employ of the Department of Health as a forensic medical officer. She confirmed her examination of the girl child on the evening of the day of the incident as well as her findings and conclusions as reflected in a J88 form. These were to the effect that there was bilateral bruising on the para-urethral folds of the girl child leading her to conclude that the child's vagina had been penetrated with a blunt object but not past the hymen. She considered, for purposes of her description, a finger also as a blunt object. The bruising was due to damage

to blood vessels under the skin. (No such injuries had been complained of or noticed when the mother had bathed the child earlier that day).

[4] The appellant's evidence was that he knew the girl child and her mother, with whom he previously had a relationship. The mother and child had slept at his place the night before the day of the incident in question. On the day of the incident, the mother had gone to the female neighbour to do washing. After the **appellant had returned after having con5umod 5orghum beer with another** neighbour at a nearby house for some hours, he went to lie on his bed on the left hand room in his house. The house has three sections, the left section - where the appellant's bedroom is, a centre section where the kitchen was and a right hand section where a living room was situated. His bedroom section was divided from the rest with a curtain. He woke to hear the child and her friends making a noise in the house. He pulled back the curtain to admonish the children whereupon they ran out of the house. He then called a friend of his from an adjacent tavern to come and cut his hair. The payment was apparently a scale which he filled with beer at the adjacent tavern. It was while sitting in front of his house, having his head shaved that he saw a lady walking past with a cellphone. Shortly hereafter the police arrived accusing him of having raped the girl child who he then noticed sitting with her mother at the female neighbour's house. His other evidence was that at that stage he was not on a good footing with the lady who had phoned the police, who he knew by name. In cross-examination he testified that the mother and child had not slept at his place, the mother had merely placed her suitcase at his place while going to do the washing, which she comes and does on Thursdays and Fridays. He denies the incident as testified about by the prosecution witnesses. He could not dispute the medical evidence but added that he and the female neighbour were also not on a good fooling with each other.

[5] Evaluation ;

5.1 From a conspectus of all the evidence, the following objective facts appear to be common cause:

5.1.1 The girl child was in the appellants house on the day in question.

5.1.2 Medical evidence indicated that the girl child had sustained an injury to

her private parts, caused by a blunt object such as a finger.

5.1.3 One Ntombi had called the police.

5.1.4 When the police came, the appellant was at his house and within sight and the girl child was in the company of her mother and the female neighbour.

5.2 In the absence of any other person or cause for the objectively determined injuries to the girls child's private parts having been identified, then by pure inferential reasoning, the appellant was the cause thereof. In R v Blom 1939 AD 188 the application of inferential reasoning has been stated as follows namely that the inference sought to be drawn must be consistent with all the proven facts and that the proven facts must be of a kind that they exclude every reasonable inference, save for the one sought to be drawn.

5.3 This approach has been amplified by Nugent, J (as he then was) in S v Van der Meyden 1999 (1) SACR 447 *(W)* at 448f - I and quoted by approval by Davis, J in the majority judgment in S v Abader 2010 (2) SACR 558 (WCC) at [44]:

> *"The onus of proof in a criminal case is discharged by the State if the evidence established the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent... . these are not separate and independent test but the expression of the same test when viewed from apposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other".*

5.4 In similar fashion as in S v Abader (at [45] - [48]), once the minor child has been found to have suffered the injuries mentioned, then, in the absence of any evidence (or even suggestion of a reasonable possibility) that she may have sustained it other than at the place of the appellant, leads to the only

inference that the injuries were caused by him. I interpose to state that the appellant's vague allegation of the minor child, who had been alone all day, suddenly playing with an unknown boy, so noisily that it woke up the alleged sleeping appellant, had, in our view, correctly been rejected by the trail court, particularly if one has regard to the vague manner in which this evidence has been tendered.

5.5 I have perused the evidence of the mother and that of the female neighbor and find that the magistrate has correctly accepted this evidence as credible. I add hereto that the neighbour's evidence was consistent with the statement she had given to the police in all material respects, handed in as exhibit "B". Once that is added to the conclusion mentioned in paragraph 5.4 above, the attack on the finding of guilty beyond reasonable doubt flounders.

5.6 The appeal against conviction should be dismissed.

[6] Sentence

6.1 In terms of Section 51 (1) of aforementioned Act 105 of 1997, read with Part I of Schedule 2 thereof, a person who is convicted of the rape of a person under the age of 16 is liable to be sentenced to life imprisonment as a prescribed minimum sentence.

6.2 The magistrate indicated in the reconstructed record that he probably did not impose the prescribed minimum sentence because the appellant had penetrated the child with a finger. The magistrate viewed this as less serious than should she have been penetrated with a penis.

6.3 Evaluating the evidence from the perspective of the victim, the difference pales. Although the impact of the offence on the child was not the scope of the investigation by the psychologist, some information in this regard is contained in her report. The child. who was a friendly child that had gotten along with her peers prior to the incident, was no longer an enthusiastic playing child. She also suffered the repeated secondary trauma, having, at her age, to repeatedly relate the incident to the examining doctor, the psychologist, the investigating officer, the prosecutor during consultation and again in court. It is therefore seriously doubtful whether the use of a finger, rather than a penis could constitute exceptional and compelling circumstances justifying a lighter

sentence.

6.4 Counsel for the state correctly pointed out that lack of serious physical injuries is but one factor to be considered cumulatively with other sentencing factors. See S v SMM 2013 (2) SACR 292 (SCA) at [26].

6.5 There are no "exceptional and compelling" circumstances present in the appellant's personal circumstances: he was 46 years old, had 4 children and had spent more than a year in custody pending finalization of the trial.

6.6 On appeal the magistrate is accused of having committed a misdirection by not having requested a pre-sentencing report. It needs to be noted that the appellant had been legally represented throughout and that pre- sentencing reports should not be confused with the trial court's obligation to impose an appropriate sentence in the first place. See S v Le Roux 2010 SACR 11 (SCA) at [35] - [36]. Where it is clear, as it is, in our view here the case, that the magistrate had indeed taken such factors as may be present into account and has, to benefit of the appellant, deviated from the prescribed minimum sentence then, in the absence of any indication of which facts or factors the magistrate may have overlooked, the failure, such as it was, did not amount to a misdirection which vitiated the sentencing proceedings.

6.7 Taking everything into account and without repeating the abhorrence of violence and sexual offences against both women and the young, the imposed sentence of 15 years does not induce a sense of shock and is not shockingly disproportionate the circumstances of the case. In my view, it does not warrant interference.

[7] The order should be that the appeal against both conviction and sentence be dismissed.

N DAVIS

Judge of the High Court
Gauteng Division. Pretoria

I agree

M A LUKHAIMANE, AJ

Acting Judge of the High Court

Gauteng Division. Pretoria

Date of Hearing: 05 September 2019

Judgment delivered: 12 December 2019

APPEARANCES:

For the Appellants:	Ms M.B Moloi
Attorney for Appellants:	Pretoria Justice Centre, Legal Aid, Pretoria
For the Respondent:	Adv. J.P Krause
Attorney for Respondent:	Director Public Prosecution, Pretoria