REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

APPEAL NO: A116/2015

14/6/2019

In the matter between:

MADUBE OUPA FRANK **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

MOLOPA-SETHOSA J

Case Summary: An appeal against conviction and sentence of 20 years' imprisonment for the rape of a 13 year old girl, K[….] M[….], imposed at the Regional Court for the Regional Division of Gauteng held at Benoni

Order

The appeal against both conviction and sentence is dismissed.

[1] The appellant was arraigned in the Benoni Regional Court on a charge

contravening of Section 3, read with *Section 1, 55, 56 (1), 57, 58, 59, 60 and 61* of the Criminal Law (sexual Offences and Related Matters) Amendment Act 32 of 2007- Rape (read with the provisions of section 51 as well as schedule 2 of the Criminal Law Amendment Act 105 of 1997, as amended ("the Act"), of a female child aged 10 years old-count 1; and assault-count 2.

[2] On 11 September 2013 the appellant pleaded not guilty to count 1-rape; and pleaded guilty to count 2-assault. The appellant exercised his right to remain silent, i.e. did not give a plea explanation, in respect of the rape charge.

[3] The appellant was convicted on 07 November 2013 on all counts as charged.

[4] On 28 January 2014 the appellant was sentenced as follows:

[4.1] Count 1: 20 years' imprisonment

[4.2] Count 2: 6 months imprisonment

[4.3] The sentence in count 2 was ordered to run concurrently with the sentence in count 1

[4.4] The court *a quo* further ordered that in terms of section 103(1) of the Firearms Control Act 60 of 2000 the appellant remains unfit to possess a firearm; and in terms of section 50(1)(i)(a) of the Criminal Law amendment (Sexual Offences and related matters) Act 32 of 2007 the appellant's name is to be recorded in the national Register for Sexual Offenders.

[5] The appellant was legally represented during the trial proceedings in the court *a quo.*

[6] On 19 November 2009 the appellant brought an application for leave to appeal against his conviction on the rape charge and 20 years sentence in respect thereof, before the learned court *a quo* and the leave to appeal was granted by the learned magistrate· on the same day [on 19/11/2009]. The appellant thus appeals against both his conviction and sentence.

[7] The appellant contends that the trial court erred in convicting him as the state did not prove its case beyond reasonable doubt. That the complainant was

not only a single witness but a minor child whose evidence should have been treated with caution. Further that there were contradictions in the state case that the court should have taken into account.

[8] The State presented the evidence of the following witnesses:

[8.1] K[….] C[….] M[….] ("The complainant");

[8.2 Sister Kate Skosana ("Skosana");

[8.3] N[….] M[….] ("M[….]");

[8.4] The appellant testified in his own defence and did not call any other defence witness.

[9] K[….] C[….] M[….], ("the complainant"), who is the appellant's stepdaughter, testified that she lived at [….] in Wattville with her mother and her step father, the appellant. That the door of her bedroom was not closing properly, and sometime in October 2009 she was sleeping at night when the appellant came into her bedroom and informed her that he needs to check if she is still a virgin or not so that he can tell her mother because she was 'busy'. She testified that the appellant inserted his finger inside her vagina and said that he cannot tell if she is a virgin or not and said that it is better that he does it the old way, the appellant then inserted his penis into the complainant's vagina, and did the up and down movement while on top of her. She testified that she did not tell anyone about what the appellant did to her on that day. She was 13 years old at the time. She was not sexually active at the time; she was still a virgin, and the appellant after the first sexual intercourse said to her that indeed she was still a virgin.

[10] She testified that by 'busy' she meant that she went out with her friends a lot, spent most time with her friends, coming back home late at around 20H00 instead of 18H00 as expected by her parents, but that she never slept out. However, at the time the appellant first came onto her, when he said he wanted to check her virginity, including the second time which is dealt with in para [11] here below, she was not yet sexually active.

[11] She testified that about two to three weeks after the first incident, around November 2009, the appellant came into her bedroom for the second time. When the appellant entered her room he was naked, he again raped her. Earlier that

evening the appellant had bought her cider/Brutal fruit, she was tipsy. She screamed but her mother's bedroom was further from where she was, her mother did not hear her; and her mother was also pregnant at the time, she did not want to put pressure on her, she did not want to cause her to have miscarriage. She testified that the rape by the appellant happened only, twice.

[12] She testified that from that time on she put her wardrobe in front of her bedroom door when she went to sleep to prevent anybody from coming into her bedroom room whilst she is sleeping.

[13] She further testified that one Friday, the school had just closed; she forgot to put the wardrobe in front of her bedroom door when she went to bed. By that time her mother had had a baby; the appellant came into her bedroom and she told the appellant that 'it stops right here right now', and that she'll tell her mother. The appellant stopped, saying to her that he did not want to cause any problems.

[14] She testified that the next day, she and her friends went out and stayed until late at night. Her friends' mother, Ms N[….] M[….] picked them up late from a club, she gave them a hiding with sjambok, and she took them home one by one.

[15] She further testified that on that day she then informed N[….] M[….] that she had problems with her stepfather/the appellant who was sexually abusing her. N[….] M[….] accompanied her home to tell her parents that she will be sleeping at her house. On their arrival at her home her step father, the appellant, gave her a hiding in the presence of N[….] M[….] and her mother because she had come home late, at around 22H00.

[16] The court *a quo* evaluated the evidence of the complainant and after applying the cautionary rule found that her evidence was truthful and reliable.

[17] Kate Skosana testified that she is a nurse working at the Crisis Centre of the Far East Rand Hospital, and that she was trained at Baragwanath Nursing College as a sexual assault nurse examiner.

[18] She testified that on 12 October 2013 she examined the complainant herein. The complainant informed her that she was sexually assaulted twice by her stepfather at her home in 2009.

[19] She noted, amongst others, on the J88-Exhibit B, the contents of which

she read into the record, that

> *"Hymenal Changes-Hymen shows signs of old healed scars- multiple clefts and bumps, which is a sign of being sexually active."*

[20] She testified that it was not possible to tell whether there was forceful penetration or not, since the old scars were healed.

[21] N[….] M[….] also testified and she corroborated the complainant. She testified that the complainant had indicated to her that she did not want to go home and reported to her that the appellant was sexually abusing her. She took the complainant home to inform her parents. The complainant that evening slept at her house.

[22] She confirmed that indeed the appellant assaulted the complainant in her presence on the night in question; she thereafter took the complainant to her home with her mother's blessing. Her evidence differs with that of the complainant where she testified that the appellant assaulted the complainant with hands whereas the complainant and the appellant testified that the appellant assaulted the complainant with a sjambok. She however confirmed that on the night in question she had brought a sjambok to the complainant's home.

[23] The appellant testified in his defence and called no witnesses. He denied that he ever raped the complainant. He testified that the complainant alleged that she had been raped by him because the complainant was given a hiding by him for coming home late on the night she was brought home by N[….] M[….]. That the complainant was always coming home late, at times not sleeping at home, and that this made him and the complainant's mother angry, and that is the reason he assaulted the complainant on the night she was brought home by N[….] M[….]. He confirmed that after the night in question the complainant went and stayed with N[….] M[….] at her house, and thereafter went and stayed at her grandparents' home.

[24] The court *a quo* evaluated the evidence of the appellant and found his version to be not reasonably possibly true.

[25] It was submitted on behalf of the appellant that the court *a quo* misdirected itself in finding that the appellant's version is not reasonably possibly true. Further that the state has not proved its case beyond a reasonable doubt and that the conviction ought to be set aside.

[26] It is trite law that the State must prove its case beyond reasonable doubt and if the appellant's version is reasonably possibly true, he is entitled to his acquittal even though his explanation is improbable. Refer S v Mbuli 2003 (I) SACR 97 (SCA) at l 10D-F, S v Selebi 2012 (1) SA 487 (SCA), S v Van As 1991(2) SACR 74 (W) at 82D-H, S v Jackson 1998 (1) SACR 470 (SCA) and S v Schackell 2001 (4) SACR 279 (SCA).

[27] It is not necessary for the State to prove its case beyond all doubt. In S v Pallo and others 1999 (2) SACR 558 (SCA), Olivier JA at para [10] at 562 followed the approach that was taken in R v Mlambo 1957 (4) SA 727 (A) at 738A-C the following is stated:

> *"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.* An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case."

[28] It is trite that a court of appeal should be slow to interfere with the findings of fact of the trial court in the absence of material misdirection. See R v Dhlumayo & Another 1948 (2) SA 677 (A) at 705-706. An appeal court's powers

to interfere on appeal with the findings of fact of a trial court are limited. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

[29] In S *v Chabalala* 2003 (1) SACR 134 (SCA) at 140 a- b the court stated the following:

> *"When dealing with the criminal trial the correct approach is to weigh up all the elements 'which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weakness.es, 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 about the accused's guilt."*

[30] In S v Francis 1991 (1) SACR 198 (A) at 204 c-e the learned Judge of appeal, also with reference to Dhlumayo, said the following

> *"This Court's powers to interfere with on appeal with the findings of fact of a trial court are limit... In the absence of any misdirection the trial court's conclusion, including its acceptance of D's evidence, is presumed to be correct. In order to succeed on appeal accused no. 5 must convince us on adequate grounds that the trial court was wrong in accepting this evidence - a reasonable doubt will not suffice to justify interference with its findings ... Bearing in mind the advantage which the trial court has of seeing, hearing and appraising a witness it is only in exceptional cases that this Court will be entitled to interfere with a trial court's evaluation of oral testimony.*"

[31] In S. v Hadebe & Others *(supra),* at 645 e- fthe Learned Judge of Appeal held:

"In absence of demonstrable and material misdirection by the trial court, his findings of the fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate courts to factually findings of the trial court are so well-known that restatement is unnecessary. "

[Emphasis added];

[32] In S. v. Monyane & Others 2008(1) SARC 543 (SCA) at paragraph [15] the Court expressed more or less the same sentiments and added:

"Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial court's evaluation of oral testimony. "

[33] It is common cause that the complainant is a single witness in regard to the rape incident. In *S v Banana* 2000 (2) SACR 1 *(ZSC)* Gubbay CJ (delivering the judgement of the majority of that court) stated the following at page 8 C:

"Where the evidence of the single witness is corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoined may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution. "

[34] ***In S v Sauls and Others* 1981 (3) SA 172 (A) at 180G** - **H** it was held that evidence ca. n be satisfactory, even if it is open to criticism.

[35] **In *Abdoorham 1954 (3) SA 163 (N) at 165 E-F the*** court held as follows:

"The court is entitled to convict on the evidence of a single witness if

it is satisfied beyond a reasonable doubt that such evidence is true. The court may be satisfied that the witness is speaking the truth notwithstanding that in some respects he is an unsatisfactory witness."

[36] It was argued on behalf of the appellant that the complainant did not report to her mother that the appellant had raped her, even after her mother had given birth and that 'that shows that the complainant was not telling the truth.' As already stated, the complainant testified that she did not report the incidents to her mother because her mother was highly expectant [pregnant] at the time, she did not want to upset her and maybe cause her miscarriage and also she did not want to cause problems to their marriage. She further testified that she could not even tell her friends because she was ashamed that they'd say that she was no longer a virgin. It is clear that the appellant's conduct and violation on her shamed her. After her mother had given birth, the appellant came into her bedroom again one night; she informed the appellant that she was going to tell her mother about the rape, that is when the appellant decided to leave her. The following day she made a report to N[….] M[….].

[37] The circumstances in which the complainant found herself were complicated and must have been overwhelming for a 13 year old girl. It would be unreasonable to expect that her fear would dissipate when her mother had given birth. The complainant's fear must have been compounded by the fact that the appellant was her stepfather and to an extent, in love with her mother; an adverse inference cannot be drawn against the complainant's evidence due to the fact that she did not report to her mother at the first opportunity.

[38] Section 58 of Act 32 of 2007 provides that: *'Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of a sexual offence: Provided that the court may not draw any inference only from the absence of such previous consistent statement.* '

Section 59 of Act 32 of 2007 provides that: *'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'

[39] In *Monageng v The State* (590/06) [2008] ZASCA 129 (01 OCTOBER 2008) at par 24 it was held that

> *"It is further widely accepted that there are many factors which may inhibit a rape victim from disclosing the assault immediately. Children, who have been sexually abused, especially by a family member, often do not disclose their abuse and those who ultimately do may wait for long periods and even until adulthood for fear of retribution, feelings of complicity, embarrassment, guilt, shame and other social and familial consequences of disclosure. Significantly, the newly passed Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 provides. in s 59 that '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'. Raising a hue and cry and collapsing in a trembling and sobbing heap is not the benchmark for determining whether or not a woman has been raped. There was thus nothing unusual about the complainant's behaviour and her explanation for not immediately reporting the appellant is plausible".*

[40] The contradictions in the evidence of the State do not, in my considered view, materially affect the credibility of the complainant. In her evidence in chief she testified that the appellant raped her twice in 2009. Under cross examination it transpired that in her statement to the police she stated that the incidents happened in March 2010. It is common cause that her mother had a baby in January 2010. She indicated that she had left her dairy at home; she was never given an opportunity to fetch her diary. The defence made much of the

contradictions pertaining to the dates, stating that the court should not have accepted her evidence as this is amongst other things, an indication that as a single child witness she was confused and her evidence was unreliable. The contradictions were explained by the complainant, she was adamant that the two occasions where the appellant raped her, her mother was pregnant. The third time he attempted to rape her was after her mother had had a baby.

[41] Looking properly at her evidence, she was never confused that when the two rapes occurred her. mother was still pregnant, she gave plausible reasons why she did not tell her mother about the rapes. On the third occasion when the appellant attempted to rape her, when she told the appellant 'it stops right here right now' the mother had had the baby. As already stated above, her mother had a baby in January 2010. In the J88 completed by the community nurse who examined her, Kate Skosana, under item 5-Clinical findings- it is stated/noted that the complainant informed the nurse that 'she was sexually assaulted by her stepfather in 2009', and that 'the perpetrator sexually assaulted her twice in their home'. This is consistent with her evidence.

[42] In **S v Mafaladiso v S 2003(1) SACR 583(SCA) (594a-g)** the court held that:

> *"The court must handle discrepancies between different versions of the same witness with circumspection. First the court must ascertain what the witness meant to say in order to determine whether there was a discrepancy and the extent of the discrepancy. The court must take into account the following: the fact that a statement to the police was not Subjected to cross-examination, language and cultural differences between the witness and the person who took the statement, and the fact that the police did not require any explanation of a statement. Secondly, not every error by, or discrepancy in the statement affects the witness credibility. Thirdly, the different versions must be evaluated holistically. This evaluation includes the circumstances in which the versions were given, reasons for the discrepancies, the effect of the discrepancies on the witness's*

credibility and whether the witness had sufficient opportunity to explain the discrepancies. Lastly, the witness's statement to the police must be weighed up against the witness's viva voce evidence".

[43] **In S v Mkhole 1990 (1) SACR 95 (A)** the court gave guidelines in evaluating possible contradictions and stated as follows:

"Contradictions per se do not lead to the rejection of a witness's evidence, they may simply be indicative of an error. Not every error made by a witness affects his credibility: in each case the trier of fact has to make an evaluation, taking into account such matters as the nature of the contradiction, their number of importance and their bearing on other parts of the witnesses ' evidence. No fault can be found with his conclusion that what inconsistencies and differences there were, were of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction. One could add that, if anything, the contradictions points away from the conspiracy relied on" (98f-g)

[44] When evaluating the possible contradictions in the State's case, it should first be established that the contradictions are material. It was held in *S v Bruiners and Another* 1998(2) SACR 432 (SE) at 435 a-b that

"two or more witnesses will hardly ever give identical evidence with reference to the same incident or events. It is thus incumbent on the trial court to decide, having regard to the evidence as a whole, whether such differences were sufficiently material to warrant the rejection of the State's version".

[45] The complainant was relatively young at the time of the incident. Considering the lapse of time between the incident and the trial, her momentary lapse of memory was reasonable, and it was an indication that she was not

fabricating her evidence.

[46] Of importance is that N[….] M[….] corroborated the complainant by stating that the complainant reported to her that the appellant had sexually abused her. She recalls being informed of two incidents, as testified to by the complainant. She was an eyewitness to the appellant assaulting the complainant when she returned her to her parental home that evening.

[47] The long time lapse between the incident and the witnesses having to make statements and then testifying has an influence on their recollection of the events. The incident happened towards the end of 2009, and the trial started in 2013. The contradictions between the complainant and N[….] M[….] are not of such a nature that they could be classified as material contradictions. Thus the learned magistrate's finding that these contradictions were not of material nature such that the witnesses' evidence can be found to be untrustworthy or unsatisfactory cannot be faulted. In the contrary these contradictions could be a clear indication that the witnesses did not conspire against the appellant.

[48] The complainant gave detailed and logical accounts of the rape. The details were too graphically realistic and precise. She was honest and adhered to her version throughout. The complainant remained unshaken throughout the cross-examination to which she was subjected by the defence attorney. There is no basis for a finding that the complainant falsely implicated the appellant because she knew that she was going to be reprimanded for staying out until late. She did not exaggerate the appellant's conduct.

[49] The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a rehearing, because otherwise the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies.

Vide: S v Francis 1991(1) SACR 198 (A) at 198J-199A.
S v Hadebe and Others 1997(2) SACR 641(SCA) at 645 E-F

[50] On the other hand, the evidence of the appellant is riddled with improbabilities. He gives the impression that the complainant falsely implicated him.

[51] The appellant was found not to be a credible witness. He sought to state that the complainant falsely implicated him because he had given her a hiding/assaulted her with a sjambok on the night she was bought home by N[….] M[….]. The respondent correctly submitted that it is highly improbable that the complainant will falsely implicate the appellant. The complainant and the appellant were in good terms, and this was confirmed by the appellant under cross examination. The complainant had no motive whatsoever to falsely implicate him. From the evidence on record it is clear that the report to N[….] M[….] was prior to the appellant hitting/assaulting the complainant with the sjambok; therefore, it cannot be correct that the complainant falsely implicated him because she had been hit with a sjambok by the appellant.

[52] The appellant's version was correctly found to be inconsistent and improbable. The appellant's version is clearly not reasonably possibly true. The learned magistrate was correct in convicting him.

[53] The complainant was correctly found by the learned magistrate to be an honest witness. She conceded that she was at times at odds with her parent (mother and stepfather/the appellant) because she would have spent time with her friends (chilling as she called it) and would come home late, she would be reprimanded by her mother and/or stepfather/appellant.

[54] Clearly the appellant took advantage of the situation, saying to the complainant that he/appellant was testing if she/the complainant was a virgin because she was, as he put it 'busy', as she was coming home late.

[55] Her undisputed evidence is that at the time the appellant started violating her sexually, she was a virgin; she was not sexually active. On the two occasions that the appellant raped her she was not yet sexually active. It is clearly the appellant who broke her virginity. Further the appellant clearly took advantage of

a young vulnerable child; there is evidence that he bought liquor/cider for the 13 year old girl/complainant, deliberately getting the child drunk, this evidence stands undisputed, next thing raping her.

[56] The Court *a quo* looked at the totality of the evidence. There was no material misdirection by the court *a quo.* The evidence of the state witnesses was corroborated in all material respect and the identification of the appellant was never an issue. The learned regional magistrate's favourable finding about the children as witnesses can, on the totality of the evidence, not be faulted. I am not persuaded that in convicting the appellant the trial court misdirected itself in any material respect in its assessment of the evidence. The totality of the evidence justifies the trial court's findings and conclusions that the exculpatory version of the appellant was not reasonably possibly true and that the guilt of the appellant was proved beyond reasonable doubt. The Court a quo correctly found the appellant not to be a credible witness. As already stated, he sought to state that the complainant falsely implicated him because he had disciplined her with a sjambok. From the evidence on record it is clear that the report to N[….] M[….] was prior to the appellant hitting the complainant with a sjambok; therefore it cannot be correct that the complainant falsely implicated him because she had been hit by him with a sjambok. The appellant's version is clearly not reasonably possibly true. The trial court treated the complainant's evidence with caution. The appellant was correctly convicted of the rape of his step daughter. The appeal on conviction must therefore be dismissed.

[57] With regard to sentence it was submitted on behalf of the appellant that the trial court misdirected itself in sentencing the appellant to 20 years' imprisonment. It was further submitted that in imposing such a lengthy period of imprisonment the court erred as the sentence is shockingly harsh and induces a sense of shock.

[58] A presentence report was compiled by Ms M. C. Matsimela and the appellant's personal circumstances and mitigating factors were recorded as follows:

[58.1] He was 34 years old;

[58.2] He was married;

[58.3] He has three minor children, a son from a previous relationship, the complainant who is his stepdaughter and a 4 year old daughter born from the marriage;

[58.4] His mother passed away when he was 19 years old;

[58.5] He dropped out of school when he was in standard 9;

[58.6] He enrolled for electrical engineering in 1996 at Benoni technical college but could not complete his studies due to financial constraints;

[58.7] In 2001 he did maintenance services at David Brown Engineering Company;

[58.8] He also worked as a driver at Focal Fruits as well as at Amgas;

[58.9] He was an instructor at MES driving school and at Gogo Norn driving school;

[58.10] He also started a driving school in partnership with his father and was managing same;

[58.11] He was diagnosed with diabetes and is also HIV positive;

[58.12] He was a first offender.

[59] It was submitted on behalf of the appellant that the trial court erred in finding that the cumulative effect of the below mentioned factors does not constitute substantial and compelling circumstances:

[59.1] The appellant has three minor children;

[59.2] The appellant was gainfully employed;

[59.3] The appellant was a sole breadwinner;

[59.4] The appellant was a first offender;

[60] It was further submitted on behalf of the appellant that 20 years' imprisonment imposed by the trial court is too harsh and is strikingly disproportionate to the offence and ought to be set aside, that the trial court erred

in imposing a long imprisonment term.

[61] The respondent agrees with the sentence imposed by the learned Magistrate and submitted that there was no misdirection on the part of the court a quo; that the court took all relevant factors into consideration when sentencing the appellant and that the sentence imposed is fair an appropriate in the circumstances.

[62] The imposition of a sentence is pre-eminently for the sentencing court. It is trite that a court of appeal does not lightly interfere with a sentence imposed by the court of first instance; see *R v Lindley* 1957 (2) SA 235 (N). A court of appeal will interfere with the sentence only if there is a material misdirection or if the court could not, in the circumstances of the case, reasonably have imposed the particular sentence. In *S v Salzwedel* 1999 (2) SACR 586 (SCA) at 591F-G it was held that:

> *"A court of appeal was entitled to interfere with a sentence imposed by a trial court in a case where the sentence is 'disturbingly inappropriate', or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirection of a nature which shows that the trial court did not exercise its discretion reasonably.* "

[63] The general approach to be followed by a Court of Appeal with regards to sentence is set out as follows in *S v Pieters* 1987 (3) SA 717 (A) at 727:

> *"Met betrekking tot appelle teen vonnis in die algemeen is daar herhaaldelik in talle uitsprake van hierdie Hof beklemtoon dat vonnis-oplegging berus by die diskresie van die Verhoorregter. Juis omdat dit so is, kan en sal hierdie Hof nie ingryp en die vonnis van 'n Verhoorregter verander nie, tensy dit blyk dat hy die diskresie wat aan horn toevertrou is nie op 'n behoorlike of redelike wyse uitgeoefen het nie. Om dit andersom te stel: daar is ruimte vir hierdie Hof om 'n Verhoorregter se vonnis te verander alleenlik as dit blyk dat hy sy diskresie op 'n onbehoorlike of onredelike wyse uitgeoefen*

het. Dit is die grondbeginsel wat alle appelle teen vonnis beheers."

[64] Therefore the issue of sentence is always a matter for the discretion of the trial court. In *Kgosimore v* S 1999 (2) SACR 238 (SCA) at par [10], the Supreme Court of Appeal held that:

> *"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include, whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz. whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry.... Either the discretion was properly and reasonably exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so. I can accordingly see no juridical basis for the stricter test suggested by counsel; nor is there anything in section 316B of the Criminal Procedure Act, or for that matter section 310A, to suggest otherwise... It follows that, in my view, whether it is the attorney -general (now the Director of Public Prosecutions) or an accused who appeals against a sentence, the power of a court of appeal to interfere is the same.* "

[65] The appellant was convicted of the rape being the contravention of section 3 of the Sexual Offences and Related Matters Amendment Act, 32 of 2007 read with the provisions of section 51 and Schedule 2 of the Criminal Law Amendment Act, 105 of 1997 as amended. The victim, his step daughter who was thirteen (13) years old at the time of the commission of the offence. The minimum

sentence provisions pertaining to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act, Act No. 105 of 1997, were applicable in the present matter by virtue of the fact that the appellant was convicted of an offence referred to in Part I of Schedule 2 of Act 105 of 1997 as amended by Act 38 of 2007, namely: ' Rape -where the victim is a person under the age of 16 years'. The sentencing court was therefore obliged to impose the prescribed minimum sentence unless there were substantial and compelling circumstances justifying the imposition of a lesser sentence.

[66] The trial court found that there were substantial and compelling circumstances in this case since the appellant indicated that he was diabetic and imposed a lesser sentence of 20 years' imprisonment for the rape. The sentence is not shocking having regard to the nature of the crime. This Court does not find any reason to temper with the sentence. In sentencing the appellant, the trial court exercised its discretion judicially and the sentence of life imprisonment was not found to be appropriate under the circumstances.

[67] Counsel for the appellant cited several cases where the sentence of life imprisonment was reduced oμ appeal; however, Van Den Heever JA stated in S v D 1995(1) SACR 259(A) at 260e that :

> *"I agree that decided cases on sentence provide guidelines not straightjackets."*

[68] Sentencing depends on the circumstances of a particular case and lies within the discretion of a trial court. As it was held in S v Malgas 2001(1) SACR 469 (SCA) at 478D-E

> " ... *A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial Court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be usurp the sentencing discretion of the trial court...*"

[69] **In S v AM 2014(1) SACR 48(FB) at paragraph 14,** *it was held that "Rape of a young child such as the complainant is always an extremely serious matter, even in the absence of serious injuries and despite there being no evidence of permanent psychological aftereffects. This is all the more so where the perpetrator is a man in a position of trust vis-a-vis the complainant".* Life imprisonment was confirmed.

[70] The appellant showed no remorse for his deeds by denying in court that the incident had taken place, despite overwhelming evidence. Instead of taking responsibility for what he had done, he sought to make the child a liar. In effect, he victimised her again.

[71] The relevant factors and circumstances were properly considered and taken into account by the trial court. The rape of a 13 year old child is dreadful. It is an enormous and heinous crime. This is an aggravating circumstance of substance and the commission of this type of offence against innocent children undoubtedly demands the imposition of long term imprisonment. The sentence imposed upon the appellant was proportional to the offences. It must also be accepted that a child would not be left unscathed by sexual assault. Interference with the imposed sentence is in all the circumstances of this case not warranted.

[72] Given the facts of this case and the prevalence of this offence, the sentence of 20 years' imprisonment cannot in the circumstances be said to be shockingly harsh and disproportionate. The imposed sentence cannot in my considered view be said to be disturbingly inappropriate, vitiated by misdirection or totally out of proportion to the gravity or magnitude of the offences the appellant has been convicted of.

[73] The appeal against the sentence imposed can thus m my view, not succeed.

[74] In the result the following order is made:

1. The appeal against conviction is dismissed and the conviction by the court *a quo* is confirmed.
2. The appeal against sentence is dismissed and the sentence imposed by the court *a quo* is confirmed.

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

I agree

C COLLIS

JUDGE OF THE HIGH COURT

It is so ordered

For the Appellant : Adv: MB Moloi

Instructed by : Legal Aid

For the Respondent : Adv: B E Maoke

Instructed by : National Prosecuting Authority