



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION PRETORIA**

- (1) REPORTABLE: YES ☒ NO  
(2) OF INTEREST TO OTHERS JUDGES: YES ☒ NO  
(3) REVISED

**CASE NO: A446/2017**

8 October 2021

DATE

SIGNATURE

In the matter between:

**MOSES MAZIBUKO**

Appellant

and

**THE STATE**

Respondent

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**JUDGMENT**

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**Neukircher J:**

1. The appellant was charged in the Pretoria Regional Court held at Atteridgeville with one count of the contravention of section 3 of the Sexual Offences Act Number 32 of 2007 (i.e. Rape of a minor) as read with s51 of Act 105 of 1997.

2. He was subsequently convicted on this count on 6 April 2017 and sentenced to life imprisonment.
3. It is as against both sentence and conviction that the appellant now appeals in terms of section 309(1)(a) of Act 51 of 1977. The appeal is with the leave of the court.
4. Appellant was represented a quo and pleaded not guilty.

### **The evidence**

#### **The complainant**

5. As the complainant in the matter was a minor at the time of her evidence, she testified through the use of an intermediary<sup>1</sup> and was correctly admonished by the court.
6. Her evidence is that she was born on 3 December 2005. On 6 July 2016, being the date in question, she stated that she was sleeping in her mother's room in Ous Mahlatsi's yard. Her younger brother was with her.
7. Uncle Moss<sup>2</sup>, a neighbor, who she took as her uncle, knocked at the door. He wanted her to go to the shops for him to buy him some airtime. He asked her to come with him to fetch some money. She left her brother sleeping in the room and went to appellant's room. He was in bed and she saw that he had a T-shirt on and that his blanket was pulled up over his hips to hide his legs. She had noticed that when he had come to call her at her mother's house, he was wearing shorts.
8. He asked her to massage his back and showed her how to massage him and he took his T-shirt off so that she could do so. When she climbed onto the bed and started massaging him, he grabbed her, put his hand over her mouth and pulled her

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<sup>1</sup> The point that the intermediary had not correctly been sworn in was abandoned at the hearing as the missing parts of the record had been transcribed and filed, which included this evidence

<sup>2</sup> The appellant

inside the blanket. He pulled his shorts off pulled up her dress and put his penis in her vagina. She did not scream because he put his hands over her mouth. It was also established that she never actually saw his penis because he was under the blankets but she felt the penetration.

9. When he stopped she told him she was going to tell her mother and he told her to leave, so she ran back home.

10. When she got home she did not tell her brother what had happened, and she washed her brother's clothes and hers. Her mother arrived back from work at about 19h00. She asked why she was looking so earnest and why she wasn't playing with her friends and she replied that she was scared. She then told her mother what had happened.

11. Her mother called sister Mahlatsi<sup>3</sup> and then called Chile's father (the next door neighbour). They took the complainant to Kalafong hospital and from there to Bophelong hospital in Laudium where she was examined.

12. She testified that she was in pain.

### **Complainant's mother**

13. The complainant's mother then gave evidence. Her evidence was that she rents at the same place where the appellant and his wife have lived for the past three years. She testified that when she got home from work after 19h00 she found the house very quiet and she asked the complainant why she was so quiet. The complainant told her that she was very afraid. She told her that the appellant had knocked at the door and he had wanted to send her somewhere. She followed the appellant into his house where she found him in bed with half his body covered by a blanket. He wanted a

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<sup>3</sup> The appellant's wife

massage and he showed her how to massage him. When she was busy with a massage he grabbed her, covered her mouth, put her inside the blanket and put his penis in her vagina. She told her mother that she could not scream because he closed her mouth. When he left she went home.

14. The mother then went to the neighbours and found Papa Chilitsi and Malebo.

15. She also contacted the appellants wife (sister Mahlatsi). The complainant then repeated what had happened to her to all of them. She, Miss Thlapi, and the complainant then went to Kalafong hospital. At the hospital the police were called to take them to Laudium.

### **The J88**

16. The defence admitted the correctness of the J88. This sets out the findings of the examination conducted at 00:20 on 7 July 2016<sup>4</sup>. It states that a 10-year-old child was brought in by her mother *"said to have been sexually assaulted by a known male, 41 years old on 7 July 2016". On examination vaginal abrasions noted injuries in keeping with forced penetration child in pain. General vulva and perineal oedema from swelling."*

17. The J88 also noted that the clitoris was inflamed, the fraenum of the clitoris was inflamed, that the urethral orifice had abrasions, the paraurethral folds were inflamed, there were abrasions on the labia majora and tears on the labia minora. Bleeding was also noted.

### **Appellant's version**

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<sup>4</sup> i.e a few hours after the incident



18. The appellant's version is that he was at home, resting. His wife had taken their one child for circumcision. There was a knock at the door and he found two children standing there of which the complainant was one, and she was with her little brother. According to him, they were looking for his children. He told them that his children were not there and the boy said he would go and find him. He decided to ask the complainant if she would massage his back and she agreed. He asked her to pound him on his back with fists which she did. After a while he realised that she was uncomfortable and he then told her she should go home which she did.

### **The judgment**

19. In my view, the learned Magistrate was in the best position to evaluate the witnesses. His judgment is very clear as to why he accepted the version of the complainant.<sup>5</sup>

20. The magistrate found the complainant to be a good witness. He also found that all corroborating evidence demonstrated the correctness of her version. His judgment states that "*she testified beautifully, she was an excellent witness. She answered the questions put to her in a straightforward, forthright, honest and objective sounding session. She was confident and she was in emphatic when she denied the accused version which was put to her.*"<sup>6</sup>

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<sup>5</sup> S v Dyira 2010 (1) SACR 78 (ECG) : "The courts should be aware of the danger of accepting the evidence of a little child because of the potential unreliability of untrustworthiness, as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity...Here, more than one cautionary rule applies to the complainant as a competent witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness (Schmidt Law of Evidence 4-7)."

<sup>6</sup> Whilst not specifically stating that the cautionary rules pertaining to single witnesses was taken into account, it is clear that a court may base its finding on the evidence of a single witness as long as

21. He also found the complainant's mother to be an excellent witness and he found that there was "*no indication that she was trying to guilt the Lilly*".
22. The J88 is the final piece in this puzzle. It is dated the same date as the alleged rape; it confirms injuries from a forced penetration and confirms the bleeding to which the complainant testified.
23. What is also important is that the accused's version corroborates that of the complainant insofar as all the surrounding elements of the crime are concerned save for the actual rape.
24. The magistrate specifically took into account that there is no onus on the appellant to prove his innocence<sup>7</sup> but found that the appellant's version did not make any sense and that, when all the evidence was considered as a whole, on the probabilities<sup>8</sup> the state had proved the appellants guilt beyond a reasonable doubt. He specifically found that the appellant had lied and that he had no logical, rational, truthful answer to the allegations. He found that the appellant's version was so improbable and so false that it should be rejected.
25. Accordingly, the appellant was then found guilty of the charge of rape.
26. As far as the sentence was concerned, the appellant's personal circumstances were put before the court: he is 41 years of age and was living with his fiancé. He has children of 14, 7 who stay with their mother who receives a social grant. He has standard nine and was employed as a security officer in Pretoria. He has no previous

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the evidence is substantially satisfactory in every material respect or if there is corroboration : S v Mahlangu and Another 2011 (2) SACR 164 (SCA) at par [21]

<sup>7</sup> S v V 2000 (1) SACR 453 (SCA)

<sup>8</sup> A court should be very careful when allowing probabilities to play a role in the evaluation of evidence (per S v Tellingan 1992 (2) SACR 104 (C)), however, this is one of those matters when all the corroborating evidence is so persuasive as to entitle a court to reject the appellant's version as not being reasonably, possibly true

convictions or pending cases or outstanding warrants against him. Bail had been denied and he was detained for the duration of his trial.

27. The court took all of these into account and also that the purpose of the sentence would include the elements of deterrence, retribution, rehabilitation and prevention<sup>9</sup>. It was further found that the psychological scarring and physical injuries that were suffered by the complainant would live with her forever. He also found that she had to undergo a secondary trauma by having to testify in court through an intermediary and the serious nature of the rape which has become so prevalent in our society.

28. Not to over-emphasize solely the effects of the rape on the complainant, the personal circumstances of the appellant, the interests of the community and the interests of parents and law and justice were carefully weighed.

29. All the factors mentioned supra were taken into account when the sentence was imposed on the appellant.

30. The magistrate found that there were no substantial and compelling circumstances which could justify the imposition of a lesser sentence and accordingly sentenced the appellant to life imprisonment.

### **Conclusion**

31. It is trite that a 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

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<sup>9</sup> S v CS 2016 (1) SACR 584 WCC)



the trial court, its findings of fact are presumed to be correct and will only be disregarded if the evidence shows them to be clearly wrong.<sup>10</sup>

32. I cannot, in all reasonableness, find that the magistrate was incorrect in his assessment of either the evidence<sup>11</sup> or the imposition of a life sentence on the appellant. The crime of rape is indeed a heinous one. So much more so when it is perpetrated against a defenceless child. Society in South Africa is crying out against the gender-based violence that has become so prevalent in this country today. It is unthinkable, and would be unconscionable, were a perpetrator of such a crime to be allowed to walk away from his acts with relative impunity.

33. I therefore find that there is no reason to interfere with the decision of the magistrate and accordingly the following order is made:

**The appeal is dismissed.**



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**B NEUKIRCHER**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION**


I agree

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<sup>10</sup> S v Hadebe and Others 1992 (2) SACR 641 (SCA) ; S v Monyane and Others 2008 (1) SACR 543 (SCA) at para [15]

<sup>11</sup> S v Engelbrecht 2011 (2) SACR 540 (SCA) at par [18]





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**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION**

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 8 October 2021.

Date of hearing (MS Teams) : 05 October 2021

Date of judgment : 8 October 2021

**APPEARANCES:**

For The Appellant : Mr MG Botha

For the Respondent : Advocate C Harmzen