REPUBLIC OF SOUTH AFRICA

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

CASE NO: A108/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
13/12/2021

In the matter between:

R[....]1 R[....]2 **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Jordaan, AJ

INTRODUCTION

[1] This is an appeal in terms of section309(1)(a) of the Criminal Procedure Act 51 of 1977 from the Regional Court, Pretoria, sitting as the court a *quo.* The

appellant, who was the only accused in the court a *quo,* was arraigned on the following charges:

Count 1: Rape in contravention of section 3 of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 (SORMA) read with section 51 of the Criminal Law Amendment Act105 of 1997 (CLAA);

Count 2: Sexual Assault in contravention of section 5(1) of the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007 (SORMA)

[2] The appellant was convicted on count 1 and acquitted on count 2 and sentenced as follows:

The accused was sentenced to life imprisonment. In terms of section 103(1) of the Firearms Control Act 60 of 2000 the accused is unfit to possess a firearm. In terms of section 50 of SORMA the accused details will be placed in the Sexual Offences Register and was declared unfit to work with children.[1]

CONVICTION

The Facts

[3] The charges and consequent conviction stem from events that occurred on 03 October 2018.

[4] The complainant, who is the 11-year old stepdaughter of the appellant, testified that normally, the sleeping arrangement in their one-bedroom shack with one bed is that her father lies first on the bed; next to him will be her mother, next to her mother will be her sibling and next to her sibling will be the complainant herself, who sleeps close to the wall close to which the bed is positioned.

[5] It was the complainant's evidence that all four of them were sleeping when she listened to music while the appellant's phone was placed on the charger. While the appellant pretended to be asleep, he touched her breasts and vagina over the

clothes in which she was clad which was a green t-shirt, a panty and some purple tights.

[6] She further testified that she later awoke from her sleep to find herself lying on her side, undressed and feeling as if the appellant is penetrating her anus. She called out to her mother; at the same time jumping out of bed. She switched the light on. The appellant was then seen naked on her side of the bed. She told her mother all that happened.

[7] Under cross-examination, she testified that she initially thought it was her mother touching her as she was lying facing the wall and could not see who is touching her. However, she realized that her step-father positioned himself to sleep in-between her and her 5-year old sibling. She said that she felt a touch which stopped. Later, she awoke to find the appellant having inserted his penis into her anus. She conceded that she and her mother are both of a small built.

[8] The mother of the complainant, Ms. S[....], testified that she went to bed first as she took medication which made her to fall fast asleep. She was awakened by the screams of her daughter, the complainant. On opening her eyes, she saw the complainant at the door, pulling her panty upwards her feet. She then saw the appellant on her daughter's side of the bed clad only in his underpants.

[9] When she enquired what is going on, her daughter explained to her that the appellant inserted his penis into her behind[2] and that he did it from the front and behind[3]. She, together with her two children then left for Auntie Koekie's place, where the complainant reported what the appellant did.

[10] The appellant arrived at Auntie Koekie's house, who confronted him about the incident. She said that the appellant kept on saying "I am sorry, I made a mistake". Auntie Koekie then beat the appellant with a sjambok. The appellant then left to go back to their shack. The complainant, her mother and sibling spent the night at Auntie Koekie's place. They then went to the committee to report the

---

[1] Transcribed record dated 16/11/2020 summary of page16 lines 14-25 and page17 lines 1-11
[2] Transcribed record dated 17/02/2020 page6 lines 10-11
[3] Transcribed record dated 17/02/2020 page 6 line 16 and line 25 to page 7 line1

incident.

[11] The appellant was summoned by the committee where he once again stated that he is sorry about the incident. He informed the committee that he was assaulted by three women.

[12] During cross examination she testified that they all went to bed together, there was no music playing, but that the complainant was playing games on the appellant's phone. It was further her evidence that she does sleep in her denim jeans, but denies that the complainant was sleeping in denims, it was her evidence that the complainant was sleeping in her purple tights, blue panties and a top. The appellant sleeps in underwear.

[13] She emphatically denied the appellant's version that on that night, they slept in any other order than what the complainant testified. She was adamant that she was touched by him. She denied that she ever got up to go to the toilet. She disputed the appellant's explanation that he mistook the complainant for her. She stated that the appellant only said he was sorry.

[14] Dr. Constance Agbu testified that she has worked for Gauteng Health Department for 17years. She told court that she examined the complainant on 03 October 2018 at the Laudium Community Health Centre at 20h40 in regard to an incident that occurred at 1h00am. She noted fresh tears on the posterior fourchette, which is the area between the vagina and the anal opening. She also noted fresh tears on the anal opening. She concluded forced vaginal and anal penetration. The doctor also found tears in the labia majora and on the posterior fourchette. She found a whitish vaginal discharge medially and anally. Based on his examination, the doctor arrived at the conclusions that the complainant was vaginally penetrated with a penis beyond her labia majora. He observed tears of 2,8 centimetres observed, but he did not break open the hymen, because the complainant must have struggled upon feeling pain.

[15] When confronted during cross examination that the complainant testified that she was just anally penetrated, the doctor stated in reply that because the child is

small and young, that may be what the complainant thought to be what took place but on examining the proximity of the anus and the vagina in the child; injuries found and the definition of the penetration, she concluded that the child was penetrated vaginally and anally.

[16] The appellant testified that he would sleep next to the complainant's mother and that the complainant would normally sleep next to her mother and then the younger sibling next to the complainant and the wall. He stated that on the night of the 03rd of October 2018, the complainant and her mother were already in bed, but not asleep, when he switched the light off and got into bed to sleep.

[17] In the middle of the night he woke up and held the complainant's mother and touched her vagina. When the screaming started, the complainant screamed saying:

"mom, dad is s exing and touching me! The complainant's mother got up and switched the light on. The appellant then asked her why she was sleeping on their child's side of the bed and Ms. S[....] replied that she had gone to urinate. The complainant was standing at the door at that stage. It was his evidence that he told Ms. S[....] that he is· sorry, he thought he was touching her, (the complainant's mother), and not the complainant because the two of them are equal in body size.

[18] It was further his evidence that Ms. S[....] was wearing a stretchy denim and he inserted his hand under her clothes and touched her vagina. He explained that that might be how the injuries were sustained. He denies that there was a stage at which the complainant was pulling up her panties, standing at the door. He insisted that he went to bed wearing jeans[4].

[19] During cross examination, the appellant confirmed the sleeping arrangement as per the evidence of Ms. S[....] and the complainant[5]. It was further his evidence during cross examination that he went to bed in chino pants[6].

---

[4] Transcribed record dated 22/07/2020 page 10 line 19
[5] Transcribed record dated 22/07/2020 page 15 lines 23-25 an page 16 lines 1-5
[6] Transcribed record dated 22/07/2020 page 20 line 17-18

[20] It was further his evidence during cross examination that he might have inserted his hand, on the basis of the injuries described. He cannot recall if he inserted his fingers in the front or the back[7], but he does not recall penetrating[8].

[21] Against this factual background, the Appellant was convicted and sentenced.

GROUNDS OF APPEAL AD CONVICTION

[22] The appeal in essence rests upon the credibility of the state witnesses as opposed to that of the appellant.

AD SENTENCE

[23] It was submitted that the sentence imposed was harsh. The point was raised that this was not the worst kind of rape and the court a *quo* did not take into account rehabilitation and reformation.

ISSUES

[24] The issues for determination in this appeal is:

i. Firstly, whether or not there was penetration

ii. Secondly, whether there was a mistake in identity by the appellant and

iii. Thirdly, whether the sentence imposed was properly considered

THE LAW

[25] The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 - SOMA, in section 3 of the Act provides:

'Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the

[7] Transcribed record dated 22/07/2020 page 22 lines 10-11

offence of rape.'

[26] The words "sexual penetration" are defined in section 1(1) of SOMA as including any act which causes penetration to any extent whatsoever by:

(a) the genital organs of one person into or beyond the genital organs, anus or mouth of another person;

(b) any other part of the body of one person or any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal into or beyond the mouth of another person and sexually penetrates has a corresponding meaning;

[27] This aspect is dependent on the evidence of the complainant, who was a single witness. In terms of s 208 of the Criminal Procedure Act, 51 of 1977, an accused may be convicted of any offence on the single evidence of any competent witness. The court can base its findings on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect[9] or if there is corroboration[10].

[28] Furthermore, the complainant, at the age of 12, was a child-witness. When dealing with the evidence of child witnesses, our courts have developed a cautionary rule to be applied. The court must therefore have a proper regard to the danger of an uncritical acceptance of evidence of a child-witness.

[29] The State's case also consisted of circumstantial evidence as there is no direct evidence of penetration with a penis. The- cardinal rules when it comes to circumstantial evidence are trite, and were laid down in the well-known case of

---

[8] Transcribed record dated 22/07/2020 page 22 line 12
[9] R v Mokoena 1932 OPD 79 at 80
[10] S v Gentle 2005 (1) SACR 420 (SCA)

R v Blom[11], namely:

(i). the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn;

(ii). the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

[30] It is apposite to restate the approach to be adopted by a court of appeal when it deals with the factual findings of a trial court. A court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court[12] and will only interfere where the trial court materially misdirects itself insofar as its factual and credibility findings are concerned. In *S v Francis* 1991 (1) SACR 198 (A) at 198j- 199a the approach of an appeal court to findings of fact by a trial court was summarised as follows:

"The powers of a *Court of appeal to interfere with the findings of fact of* a *trial Court are limited. In the absence of any misdirection the trial Court's conclusion, including its acceptance of* a *witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence* - a *reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which* a *trial Court has of seeing, hearing and appraising* a *witness, it is only in exceptional cases that the Court of appeal will be entitled to interfere with* a *trial Court's evaluation of oral testimony".* And in *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e-fthe Court held:

"... *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"*

[11]1939 AD (1) 188 at page 202-203
[12] **R v** Dhlumayo and Another 1948 (2) SA 677 (A)

[31] The court a *quo,* which had the benefit of observing the witness as she testified, in its judgment evaluated the evidence of the child-complainant and dealt with the aspects of her evidence which were conflicting and unclear[13].

[32] The court a *quo,* having had the benefit of observing the witness as she testified, in its judgment analysed the vidence of Ms. Francina S[....] and dealt with the discrepancies between her evidence and that of the child complainant[14].

[33] In its analysis, the court a *quo* found that the contradictions there were did not affect the credibility of the witnesses.

[34] It found that the witnesses corroborated each other and the appellant himself corroborated their evidence to a certain extent, in stating that the complainant spontaneously report: "Dad is sexing me..", coupled with the child-complainant jumping off the bed.

[35] The court a *quo* found Dr. Agbu to be an expert witness in the field that she testified on. Further in regard to her findings, her detailed motivation of her findings and her expertise, these were not attacked by the defence. The court a *quo* found that her evidence strengthens that of the child complainant, that there was indeed penetration.

[36] The court a *quo* evaluated the evidence of the appellant. It was never put to Ms. Francina S[....] that the appellant normally touches her in that way even when she is asleep. Ms. Francina S[....] vehemently disputed the version of the appellant to the effect that she went to the toilet and then changed her position on the bed. The appellant attempted to advance an explanation stating that he mistook the child for Ms. Francina S[....] and that in that regard, Ms. S[....] that, did not want to listen or give him a chance to explain. Ms. S[....] refuted this, stating that the appellant kept saying that he is sorry while she kept asking him what he is sorry for however, the appellant avoided the question and did not want to explain what he was sorry about. However, when the accused gave evidence in chief, he testified that he questioned

[13] Transcribed record page27 lines 14-25 and page28 lines 1-16
[14] Transcribed record page 29 lines 10-25 page 30 lines 1-25 and page 31 line 1

where Ms. Francina S[....] had gone and she had answered him. He explained that he touched the child thinking it was her, (Ms. Francina S[....]). He also apologised, thus in his own evidence there is no suggestion of being prevented from explaining what happened. Contrary to what was put to Ms. Francina S[....], when she was under cross- examination, it was never put to her that the appellant was not given an unhindered opportunity to explain what happened.

[37] The court a *quo* accepted that Ms. Francina S[....]' consistent evidence that the accused kept apologising or saying sorry, but never explained what he was apologising for.[15]

[38] The court a *quo* found that the evidence of the appellant is not consistent with the undisputed and credible medical evidence. He vacillated between a total denial of causing the injuries, to indicating that he perhaps could have scratched her with his nail or finger, only to later definitely deny causing the injuries.[16]

[39] Dr. Agbu's evidence excluded the possibility of a finger having caused the injuries basing that on the insignificance of the tears inflicted. The evidence of the complainant was that a finger would at most have caused bruising. There, the court a *quo* deduced that the only reasonable and irresistible inference to be drawn from the facts is that to the exclusion of anyone else, it is the appellant who caused the injuries on the child- complainant's vagina and anus. The court a *quo* further found that the medical evidence in regard to the injuries noted, the complainant's evidence that she woke up to find the appellant having penetrated her with his penis in her anus whereupon she screamed to her mother, at the same time jumping up. That, coupled with the accused's own evidence about what she shouted as she jumped up; all of that is more consistent with the probabilities around the complainant's version than with the appellants evidence that his finger caused the injuries on her.[17]

[40] with regard to the order in which the family slept on the bed, the court a *quo* found that the appellant contradicted himself"", much as he also came up with a

---

[15] Transcribed record page34 lines 22-24
[16] Transcribed record page 35 lines 1-9
[17] Transcribed record page 35 lines 21-25 and page36 lines 1-12

version which was never put to the witnesses.[18]

[41] In the final analysis, the court a *quo* found the state witnesses to be credible and reliable while the appellant was not and for the reasons enumerated in its judgment, it found that the state proved beyond a reasonable doubt that the appellant indeed deliberately penetrated the complainant's vagina and anus with his penis, while knowing that it was her, (the complainant), and not her mother. On that basis, the court a *quo* rejected the appellant's version.

[42] Advocate Vukani was unable to point to any misdirection in the court a *quo's* consideration of the facts and conclusion that the State indeed proved that the appellant intentionally penetrated the complainant's vagina and anus, while knowing it was her, (the complainant), and not Ms. Francina S[....] and it therefore rejected the appellants version. Similarly, this court too can detect no misdirection. In the result, the appeal against conviction stands to fail.

SENTENCE

[44] Advocate Kgokane submitted that the sentence of Life imprisonment imposed is harsh. He raised the fact that there were no serious physical injuries and that the prospects of rehabilitation were not given due consideration while this was not the worst kind of rape. It was further submitted that deterrence was over-emphasized, while the appellant was a first offender, with a minor child and was employed at time of the commission of the offence.

[45] Advocate Sibanda in contrast argued that this was the worst kind of rape, because it is rape of a child by her father and further that there were substantial fresh tears over and above the traumatic nature of the offence and the psychological scars which are permanent. The Respondent submitted that the court did not misdirect itself.

[43] The jurisdiction of a court of appeal to interfere with the sentence imposed

[18] Transcribed record page 36 lines 11-21

by a trial court is limited. In S *v Bogaards*[19] Khampepe J stated:

'Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. The appellate court can only do so where there has been an irregularity that results in a failure of justice; or where the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

[46] The offence that the appellant was convicted of resort under Part I of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 - CLAA, and attracts the sentence of life imprisonment as provided for in section 51(1) of the CLAA. In S *v Ma/gas* [2001] 3 All SA 220 (A), the Court held as follows:

"Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment, (or the particular prescribed period of imprisonment), as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances."

[47] A reading of the sentence judgment reveals that the court a *quo* had regard to the nature and background of the case; the personal circumstances of the appellant; his employment history and the nature of employment which was of a temporary nature; the nature of his familial relationships, the fact that he has a minor biological child with the complainant's mother; his persistent denial of the crime; the fact that he is a first offender and the relationship of trust he shared with the complainant.

[48] The court a *quo,* though not specifically quoting the cases, in its judgment, quoted the principles from the cases in considering the triad[20] as laid down in the case of the oft quoted case of *Zinn* 1969(2) SA 537 (A) at 540 wherein it was held: "What has to be considered is the triad consisting of the crime, the offender and the interests of society", the aims of punishment[21] as laid down in the case of

[19] [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41
[20] Transcribed record dated 16/11/2020 page 6 lines 14-18
[21] Transcribed record dated 16/11/2020 page 6 lines 19-21

Rabie [22] wherein Holmes JA held:

"The main purposes of punishment are deterrent, preventive, reformative and retributive;"

[49] The court had regard to the impact of the rape on the complainant who at the time of the rape was only 11 years old, the physical injuries that she sustained, that she was in a relationship of trust with the appellant, the probation officers report and weighed it against the appellant's circumstances placed before it as well as the scourge of sexual violence against women and children in society.

[50] It is disconcerting that notwithstanding the fact that the absence of physical injuries does not constitute substantial and compelling circumstances, arguments in this regard still persist as was advanced by Advocate Kgokane in this appeal which reminds this court of its duty to restate what was stated in S *v Chapman* [1997] ZASCA 45 and recently quoted in the Constitutional Court case of Tshabalala and the State[23] by Mathopo AJ and I quote:

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in the country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go to and come from work, **and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."[24]**

Further, Cameron JA described the rape of a minor by her father eloquently as follows in S *v Abrahams* 2002 (1) SACR 116 (SCA) para 17:

'Of all the grievous violations of the family bond the case manifests, this is the most

[22] 1975(4) SA 855 (AD) 862A-B
[23] 2019 **ZACC 48**
[24] Underlining bolding are my own emphasis.

complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter's best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense.'

[51] I can detect no misdirection in the court a *quo* approach to sentence. The offence, for the reasons cited above, is a particularly serious one. The personal circumstances of the appellant have been properly weighed against the seriousness of the offence and the interests of society. Far from inducing a sense of shock, the carefully considered sentence imposed by the court below strikes me as being one that is proportionate to 'the crime, the criminal and the legitimate needs of society'.

[52] That being so, no basis has been established for this court to interfere with the sentence imposed by the court a *quo.* The appeal against sentence must therefore fail and the following order is made:

ORDER:

[53] The appeal against both conviction and sentence is dismissed

M Jordaan
Acting Judge of the High Court Gauteng Division, Pretoria

I agree and so order

T Maumela
Judge of the High Court Gauteng Local Division, Pretoria

APPEARANCES:

For the Appellant: Adv J L Kgokane
Instructed by: Legal Aid South Africa, Pretoria

For the Respondent: Adv R N Sibanda
Instructed by: Director of Public Prosecutions, Pretoria

Date heard: 16 November 2021

Date delivered: 13 December 2021