



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

Case No: A557/2016

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

DATE 4/10/2023

SIGNATURE

JEFFREY MANGENERA RASEMANE

Appellant

and

THE STATE

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is 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 04 October 2023.

JUDGMENT

PHOOKO AJ

Introduction

- [1] This is an appeal against the conviction and sentence imposed by Magistrate Matshitse who sat as the court of first instance in the Regional Division of Benoni. The court found the appellant guilty of having unlawfully and intentionally committed an act of sexual penetration with a female person who was 14 years old at the time by inserting his penis into her vagina without her consent.
- [2] The Appellant was consequently sentenced to a sentence of direct life imprisonment.

THE ISSUE

- [3] The issue to be determined by this Court is whether the court *a quo* erred or misdirected itself when it convicted and sentenced the appellant.

THE FACTS

- [4] It was averred that the appellant unlawfully and intentionally committed an act of sexual penetration with a female person, the complainant, who was 14 years old by inserting his penis into her vagina on several occasions without her consent.
- [5] The incidents of rape occurred during the year 2015 at or near Putfontein in the regional division of Gauteng. The appellant's girlfriend, a mother to the complainant, had left the appellant to look after the children including the complainant because she worked far away and only returned home during weekends.
- [6] The appellant would at times call the complainant to assist him in changing the diapers for the twins. When the complainant entered the house, the appellant would lure her into the main bedroom, lock the door, throw her into the bed, and have sexual intercourse with her.
- [7] On one of the days, the complainant felt empowered and had the courage to report the appellant to one of the church members through a handwritten letter that she was being raped by her step-father, the appellant. Further, she stated in the said letter that she did not tell the family because she did not trust anyone. It

was through the letter that the incident came to the attention of the law enforcement officers and the appellant was arrested and thereafter prosecuted.

- [8] The J88 Report showed that there was sexual penetration as multiple clefts were noted. In addition, the complainant's mother corroborated that she learnt, via a letter that the complainant was raped. She also spoke to the complainant and the complainant confirmed to her that the appellant raped her and paid her R10 or R20.
- [9] The appellant's case was that the complainant's mother disputed that the appellant was abused or neglected at her home and thus contradicted the complainant. The appellant further relied on the fact that the complainant's mother was not aware that the complainant's sister was abusing the complainant. Furthermore, under cross-examination the complainant said that she felt loved by her mother but had felt as though she was not loved because of what her sister had told her such as that the complainant's mother resented her.
- [10] The appellant's case was further that the complainant had also admitted that "the abuse she averred in her letter were exaggerated in a sense".
- [11] Additionally, the appellant's case was that even if the J88 Report indicated that there were clefts in the complainant's vagina, it did not take the state's case anywhere because it was not known how old the injuries were or that the complainant had suffered sexual assault before.
- [12] The complainant testified to the effect that she did not report the first incident of rape because she feared the appellant because the appellant had told her that when he hit a person, he ensures that the person dies.

GROUND OF APPEAL

- [13] The appellant's grounds of appeal include that the trial court erred and/or misdirected itself:

[13.1] by relying on the evidence of the complainant in that she was a single

witness and a child who was not very happy at the time of the rape.

[13.2] by accepting the complainant as a credible and reliable witness because she contradicted herself about the abuse suffered.

[13.3] there is no sufficient corroboration for the child's testimony in the form of DNA and therefore it was not safe to convict the appellant based on the complainant's evidence alone.

[13.4] by finding that there are no substantial and compelling circumstances to deviate from imposing a sentence of life imprisonment.

APPLICABLE LAW

[14] The law regarding appeals is clear in that a court of appeal should be slow to interfere with the judgment of the trial court.¹ The basis for this is that the trial court *inter alia* had the benefit of observing and listening to the witnesses. However, this is not a rigid rule.² The appeal court may in certain circumstances interfere and reverse the judgment of the court *a quo* if the facts of the case from the record warrant an intervention. In *Makate v Vodacom (Pty)*,³ Jafta J accurately stated that:

“... If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case.”

[15] Similarly, in *S v Naidoo & others*,⁴ it was stated that:

“a court of appeal does not overturn a trial court's findings of fact unless they are shown to be vitiated by material misdirection or are

¹ *Malan and Another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA); *S v Naidoo and Others* 2003 (1) SACR 347.

² *Mkhize v S* (16/2013) [2014] ZASCA.

³ 2016 (6) BCLR 709 (CC) para 40.

⁴ 2003 (1) SACR 347 (SCA) para 20.

shown by the record to be wrong.”

[16] Considering the above principle, absent any misdirection by the court *a quo*, there will be no basis whatsoever for interference by this Court.⁵ However, if for one reason or the other, the court *a quo* misdirected itself on the facts and as a result came to the wrong conclusion, this Court will be justified to overturn such a decision.

[17] I now consider the submissions of the parties together with the appeal record to ascertain whether this Court can interfere with both the conviction and the sentence imposed by the lower court.

THE APPELLANT’S SUBMISSIONS

Conviction

[18] The appellant argued that the absence of the DNA to link the appellant to the rape did not warrant a conviction. According to counsel, the J88 Report does show that the complainant was involved in sexual intercourse but did not serve as a corroborative about who sexually violated her. To this end, counsel argued that anyone could have sexually violated the complainant and that the complainant was falsely implicating the appellant.

[19] In addition, counsel argued that the mere fact that the complainant took longer to report the incident of rape and/or not report to her mother when she returned on Fridays meant that it was not that serious as she would go back to the same house where the rape took place and watch television with the appellant.

[20] Counsel further argued that the complainant’s explanation for not reporting the rape earlier as she was scared of being hit or because of the threats that were made by the appellant to her sister that when the appellant hits someone he ensures that the person dies was not supported by any evidence.

⁵ *R v Dhlumayo and Another* 1948 (2) SA (A); *S v Monyane & Others* 2008(1) SACR 543 SCA at para 15.

- [21] According to counsel, it was only in the letter that the complainant stated that she did not trust anyone from her family because she felt abused and that her mother did not care for her enough. However, under cross-examination, counsel argued that the complainant changed her version and indicated that it was her sister who had made her believe that her mother did not love her. The complainant's mother disputed the contents of the letter in so far as they related to her not loving the complainant and the situation of abuse at the complainant's home.
- [22] Counsel also argued that the complainant was not a "very happy" child at the time of the alleged incidences of rape. To this end, reference was made to an occasion where the complainant was not happy because her mother had not bought her a cell phone but had purchased one for the complainant's elder sister.
- [23] Furthermore, the appellant submitted that the trial court ought to have not relied on the evidence of a single witness as this was inadequate to secure a conviction.
- [24] Counsel further averred that the complainant was falsely implicating the appellant about the rape.
- [25] Counsel contended that the trial court erred in rejecting the appellant's version as he gave it accurately and without contradictions.
- [26] Consequently, counsel argued that the respondent did not prove its case beyond a reasonable doubt that the appellant had raped the complainant.

Sentence

- [27] Concerning the sentence, the appellant argued that the court misdirected itself when it found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence.
- [28] Through reliance in *S v Zinta*,⁶ counsel submitted that there were substantial and compelling circumstances in this case as the appellant is a father to his five

⁶ 1990 (2) SACR 44 (W).

children and that he is not a “hard-core offender”. Furthermore, counsel submitted that his previous conviction is more than 24 years, and he should be regarded as a first offender who does not require to be permanently removed from society.

[29] Counsel further submitted that the offence in question did not fall within the worst category of offences that are committed in South Africa because the complainant was not assaulted and/or did not suffer serious physical injuries during the commission of the offense, and that there is no evidence that she was infected with the HIV or that she is HIV positive.

[30] Counsel further argued that there was no victim impact report to show the extent to which the rape affected the complainant.

[31] Finally, counsel argued that there were no attempts made by the Magistrate to grade the seriousness of the rape because no weapon was used to force the complainant’s submission and/or the physical injuries caused by rape.

RESPONDENT’S SUBMISSIONS

Conviction

[32] Counsel for the respondent was brief and argued that the appellant’s contention about the complainant being a single witness had no merit because the complainant discussed in detail how she was repeatedly raped by the appellant including mentioning that she was raped three times.

[33] In addition, counsel for the respondent contended that although the complainant was a single witness, the evidence was corroborated by the J88 report which *inter alia* indicates that “findings are consistent with vaginal penetration of a blunt object multiple clefts noted”.

[34] Furthermore, counsel contended that there was no ill motive for the complainant to falsely implicate the appellant as she had mentioned everyone who made her upset at home such as her sister, and the appellant whom she identified as the

person who repeatedly raped her.

Sentence

[35] Regarding the sentence, counsel relied on various cases and *inter alia* argued that the fact that no violence was used to achieve the end does not constitute a mitigating factor⁷. Consequently, counsel submitted that the sentence imposed cannot be said to be shockingly inappropriate but fits the nature of the crime.

[36] Finally, counsel argued that the absence and/or presence of a victim impact report would have not impacted on sentence.

EVALUATION OF SUBMISSIONS IN RESPECT OF CONVICTION AND SENTENCE

Conviction

[37] About the complainant being a single witness, the trial court correctly took cognisance of the fact that the complainant was a child and a single witness and therefore had to treat her with due caution.⁸ Consequently, it adopted a holistic approach in the assessment of the entire evidence including the J88 Report.

[38] For example, the trial court found that the complainant had explained the first incident of rape in a logical and chronological manner where the appellant had invited her to the main bedroom in April 2015, taken her onto the bed, touched her private parts, and eventually had sexual intercourse with her. The trial court did not find any improbabilities in her description of how the events took place. I do not find any reason to fault the findings of the trial court regarding how the complainant accurately narrated the incidents of the rape and how she decided to report the same to one of the church elders via a letter because of the motivation she had received via one of the sermons about a rape-related incident. The complainant stuck to her narration of the rape events throughout the trial.

⁷ See for example, *S v M* 2007 (2) SACR 60 (W).

⁸ Trial Court Judgment at page 57 at para 20. See also *Sphanda v S* (A607/2017) [2021] at para 20.

- [39] In addition, the trial court also found that the J88 report indicated that “there were multiple clefts in her hymen”. According to the trial court, the J88 report supported the evidence of the complainant. In other words, the J88 report corroborated the claim that someone had penetrated the complainant. In my view, this is a clear indication that the trial court did not only rely on the evidence of a single witness but also on gynaecological examination which corroborated the evidence of the complainant. Therefore, this settles the issue of conviction based on a single witness.
- [40] When counsel was asked to comment about the J88 report in so far as it relates to findings of rape, her response was that anyone could have had sexual intercourse with the complainant without providing reasons for such a proposition. This is regrettable, to say the least, because the complainant clearly identified her perpetrator.
- [41] Concerning the complainant’s unhappiness at home, I do not think that there is any basis to fault the trial court when it found that there was no reason for the complainant to be upset with the appellant except that she was upset with him because he had raped her. I further agree with the trial court that the complainant was upset with her mother because of the cell phone that was not bought for her and that this had nothing to do with the appellant. The complainant had sought what her mother could not afford at the time. However, the complainant and her mother did resolve the issue of the cell phone.
- [42] About the complainant falsely implicating the appellant, in my view, the trial court correctly observed that the complainant had testified that he had no issues whatsoever with the appellant save for the incident of rape and that the evidence before it did not suggest that there was any motive by the complainant to implicate anyone or the appellant about the rape as she mentioned all the people who had at one stage made her upset including her mother and the sister.
- [43] In my view, the trial court was correct when it observed and concluded that the complainant impressed it as a witness as she narrated to the court how the incident of rape took place on various occasions. Further, the court also

highlighted that the complainant conceded certain aspects under cross-examination such as that she felt loved by her mother whereas she had indicated in the letter that she was being abused and not loved. Further, under cross-examination, the complainant initially denied requesting a cell phone from her mother but later stated that she did ask for one. However, the court observed that she did not make “any concessions as with regards to the incidence where she was raped”. In my view, the aforesaid contradictions under cross-examination do not amount to material discrepancies.

[44] All in all, the trial court carefully considered the evidence before it, and the fact that the complainant’s contradictions about not being loved by her mother were insignificant compared to the evidence about how she was raped and the medical examination therefore which corroborated her version. In other words, there were no material discrepancies in the complainant’s testimony.

[45] Based, on the above, I agree with the trial court when it found that the appellant’s evidence constituted bare denials and that the probabilities and improbabilities of versions dictated that the probabilities favoured the evidence of the state. It, therefore, found that the version of the appellant was not reasonable or reasonably possibly true.

[46] Considering the above exposition, I am of the view that the trial court was correct in its finding and did not err and/or misdirect itself when it convicted the appellant.

Sentence, substantial and compelling circumstances

[47] Section 51(1) of the Criminal Laws Amendment Act, 105 of 1997 (“the Act”) provide as follows:

“51 Discretionary minimum sentence for certain serious offences

- (1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.
- (2) ...

- (3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to in Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.
- (aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:
 - (i) The complainant's previous sexual history;
 - (ii) an apparent lack of physical injury to the complainant;
 - (iii) an accused person's cultural or religious beliefs about rape; or
 - (iv) any relationship between the accused person and the complainant prior to the offence being committed."

[48] The above provision confers a discretion on courts to depart from the prescribed minimum sentence of life imprisonment where substantial and compelling circumstances justify the imposition of a lesser sentence. This provision does not encroach on judicial discretion⁹ during the sentencing stage but gives the courts a degree of leeway to impose a lesser sentence if circumstances permit it to do so.¹⁰ Further, the courts are called upon to record factors qualifying as substantial and compelling circumstances that warrant the imposition of a lesser sentence.

[49] The Supreme Court of Appeal in *S v Malgas*¹¹ cautioned that "the specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny". To decide whether substantial and compelling circumstances exist, a court is required to "look at traditional mitigating and

⁹ *S v Dodo* 2001 (3) SA 382 (CC).

¹⁰ See *S v Malgas* [2001] 3 All SA 220 (A) at para 34; *S v Pillay* 2018 (2) SACR 192 at para 11.

¹¹ *S v Malgas* at para 9.

aggravating factors and consider the cumulative effect thereof”.¹² The court in *S v Pillay* indicated that for circumstances to be exceptional or compelling, they need not be “exceptional in the sense that they are seldom encountered or rare, nor are they limited to those which diminish the moral guilt of the offender.”¹³ In other words and depending on the facts of each case, the personal circumstances¹⁴ of the accused such as young age and remorse could be regarded as substantial and compelling circumstances that justify deviation from a prescribed minimum sentence.¹⁵

[50] The court is required to strike an equilibrium of the mitigating and aggravating factors and cumulatively give weight to each of the factors advanced to ascertain whether there are substantial and compelling circumstances exist. This is known as the proportionality test.¹⁶ The interests of society would be to adhere to the prescribed sentences unless substantial and compelling circumstances are present.

[51] The appellant, as someone who seeks to be sentenced outside the ambit of the prescribed minimum sentence must satisfy the court on a factual basis that there exist substantial and compelling circumstances that justify a departure from the prescribed minimum sentence.

[52] I disagree with counsel for the appellant that the court *a quo* misdirected itself when it found that there were no substantial and compelling circumstances that justified the imposition of a lesser sentence. The trial court considered this aspect and observed that the appellant *inter alia* has children. However, the court found that the rape “was not a once off occurrence, but something which happened several times”.¹⁷ Consequently, in my view, it correctly found that this was sufficient to “find that there are no substantial and compelling circumstances”.

¹² *S v Pillay* at para 12.

¹³ *Ibid* at para 10.

¹⁴ *Director of Public Prosecutions, Gauteng Division, Pretoria v D.M.S and A.O.L* (69/2022) [2023] ZASCA 65 at para 26.

¹⁵ See *S v Malgas* at para 34.

¹⁶ *Ibid* at para 32. See also *S v Vilakazi* [2008] 4 All SA 396 (SCA) at para 3; *S v Zinn* 1969 (2) 537 (A) at 540G, and *Maila v S* (429/2022) [2023] ZASCA 3 at para 60.

¹⁷ Trial Court Judgment at page 68, at para 5.

[53] I find the case of the *DPP, Pretoria v Zulu*¹⁸ relevant in the present matter. There, the court found that the accused *inter alia* had a close relationship with the complainant in that he was a step-father and the complainant was his step-daughter. Similarly, in this case, the appellant was a step-father to the complainant. The court *a quo* correctly observed that the appellant was in a position of trust. The mother of the complainant who happened to be the appellant's boyfriend trusted the appellant with the responsibility to look after her children because of work commitments elsewhere. However, the appellant abused the said trust as he turned the complainant, a 14-year-old to a sexual partner.

[54] The appellant, who had assumed the role of the father in the absence of the complainant's mother, ought to have protected his step-daughter and not the other way around. He clearly took advantage of the fact that the mother of the complainant was miles away. He also took advantage of the girl child. The Constitutional Court remarked in *Bothma v Els and Others* as follows:

‘...it [rape] often takes place behind closed doors and is committed by a person in a position of authority over the child, the result is the silencing of the victim...’¹⁹ (own emphasis added).

[55] Rape has become a social cancer in South Africa.²⁰ The interests of the community expect the courts to protect girl children from men who cannot control their sexual greed such as the appellant. As was observed by the Constitutional Court in *Bothma v Els and Others*²¹ per Sachs J that:

‘Rape often entails a sexualised act of humiliation and punishment that is meted out by a perpetrator who possesses a mistaken sense

¹⁸ *DPP, Pretoria v Zulu* (1192/2018) [2021] ZASCA 174 at para 28.

¹⁹ At para 46.

²⁰ See for example, *Rommoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA), *S v Gqamana* 2001 (2) SACR 28 (C) and *Director of Public Prosecutions, Free State v Mokati* (Case no 440/2019) [2022] ZASCA 31.

²¹ 2010 (2) SA 622 (CC) at para 45.

of sexual entitlement. The criminal justice system should send out a clear message through effective prosecution that no entitlement exists to perpetrate rape...’.

- [56] In light of the above, I do not think that there exist any grounds to interfere with the sentence of the court *a quo*. The trial court was correct in finding that the aggravating circumstances of the crime far outweighed the mitigating factors. It, therefore, in my view, correctly found that there were no substantial and compelling circumstances that would justify a deviation from the prescribed applicable minimum sentence.
- [57] Even if there was a victim impact report, it would have arguably not deterred the court *a quo* from imposing a sentence that fits the nature of the crime committed against the complainant. In *S v Ncheche*,²² the court held that certain “cases of rape may be so serious”, that, regardless of the emotional consequences for the complainant, they justified life imprisonment. In my view, the present case is no different from such serious cases. It squarely fits within the categories of those serious cases. Consequently, I agree with counsel for the respondent that the presence and/or absence of the victim impact report is immaterial in the context of this case.
- [58] Regarding the submission that this was not one of the worse cases of rape because there was no violence used against the complainant, the court sought clarity from counsel about what she meant, and counsel tried to persuade this court that no force was used against the appellant, and this should to a certain extent count in favour of him. This submission is misplaced and unfortunate as it suggests that some forms of rape are better than others. This underestimates the crime of rape and the negative impact it has on the victim.
- [59] Consequently, my reading of the judgment and order of the court *a quo* including the record, and submissions of the parties do not show a misdirection that would justify interference by this Court. I am therefore of the view that both the conviction and sentence in respect of rape were proper.

²² 2005 2 SACR 386 (W) at para 29,

[60] Having carefully considered the appeal, both the appellant's and respondent's written and oral submissions. I am of the view that the appeal has no merit.

ORDER

[61] I make the following order:

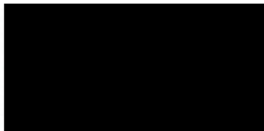
(a) The appeal against the conviction and sentence is dismissed.



PHOOKO AJ

**ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

I agree it is so ordered.



POTTERILL J

**JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

| | |
|-----------------------------|-------------------------|
| Attorney for the Appellant: | Miss MMP Masete |
| Instructed by: | Pretoria Justice Centre |
| Counsel for the Respondent: | Adv E.V Sihlangu |
| Instructed by: | State Attorney |
| Date of Hearing: | 01 August 2023 |
| Date of Judgment: | 04 October 2023 |