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IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR120/15

In the matter between:

SILINDILE MSIBI **Appellant**

vs

THE STATE **Respondent**

APPEAL JUDGMENT

Delivered on 25 August 2016

Mbatha J (Vahed J concurring):

[1] On 22 August 2013 the appellant was convicted in the Regional Court, Camperdown of the rape, allegedly committed on 17 February 2011, of a minor female child, N N ("the complainant"). The complainant was approximately 11 years old at the time, and was raped more than once by the appellant. The offence fell within the provisions of Section 51(1) and Schedule 2 of the Criminal Law Amendment Act.[1]

[1]Act 105 of 1997 as amended.

[2] The appeal against both conviction and sentence is before us with the leave of the court *a quo*. The appellant was represented by Ms *Majola*, who, in her heads of argument comprehensively summarised the evidence given at the trial. In her heads of argument and address before us she has conceded that the State has proved its case beyond a reasonable doubt. She further submitted that the contradictions in the state's case, as raised by the defence, were not material when compared to the evidence presented by the state and the circumstances of the case.

[3] I accept that the DNA evidence presented by the state, as Exhibit "E", corroborated the evidence of the complainant in a material way so as to remove any doubt as to the identity of the perpetrator. The finding of the forensic analyst, Warrant Officer Shane Leslie Whelan, who had examined the swabs taken from the complainant against the blood sample material of the appellant, is conclusive in that he made the following findings:

> '4.1 The DNA result of the Body Fluid Deposit Swabs A and C (09…….) matches the DNA result of the reference sample (10…… "M SIBISI"); and
>
> 4.1.1 The most conservative occurrence for the DNA result from the Body Fluid Deposit swabs A and C (09D7AA0404XX) is 1 in 460 billion people.'

[4] In summary, the appellant did not dispute that he had left for the shops in the company of the complainant and that they returned to her grandmother's house, save that he stated that nothing had happened to the complainant whilst she was in his company. He failed to explain the positive link of his DNA to the swabs taken from the complainant's vagina.

[5] Dr L. Ramiah also gave evidence at the trial where he confirmed that the complainant had been penetrated vaginally. He had examined the complainant on 18 February 2011, a few hours after the alleged rapes. The J88 form completed by Dr Ramiah was handed in as Exhibit "D". It recorded that the complainant sustained a tear on the right upper region of her labia minora, which he described as the inner lip of the vagina. His findings were that it was highly suggestive that blunt force had been applied to the vagina.

[6] However, notwithstanding the concession made by the appellant's counsel, this court has to be satisfied that the conviction was in accordance with justice. Notwithstanding the concession made by counsel for the appellant, we had to satisfy ourselves that indeed the appellant was correctly convicted. We have considered the merits of the case and have come to the same conclusion as counsel for the appellant that the conviction should be confirmed. The concession was thus correctly made.

AD SENTENCE

[7] The appellant was sentenced to life imprisonment. He was convicted of the rape of a person under the age of 16 and in circumstances where the victim was raped more than once.

[8] It has been submitted that the sentence meted by the learned Regional Court Magistrate is inappropriate and that the court did not exercise its discretion reasonably. It is further submitted that the learned magistrate should have taken into account the personal circumstances of the appellant as testified to by his brother; that this was not one of the worst rape cases in that there was no evidence of any physical harm or injuries inflicted on the complainant nor was violence used; that the appellant had only one previous conviction dating back to 2002 and that the learned magistrate ought to have provided time for a probation officer's report to be obtained.

[9] The state opposes the appeal on sentence.

[10] The appellant did not testify in mitigation of sentence. Instead he called a witness, his brother, who gave evidence in mitigation of sentence. Both counsel addressed the court at some length on the question of sentence.

[11] It is common cause that the appellant was convicted of sexual assault falling within the ambit of section 51(1) read with Part 1 of schedule 2 of the Criminal Law Amendment Act.[2] The victim was a girl under the age of 16 and she was raped more

[2] Act 105 of 1997 as amended.

than once. The prescribed sentence for such a conviction is life imprisonment, unless the court can find substantial and compelling circumstances which can persuade the court to deviate from imposing the prescribed minimum sentence. The learned magistrate found that there were no substantial and compelling circumstances and sentenced the appellant to life imprisonment.

[12] The personal circumstances of the appellant are as follows:

(a) He was 34 years' old at the time of sentencing;

(b) He is unmarried with no children;

(c) He dropped out of school in standard 6 after repeating that class three times;

(d) He earned about R70 per day from temporary employment; and

(e) He had one previous conviction for assault, which had been imposed ten years before the present matter.

[13] It is trite that an appeal court will only interfere with a sentence if the trial court misdirected itself when passing the sentence. Moreover, a misdirection alone does not suffice for a court of appeal to interfere as expressed by Trollip JA in *S v Pillay*[3] where he stated as follows:

> 'it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the court's decision on sentence. That is obviously the kind of misdirection predicated in the [*dictum* of *S v Fazzie and others* 1964 (4) SA 673 (A) at 684A-B which states that] "the dictates of justice" clearly entitle the Appeal Court "to consider the sentence afresh".'

[14] The evidence presented at the trial clearly established that the victim was only 11 years' old when she was raped; she was raped more than once in one day by the appellant; she sustained injuries to her vagina; she was traumatised; she was raped without a condom and for the first time she had to repeat a grade at school.

[3] 1977 (4) SA 531 (A) at 535F-G.

[15] In sentencing the appellant, the magistrate heard the testimony of the appellant's brother L M, regarding the appellant. L M, who is older than the appellant, was in a better position to give a clear picture to the court about the appellant. Apart from informing the court that the appellant struggled with standard 6 schooling, he described him as a well behaved person who also made financial contributions to the family from his meagre earnings. He informed the court that though appellant consumed alcohol, he was not a violent person. The appellant lives with his parents and siblings.

[16] The appellant was trusted by the family of the complainant. The complainant referred to him as uncle even during the trial. He betrayed the trust of that family, who did not fear that anything could befall the child entrusted to him.

[17] However significant also is that the appellant pushed the complainant into a bush, used force to stop her from crying for help and sexually assaulted her. The assault was interrupted because they heard the voices of people going past the area where she was being raped. The complainant having escaped from him, he pursued her and sexually assaulted her again within the precincts of her home.

[18] The appellant, notwithstanding the overwhelming evidence against him, failed to display any remorse for his actions. The appellant is not a youthful offender, at 34 years of age he could distinguish between right and wrong. It is understood that a sentence that is older than ten years is often not considered as a previous conviction in sentencing an accused person. Be that as it may, his first conviction ought to have served as a deterrent to him in committing further crimes. It is clear that the first conviction did not have any deterrent effect upon him.

[19] We do not accept the proposition that rape must be brutal in nature to only then deserve a harsher sentence. On its own, it is violent in nature even when it is not accompanied by other physical assaults or the killing of the victim. There is evidence that the complainant bled from her injuries. In her evidence she testified

that she had to receive treatment for HIV/AIDS after being raped as she was raped without a condom. The complainant repeated grade 6 which is sufficient evidence of trauma. One can take judicial notice of the fact that rape is traumatic in its nature without the need for any psychologist or psychiatrist to confirm that, let alone a probation officer's report. As early as in 1995 the Appellate Division in *S v D*[4] the courts recognised that children are vulnerable to abuse and the younger they are, the more vulnerable they are.

[20] As for the submission that the learned magistrate refused the appellant an opportunity to obtain a pre-sentencing report, we have noted that, the appellant was represented by a very robust and diligent attorney, who finally called a family member who placed all the facts about the appellant before the court. He extensively and efficiently addressed the court in mitigation of sentence. It must also be borne in mind that not all the matters require a pre-sentencing report. The appellant is 34 years' old and according to his brother, he is not a youthful offender, he is not a primary care giver to any children, he is mentally fit as he stood trial and gave evidence in his own defence. The evidence given in mitigation of sentence by his counsel was extensive and sufficient enough for the court to apply its mind. The failure by the court to request a pre-sentencing report when all the facts were before it did not amount to a misdirection. There was no duty upon the court to call for further evidence in this regard.

[21] The sentence is not disproportionate to the crimes committed. The court *a quo* acted in line with what Nugent JA in *S v Vilakazi*[5] stated:

> '… it is incumbent upon a court in every case, before it imposes a prescribed sentence, to access, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence.'

S v Malgas[6] clearly defined the approach that the courts should adopt in the application of the minimum sentence legislation. It is stated that in determining the

[4] 1995 (1) SACR 259 (A)
[5] 2009 (1) SACR 552 (SCA) para 15

presence or absence of substantial and compelling circumstances, the sentencing court is required to give due regard to those facts traditionally considered as 'mitigating and aggravating' factors. However, the same court stated that the courts should not depart lightly from imposing the prescribed minimum sentences. Speculative hypothesis favourable to the offender, undue sympathy, aversion to imprisoning first offenders and other factors are to be excluded in the determination of sentences falling under the purview of minimum sentence legislation.

[22] We are therefore of the view that the appeal against both conviction and sentence should not succeed.

[23] The following order is made:

> **'The appeal against both conviction and sentence fails and the conviction and sentence are confirmed'**

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MBATHA J

_____
VAHED J

[6] 2001 (2) SA 1222 (SCA)

Date of Hearing:	23 August 2016
Date of Judgment:	25 August 2016

Appearances

Counsel for the Appellant:	Ms E N Majola
Instructed by:	Pietermaritzburg Justice Centre
Counsel for the Respondent:	Ms A Watt
Instructed by:	The Director of Public Prosecutions Pietermaritzburg