IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable

CASE NO: AR751/17

In the matter between:

SIBONELO BO NGOBESE **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: **Gorven J and Ntshulana AJ**
Heard: **1 March 2019**
Delivered: **29 March 2019**

ORDER

On appeal from: Mtubatuba Regional Court (sitting as court of first instance):

The appeal against convictions and sentence is dismissed.

JUDGMENT

Ntshulana AJ

Introduction

[1] This is an appeal against convictions and sentence. On 25 November 2015, the appellant, Mr Ngobese, was convicted in the regional court sitting at Mtubatuba, of two (2) counts of rape (in respect of two 9 year old girls) in contravention of s 3, read with ss 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) having been legally represented during his trial.

[2] On 29 January 2016, he was sentenced to undergo life imprisonment in respect of both counts which were treated as one for purposes of sentence. The court *a quo* also ordered that his name be entered into the register for sexual offenders in terms of s 50 of the Act.

[3] Accordingly, and in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 (the CPA) read with sections 10, 11 and 43(2) of the Judicial Matters Amendment Act, 42 of 2013, the appellant has an automatic right to appeal against both his convictions and sentence.

Summary of the evidence

[4] The complainant on the first count, who will be referred to as BG, testified through an intermediary. So did the complainant on the second count who will be referred to as NM. Before evidence was led, their birth certificates and medical reports in respect of both complainants, contained in J88 forms, were handed into court and accepted by the appellant as accurate. BG was born on 10 October 2004 and NM on 9 December 2004. They were both 9 years old when the incident took place on 1 August 2014.

[5] Dr SL Nkosi, who examined both complainants and completed the J88s, recorded in respect of BG: '*Hymen intact with thin, transparent edging . . . Vulva not inflamed at present. Thus no transhymen penetration has occurred but this does not rule out sexual acts on the victim without penetration including attempted rape*.' His examination took place some 14 days after the incident.

[6] In respect of NM he observed: '*Hymen slightly loose for her age and intrectus (?) opens >1x1cm. Not usual for her age. Penetration has occurred in the past*.' In the schematic drawing he marked '*Portion without* hymen'.

[7] BG told the court that on the day of the incident she and NM were playing at

home and they were alone. Her grandmother was away at Empangeni and her brothers were out playing soccer. The appellant, who is well known to both her and NM, came and told them to go with him to the bush under threat to beat her. They both followed him to the bush near the Nkosi homestead. At the bush in the presence of NM, the appellant lifted up BG's skirt, undressed her panty, opened her thighs and made her lie down facing up. The appellant also undressed his pants and underwear. He then lay on top of her and inserted his private part which he uses to urinate into her private part which she uses to urinate. He made movements on top of her. He stopped and instructed her to dress. He then did the same thing to NM. When he finished with them both he told them to go and threatened to beat them if they told anyone. BG eventually told her mother of the incident. This happened because BG was sick and her mother took her to the clinic and she was walking slowly. When her mother asked why she was walking slowly BG told her what the appellant did to her. She and NM were taken to the clinic and examined. Under cross-examination she confirmed making this first report to her mother. She denied the appellant's version that he was at his home building a house. She denied any knowledge of NM's mother in 2014 threatening to have the appellant arrested. She did not know about any land dispute.

[8] NM corroborated the evidence of BG in every material respect. She was sexually penetrated by the appellant and she witnessed the same happen to BG at the same spot in the forest. She was a bit more detailed then BG but they corroborated each other about their ordeal at the hands of the appellant in the bush.

[9] BG's mother testified that, when they were coming from the clinic, BG was walking slowly. Upon questioning her why this was so, BG reported that the appellant had done a naughty thing to her and NM in the bush. She established from BG that the appellant had inserted his private part into the private parts of BG and NM. She then took BG back to the clinic where a doctor examined her.

[10] The mother of NM testified. She recalled that on 1 August 2014 she had gone to collect a grant at Hluhluwe. NM was not at school but at BG's home. She first heard from BG's mother that the children had been raped and upon asking NM she confirmed this. In IsiZulu NM reported that the appellant took his penis and inserted it into her vagina. Under cross examination she stated that on 1 August 2014 she noticed NM walking in a gingerly fashion. Upon asking the reason, NM reported that she had been stung by thorns. The witness did not enquire any further until the issue

came out. Another State witness, Mduduzi Mlawu, testified that, on that day, he was with the appellant at the Zikhali homestead drinking sorghum beer and that at about 13h00 the appellant left after quarrelling with another person.

[11] The appellant testified that he knew both the complainants in that they are his neighbours. He stated that there was a dispute over land between his family and the family of the two complainants. He said that, during the feud in February 2014, some members of the complainants' family stated to his mother that the year 2014 would not end before her child was arrested. He believed this was a reference to him. About the day of the incident, he stated that he was at home building a house and later fixed a fence and remained at home. He denied Mlawu's version of his being at the Zikhali homestead until 13h00. He stated that he thought the case had been fabricated because of the families' feud. The appellant called no other witnesses.

[12] The court *a quo* rejected the appellant's alibi and convicted him.

Issues

[13] Three main points were raised before us in challenging the conviction of the appellant. They are:

a) That the medical evidence in respect of BG was inconclusive regarding the question of penetration of BG.

b) That the doctor did not testify to confirm his findings in respect of NM.

c) The need for caution in evaluating the evidence of children.

[14] The identity of the appellant is common cause; this is clear from the evidence of all the witnesses including that of the appellant. Any feud, if it existed, was not between the accused and the two complainants. There is not a shred of evidence that the two complainants even knew of such feud. It is common cause that the complainants were together on the 1 August 2014. It is common cause also that the two complainants did not make reports soon after the incident of rape. It is common cause that on the day 1 August 2014 there was a traditional function at the Zikhali family's homestead in the area. There is no dispute that the children were not at school.

[15] In my view, if the children were part of some conspiracy or plot as suggested in the appellant's evidence, to falsely implicate him, it makes no sense that they did

not report the matter immediately after it occurred. The incident only came to light because BG was walking slowly from the clinic some 14 days later. Had she been walking fast that day, this matter might not have seen the light of day. There is no doubt in my mind that the learned magistrate correctly found that the incidents occurred.

[16] It is clear from the medical evidence that there was penetration of NM. The only challenge mounted by the appellant was that the doctor did not testify. This would, of course, be preferable but the report was accepted by consent at the trial and there was no challenge by the defence to the findings in it.

[17] In respect of penetration of BG, in my view the court *a quo* was correct in finding that penetration did take place despite the inconclusive findings recorded in the J88. This, in my view, is not strange in the light of the passage of time. It should also be borne in mind that penetration beyond the *labia majora* is sufficient for purposes of sexual penetration as defined and provided for in the Act. The inference that such penetration took place is irresistible in the light of the following facts:

a) BG was lying down facing up and her panty removed with open thighs.

b) The appellant had his pants and under pants down with his penis exposed.

c) He lay on top of her and made movements.

d) The direct evidence of BG is that he inserted his penis into her vagina. This was not challenged.

e) Her mother noticed a change in the way she walked, even after some time had elapsed.

We are satisfied that BG was penetrated at least beyond the *labia majora*.

[18] The appellant's counsel, in his heads, relied on the difference between the two complainants regarding what the appellant exactly said upon approaching the two complainants. In my view this is indicative of an absence of any collusion between them. The fact that BG does not mention a cane knife is also no indication of discrepancies between their versions. As can be seen from the record, NM gave more details than did BG. In my view the versions were not contradictory but merely differed in detail.

[19] The learned magistrate was clearly aware for the need to apply caution in the evaluation of the evidence of the two children. In his judgement he stated:

'Evidence for the State is that of the minor victims who were involved here, which must be

approached with greatest caution in terms of the Judges Rules'. (Vol. 2 page 134 lines 11-13)

[20] Throughout the trial, the appellant only challenged the State evidence based on his alibi and his assertion that the entire incident was concocted due to the alleged family feud. He at no stage challenged the experience of the two complainants in the bushes. It is barely conceivable that two young children could fabricate and consistently carry through the kind of detailed account to which they testified if it had not occurred.

[21] Our law has long held that the approach by an appeal court to findings of fact is that, in the absence of a demonstrable and material misdirection by the trial court, they are presumed to be correct, and will only be disregarded if the recorded evidence shows them be clearly wrong (see in this regard *S v Hadebe and others* 1997 (2) SACR 641 (SCA) at 645e-f). I am satisfied from the evidence on record that no such misdirection was demonstrated.

[22] In my view the trial court correctly rejected the version of the appellant as false beyond reasonable doubt. Given the credible evidence of the State witnesses, which covered all the elements of the crimes in question, the appeal against his convictions must fail.

Sentence

[23] Punishment is pre-eminently a matter for the discretion of the trial court. An appeal court can only interfere with the sentence of the trial court if such sentence is vitiated by irregularity, misdirection or is so disturbingly inappropriate that it induces a sense of shock (see in this regard *S v Rabie* 1975 (4) SA 855 (A) at 857D-F; *S v Petkar* 1988 (3) SA 571 (A) at 574C).

[24] The complainants were 9 years old at the time of the incident and the provisions of the Criminal Law Amendment Act 105 of 1997 accordingly find application. This provides for a minimum sentence for each rape of life imprisonment. To avoid this, substantial and compelling circumstances must be present. In *S v PB* 2013 (2) SACR 533 (SCA) para 20, Bosielo JA formulated the approach by a court on appeal against a sentence imposed under this legislation as follows:

'What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would

have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not.'

[25] As Rogers J agreed in *S v GK* 2013 (2) SACR 505 (WCC), whether or not substantial and compelling circumstances are present is not a discretionary issue but rather involves a value judgment by the trial court. A court of appeal is only entitled to interfere if it is of the view that the lower court erred in its conclusion.

[26] In *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 20, Nugent JA said that 'it is enough for the sentence to be departed from that it would be unjust to impose it.' To determine whether or not it would be unjust to impose the sentence the court is entitled to consider factors traditionally taken into account in sentencing, including mitigating factors.

[27] In *S v Nkomo* 2007 (2) SACR 198 (SCA), Lewis JA para 3 held as follows:

'But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing - mitigating factors - that lessen an accused's moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of these need be exceptional.'

[28] I turn then to the central issue and consider all the circumstances available to the court *a quo* to assess whether it erred in the conclusion that no substantial and compelling circumstances were present. Put differently, was it unjust to impose life imprisonment?

[29] The appellant has no previous convictions. He was 26 years old. He was employed when arrested. He was in custody for 1 year and five months prior to sentencing. His highest level of education was grade 4. The court also considered the reports of a Probation Officer and a Correctional Supervision Officer. The Probation Officer noted that the appellant had not shown any remorse and recommended imprisonment including imprisonment for life in terms of section

276(1)(b) of Act 51 of 1977. The Correctional Officer recommended direct imprisonment.

[30] The court *a quo* considered the seriousness of the crimes, the prevalence thereof and the fact that the appellant showed no remorse. The complainants, as children, should have been able to trust that the appellant would protect them from harm. He was well known to them and a close neighbour. Instead, he took advantage of their vulnerability and tender ages.

[31] The court *a quo*, in my view, was aware of the importance of taking a victim-centred approach in offences of this nature, as laid down in *S v Matyityi* 2011 (1) SACR 40 (SCA). It considered this case. This is important to achieve proportionality and a balance between the interests of society and those of the appellant.

[32] Whilst is it regrettable that no victim impact report was presented to the court, we are of the view that in the context of this particular case, the court *a quo* had sufficient facts before it to assess the proportionality and the other circumstances relevant to sentence.

[33] The appellant's refusal to take responsibility for his actions showed that he was someone who would not easily be rehabilitated. Not only did he rape his neighbours' children but he also put them through the additional trauma of testifying and imputing dishonesty to their version in the process.

[34] Rape of a child under the age of 16 is a heinous and abhorrent crime, which is why the lawmaker has placed this type of rape in the category of crimes attracting a life sentence in the absence of substantial and compelling circumstances.

[35] In S *v Chapman* 1997 (3) SA 341 (SCA) at 344 l-J, it was correctly said that '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.' Despite the introduction of the minimum sentencing regime, there is no sign that these kinds of incidents are on the decline.

[36] In *S v Jansen* 1999 (2) SACR 368 (C) at 378G-379B, the court aptly put it as follows:

'Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society . . . The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure.

It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution. The community is entitled to demand of the police that they bring those who subvert these minimum aspirations before the courts and that the courts, in punishing such persons, should ensure that the sentence adequately reflect the censure which society should and does demand, as well as the retribution which it is entitled to extract.'

[37] Having considered and examined all the circumstances of this case we are not convinced that the court a quo erred in coming to the conclusion that substantial and compelling circumstances which would warrant a sentence other than life imprisonment were not present. It cannot be said that the sentence imposed by the court *a quo* give rise to an injustice. Nor could the appellant point to any material misdirections on the part of the learned magistrate. There is therefore no basis on which to interfere with the sentence. In my view, the prescribed sentence is indeed proportionate to the offences charged.

Order

[38] In the result, the appeal against the convictions and sentence is dismissed.

Ntshulana AJ

I Agree

Gorven J