IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 391/16

In the matter between:

ZABAPHI MJOLI Appellant

and

THE STATE Respondent

JUDGMENT

Date delivered: 1 November 2019

Masipa J (Potgieter AJ concurring):

[1] The appellant in this matter was charged with one count of rape read with the provisions of s 51 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the 1997 Act') and one count of kidnapping. He pleaded not guilty to both charges and was convicted on the count of rape by the Regional Court Maluti on 29 October 2014.

[2] At the time of the commission of the rape, the complainant was 15 years old and according to the charge was raped more than once. The appellant was sentenced on the same day to life imprisonment. Pursuant to s 10 of the Judicial Matters Amendment Act 42 of 2013, the appellant enjoys an automatic right to appeal against his conviction and sentence.

[2] The evidence of the complainant was that on 21 November 2012, in the evening, she was at a place called Hostel visiting her friend T[….] who was in the company of her other two friends R[….] and D[….]. Whilst there, she was called by a young man by the name of P[….] who asked to talk to her outside. They went outside and P[….] said they should go. They continued walking until they reached the appellant. The appellant was known to her for a period of about five years since he is the uncle of her other friend B[….]. P[….] informed the complainant that it was the appellant who was calling her, and he then left.

[3] When the complainant asked the appellant what he wanted to say to her, he responded by saying “I have come to fetch you, let us go”. He forced her to go with him to his home by grabbing her after she refused to go with him. He also told her to think of her life. She observed that he had an iron rod in his possession. When they arrived at his home, they entered the house whereupon he instructed her to sit down. She had seen B[....]but could not talk to her as she was far away and she was afraid of the appellant. She did not know if B[....]had seen her. The appellant then proposed love to her and she informed him that she did not love him and that he was older than she was. She disputed that she had prior to that day accepted the appellant’s proposal and was in a love relationship with him.

[4] The complainant told the appellant that she wanted to go home. The appellant again told her to think of her life. When the appellant said this, she believed that he was going to kill her. He went to lock the door and when the

complainant tried to pull the door, he fought her off and pushed her on top of the bed. He instructed her to undress and when she did not comply he threatened her with the iron rod and showed her a knife which was under the pillow. He told her to consent to having sexual intercourse with him and mentioned to her that he was aware that she was a virgin. The appellant said that he would not cause her pain. She did not comply with his instruction to undress and he undressed her then undressed himself.

[5] Having undressed her, the appellant inserted his penis into her vagina and made up and down movements until he ejaculated. The appellant thereafter slept. Sometime during the night, the appellant woke up and raped her again in a similar manner. The complainant denied that the appellant had non-penetrative sex with her. The appellant went back to sleep and around 06h00 in the morning told the complainant that she must go. The complainant went to the Hostel and reported the incident to her three friends who advised her to report the incident to the police. She sought the assistance of her neighbour Thabang who then accompanied her to the police station where she reported the matter and she was then taken to the hospital by the police. At the hospital, the doctor examined her private parts and took her underwear. She was provided with ARV treatment amongst others.

[6] The complainant conceded that the appellant had gone to look for her at her home prior to him going to the Hostel. Although she could not say whether the appellant was aware of her age, she said that she used to go and play at his home with B[....]who was 14 years of age at the time. The complainant used to attend traditional virginity testing and stopped after the rape.

[7] The complainant's evidence was corroborated by R[….] L[….] who stated that they were at Hostel and confirmed the sequence of events as testified to by the complainant. In respect of the rape incident, she was one of the first reports to whom the complainant reported the rape. Her evidence in respect of what was reported to her and her other two friends was consistent with the complainant's

evidence. She confirmed that the complainant underwent traditional virginity testing which she stopped attending after the incident. Her evidence was also that she was unaware of any love relationship between the complainant and the appellant.

[8] Doctor Tshuku examined the complainant and in her gynecological examination recorded a tear at 6 o'clock, a bruising in the posterior fourchette, bruising around the entrance of the vagina and fresh tears on the hymen. Based on the injury, her conclusion corroborated that of the complainant that there was vaginal penetration. According to her clinical findings, the complainant was a virgin before she was raped.

[9] The appellant's evidence is that he had a secret love affair with the complainant. He confirmed that he went to Hostel where he sent P[....] to call the complainant. When he met the complainant, he was carrying a stick, not an iron rod. They walked to his home where they sat and were talking about their relationship. When it was time to sleep, the complainant asked him if he would not damage her virginity as she was undergoing virginity testing. The complainant consented to having sexual intercourse with him and they had non-penetrative sexual intercourse on two occasions. There was no vaginal penetration.

[10] According to the appellant, while the complainant was in his room B[....]came in and saw her. He testified that subsequent to him having sexual intercourse with the complainant, she attended virginity testing and it was found that she was still a virgin. This version was of course new and was not put to the complainant and Dr Tshuku to comment on. When questioned about this, he said that the doctor was wrong. The appellant knew that B[....]was 14 years of age and that she used to play with the complainant. He agreed that there would be no reason for the complainant to cry rape if it had not occurred.

[11] When B[....]was called to testify, she portrayed herself as an unreliable witness. According to her evidence, she and the complainant were very close friends. According to her, the complainant and the appellant were in a love

relationship. On the night of the incident, she heard dogs barking from outside her house and went out to investigate the cause. She saw the complainant and the appellant about to get into his room. She told her grandmother that the dogs were barking at the appellant which she said was a lie since they had been barking at he complainant. She went to the appellant's room to fetch her belongings and found the complainant on the appellant's thighs. She added that both the complainant and the appellant were smoking dagga. And when she asked the complainant if she was okay, the complainant answered in the affirmative. She then closed the door and left. The sum total of the evidence given by B[....]was of course new evidence which was not put to the complainant.

[12] B[….]'s evidence was that she did not see the complainant after that night. When asked about a version she gave to the police she said that she had lied to the police. She had lied to the police that she met the complainant who said she was going to report the appellant to the police and it looked like she was crying. She sympathised with her and decided to give her support. She also lied that she had seen the appellant in possession of a stick like object and that the complainant seemed like she was crying and asking the appellant to let her go.

[13] B[....]stated that she lied to protect her friend but was not lying in her evidence before court. When it was put to her that her evidence was framed in order to protect her uncle, her response was that she did not know what to say. She said it was important to mention that the complainant and the appellant were cuddling as they were lovers. She could not explain why the appellant had not mentioned this in his testimony.

[14] The court a quo found the evidence of the complainant and that of the other State witnesses to be reliable and logical. It accepted that the complainant was scared of the appellant. It rejected the appellant's version that he had non-penetrative sexual intercourse with the complainant.

[15] The challenge against the decision of the court a quo in respect of conviction is that it ought to have found that the appellant's version that he had non-penetrative consensual intercourse with the complainant was reasonably possibly true and consequently, that the State failed to prove the appellant's guilt beyond reasonable doubt. Although counsel for the appellant Ms A*nastasiou* initially took a point that there was no penetration, she abandoned this accepting that the evidence of Dr Tshuku was objective medical evidence corroborating the version of the complainant. She also argued that there were several opportunities for the complainant to call out for help but that she failed to do so. In view of this, it was argued that the appellant's version that the complainant had consented carried more weight.

[16] Mr *Mazi* for the State argued that there was no misdirection by the court a quo and that this court can only interfere where there is a misdirection and if convinced that the decision of the court a quo was clearly wrong. In view of the corroborating evidence by Dr Tshuku the issue whether there was penetration fell away and it could not be said that the complainant was a single witness in this regard. In *S v Ramulifho* 2013 (1) SACR 338 (SCA) para 11, the court stated that in rape cases, objective evidence provided by the medico-legal examination of the complainant is essential to determine where the truth lies. Dr Tshuku's evidence amounts to such objective evidence and confirmed the complainant's version. It was argued that in any event, s 208 of the Criminal Procedure Act 51 of 1977 makes provision for an accused person to be convicted on the evidence of a single witness where it is found that such witness is competent and reliable.

[17] The State in its written heads of argument ventured into dealing with the issue of caution which must be exercised when dealing with the evidence of a single witness. This was in my view unnecessary since there was corroborative evidence on the issue of whether here was penetration or not. Aside from the evidence of Dr Tshuku, the State argued that the evidence of R[....] corroborated the complainant's evidence. While I accept that there was some corroboration, it cannot be said that there was corroboration on the rape itself. What the evidence

of R[....] in respect of rape does is to show consistency of the complainant's evidence.

[18] Even if it was accepted that she was a single witness, in *Modiga v S* [2015] 4 All SA 13 (SCA) para 32 the court stated that even when dealing with the evidence of a single witness, courts should never allow the exercise of caution to displace the exercise of common sense.

[19] As regards the fact that that the complainant failed to call for help when she had several opportunities to do so, Mr *Mazi* submitted that it was unreasonable to have expected her to do this when she was under threat. Also, the person that she could have shouted out for help to was B[....]who was younger and she could not have had any hope of being assisted by her.

[20] There is no evidence from a reading of the record to suggest that the issue of shouting out for help was raised with the complainant. The argument by Ms *Anastasiou* and most of the reply by Mr *Mazi* is therefore based on suppositions. What we know from the evidence however, is that the appellant had threatened the complainant with her life and was carrying a stick. When she was asked what she understood when he said that she must think of her life, she stated that she understood this to mean he would kill her if she did not comply.

[21] The evidence of B[....]which was aimed at supporting the appellant's version was inconsistent with his version and was a clear fabrication. She mentioned things which were never mentioned by the appellant for example, that she found the complainant siting on the appellant's thighs, that they were smoking dagga and that the dogs had barked at the complainant. The fact that she confessed to have lied in her statement to the police on its own show that her evidence could not be believed.

[22] On a consideration of all the evidence led, I am satisfied that the decision of the court a quo on conviction was correct.

[23] In respect of sentence, it is trite that when dealing with sentence, this court will not interfere with the discretion of the court a quo unless the discretion is improperly exercised or the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate. See *S v Romer* 2011 (2) SACR 153 (SCA) para 22. There must be a striking disparity between the sentence passed and that which this court would impose. See *S v Naidoo* 2010 (1) SACR 369 (KZP).

[24] It was submitted for the appellant that the cumulative effect of his mitigating factors amounted to substantial and compelling circumstances warranting a deviation from the prescribed minimum of life imprisonment. These were that he was a first offender; contributing towards society and maintaining his family. The record reveals that he was 31 years of age at the time of sentencing, married with and had two children aged six and two respectively. He was self-employed and his wife was unemployed. His income was not stated. He left school in standard two (what is now grade four). It was submitted that the sentence was disproportionate to his circumstances. In this regard, reliance was had to *S v Mahomotsa* 2002(2) SACR 435 (SCA) to the effect that there is a varying degree of seriousness in cases.

[25] Counsel for the State submitted that in *Mahomotsa* the court stated that the sentence should fit the crime as well as the offender. Further, the mere fact that the offence when compared to others is less serious is no bar to the imposition of the maximum sentence. It was further argued that the mere fact that a person is a suitable candidate for rehabilitation does not in itself mean that life imprisonment cannot be imposed. See *S v Solomon & another* 2008 (2) SACR 149 (E) paras 17, 24 and 25. It was submitted further that the court a quo correctly found that the mitigating factors when weighed against the aggravating factors did not constitute substantial and compelling circumstances to justify a deviation.

[26] In *S v Malgas* 2001 (1) SACR 469 (SCA) the court stated that courts have to approach the question of sentencing conscious of the fact that minimum

sentences have been ordained as the sentence which should ordinarily be imposed, unless substantial and compelling circumstances are found to be present. Prescribed sentences should be imposed and the sentencing court should not deviate from prescribed sentences for flimsy reasons.

[27] In *S v Vilakazi* 2009 (1) SACR 552 (SCA) it was held that in cases of serious crime the personal circumstances of the offender necessarily receded into the background. Once it was clear that a substantial jail term was appropriate questions of whether or not the accused was married, or employed, or of how many children he had were largely immaterial. However, they remained relevant in assessing whether the accused was likely to offend again.

[28] It is common cause from the evidence that the complainant was a virgin and that she treasured this. She participated in traditional virginity testing. As a result of the appellant's conduct she can no longer do this. The appellant took away something sacrosanct to her. Ms *Anastasiou* argued that the court a quo found that there was slight penetration. This is in fact incorrect and what the court a quo found was that there was actual penetration. It then ventured to state that it was irrelevant whether such penetration was slight or not. There was never a finding by the court a quo that penetration was slight. In view of this, her argument that because the penetration was slight, meant that this was not the worst kind of penetration and that there can be a deviation from the prescribed minimum sentence cannot be sustained.

[29] In *S v Chapman* 1997 (2) SACR 3 (SCA), the court stated that, at 5B-C:

'The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution *and to any defensible civilisation.*

Women in this 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 and come from work, and to enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.'

[30] At 5A-B of *Chapman*, the court stated the following:

'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.'

[31] The court went further to say at 5D-E:

'The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity, and freedom of all women, and we shall show no mercy to those who seek to invade those rights.'

[32] In *S v Mojaki* 2006 (2) SACR 590 (T) the court at 591H-I described rape as follows:

'Rape is a very serious offence, so serious that I doubt whether those who are not women will ever be able to fully understand its effect on the victim. It violates the dignity of the person being raped. More so when it is perpetrated on young, defenceless and innocent ones. Children are entitled to be children.'

[33] Ms *Anastasiou* submitted that the appellant was a first offender while in recent times you would find youth of 18 and 19 years of age as second and third rape offenders. If the submission is correct, then the justice system is clearly failing society, the accused and the victims themselves. It would beg the question as to how these offenders would be out in the community when there was clear legislation dealing with sentencing in such serious matters. It would also suggest that rehabilitation has failed to achieve its purpose.

[34] In *S v PB* 2013 (2) SACR 533 (SCA) para 16 Boshielo JA stated that by slavishly following a trend not to impose life imprisonment for rape, courts would be 'acting improperly and abdicating its duty and discretion to consider sentence untrammelled by sentences imposed by another court'. Such a sentence would be appealable as the court would have failed to exercise its sentencing discretion properly or at all. In *S v PB*, the court considered the appellant's personal circumstances. Having done so, it found that the fact that he was married to the complainant's mother, had three children, was 38 years old when the offence was

committed, was in gainful employment and maintaining his children, pleaded guilty and had a drug habit were insufficient to meet the threshold of substantial and compelling circumstances. This, when it compared with the fact that the appellant was the complainant's father, that she was 12 years old when she was raped the extent of the emotional and psychological suffering as appears from the victim impact assessment report which it found as mitigating. Similar conclusions were arrived at in *S v Bailey* [2012] ZASCA 154 (1 October 2012) and *S v Kwanape* 2014 (1) SACR 405 (SCA).

[35] I am of the view that on the facts of this case, there exist no circumstances that can be said to be substantial and compelling to warrant a deviation from the prescribed minimum sentence. Consequently, I find no misdirection or irregularity by the court a quo. Further, that there was no misdirection by the court a quo in sentence.

[36] In the result, I propose the following order:

1. The appeal against the conviction and sentence is dismissed.
2. The decision of the court a quo is confirmed.

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Masipa, J

I agree,

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Potgieter, AJ

DETAILS OF THE HEARING

Appearances:

For The Appellant:	Ms Z Anastasiou
Instructed by:	Legal Aid South Africa
For the Defendant:	Mr M Miza
Instructed by:	Director for Public Prosecutions, Pietermaritzburg
Matter heard on:	25 October 2019
Judgment delivered:	1 November 2019