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

Appeal No: AR 108/20

Magistrate's Case No: GRC 12/19

In the matter between

SFISO LUCKY KHANYILE **THE APPELLANT**

and

THE STATE **THE RESPONDENT**

Dealt with in term of s 19(*a*) of the Superior Courts Act 10 of 2013 without a hearing. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10:00 am on 6 August 2021.

ORDER

The appeal against conviction and sentence imposed by the trial court is dismissed.

APPEAL JUDGMENT

MOGWERA AJ (K PILLAY J concurring)

[1] On 26 June 2019 the appellant was convicted of rape of his minor daughter and sentenced to life imprisonment by the Greytown Regional court. Pursuant to this he was declared unfit to possess a firearm in terms of the provisions of section 103 of the Firearms Control Act, 2000 and an order was made that his name be inserted in the register of sexual offenders. This appeal is brought without leave of that court as the appellant exercised his automatic right to appeal against his conviction and sentence in terms of section 10 of the Judicial Matters Amendment Act 42 of 2013.

[2] The state's evidence which led to the conviction of the appellant was given by six witnesses: Dr Laura Troskie, the complainant, X.S.K., S.B., N.K. and Richard Andrew Gilden. What follows is a brief summary of their evidence.

[3] Dr Troskie examined the complainant, who was 16 years at the time, at Greytown Hospital on 24 July 2018. The complainant was brought to her by a member of the South African Police Service, with a history that she had been raped by her father. There were no visible injuries revealed by the gynaecological examination of the complainant, but she observed that the complainant's hymen was absent, which indicated to her that she was

no longer a virgin. She testified that lack of visible injuries did not necessarily exclude the possibility that sexual penetration had occurred as stated by the complainant. The doctor also took samples from the complainant's genital area and packaged them in a sexual assault evidence collection kit, as required for purposes of DNA analysis. The kit was handed to one N T Shezi, the police officer who was in the complainant's company to take to the police station.

[4] The complainant, who testified through an intermediary, stated that on 24 July 2018 when she returned home from collecting firewood she was called by her father (the appellant) to his structure (room). Upon her arrival in this room the appellant grabbed her and threw her onto his bed. He removed her panties, and his pants and thereafter proceeded to have sexual intercourse with her. Thereafter he put his pants back on and left to go to work. Immediately thereafter the complainant reported the incident to one X.S.K., her aunt. The matter was subsequently reported to her grandmother, and to the police who were called to attend to the complaint. The complainant was then taken by the police to the doctor on the same day. The appellant was then arrested.

[5] The complainant also testified that she had been raped by her father previously. She recounted an incident which occurred in March 2017. She indicated that she was in relationship with a certain boy from the Buthelezi family. One night she sneaked out to visit him and she returned home at about 23h00. She was then given a hiding by the appellant, until he was stopped by his wife who is the complainant's stepmother. The following day the appellant's wife left to a place where she had to attend a funeral. It was during that day that the complainant testified her father came back from work during lunch time, and told her to show him how she 'was doing or how did [she] do it to the Buthelezi boy.' He removed her panties and had intercourse with her and thereafter went back to his work place. She did not report this incident to any person because the appellant had threatened to kill her if she did.

[6] The complainant further stated that there had been similar incident prior to this, although she could not recall the exact date when it happened. On that occasion it was

at night and all members of her family were sleeping in their respective rooms. The appellant came to her room and got onto her bed. He removed her pants and her panties, and when she asked him what he was doing as she did not understand what was happening, he told her to keep quiet. He lowered the zip of his pants, took out his genital organ and inserted it into her genital organ and had sexual intercourse with her. When he had finished she took a tissue and wiped herself and it was then that she realized that she was bleeding. The appellant had gone back to the room where he sleeps with his wife. This incident prompted the complainant to report to one, S.B., what had been done to her.

[7] X.S.K. testified that on 24 July 2018 around midday she was at her home when the complainant reported to her that she had just been raped by her father. She then took the complainant to her (X.S.K's) mother who decided to examine the complainant. Thereafter it was decided that the police should be called and this was done. The police arrived and attended to the complaint.

[8] The evidence of S.B. is that the complainant had reported to him that the appellant 'was raping' or had raped her. This report was made to him sometime in 2017, that is the year preceding the one he was called to testify about. The complainant told him that this would happen when her mother was away, that the appellant would sometimes do this in the forest or plantation and also when 'her father is returning from work.' He understood this to mean that this had happened on different occasions. He told his aunt, N.K., what had been reported to her by the complainant. This was confirmed by N.K. in her evidence. She also stated that upon questioning the complainant regarding this matter she informed her that the incident of that day was not the first one, and that had happened before.

[9] Although the evidence of Constable Richard Andrew was not a model of clarity what can be gleaned therefrom is that he is the police officer who arrested the appellant and obtained from him a buccal sample for DNA purposes. He properly sealed the sample which he had marked in the exhibit bag which was also marked using a serial number. These were later sent to the Forensic Science Laboratory by courier, and the crime kit

was also sent there by him for forensic analysis and comparison with the buccal sample. To avert further confusion, the defence decided to make formal admissions regarding the chain of custody of the samples, namely that they were properly obtained, packaged and sealed and that there had been no tampering therewith until they were subjected to a comparison process at the Forensic Science Laboratory.

[10] The appellant denied all the allegations made against him by the complainant. He testified that the complainant came to stay with him and his family in Rietvlei since she was still an infant. Her mother is residing in Mooi River. At no stage had he ever had sexual intercourse with the complainant. He believes that the complainant is falsely implicating him because she used to go out through the window at night, when the family would be sleeping, to visit boys, and he would beat her up when she returned. He mentioned the incident relating to the Buthelezi boy to illustrate this point. He is also of the view that the reason why the complainant concocted these stories about him is because he used to refuse her permission to visit her mother, as he noticed that the complainant was starting to be naughty. The appellant further testified that there has always been some animosity between his family and the family of the other witnesses who testified that they were informed of the incidents by the complainant.

[11] The appellant raised the following grounds for appeal against conviction and sentence: *(a)* the trial court failed to exercise caution in its evaluation of the evidence of the complainant who was a single witness and a child at the time; *(b)* the trial court erred in rejecting the evidence of the appellant that the complainant was implicating him falsely because he had chastised her and she wanted to go and reside with her mother; *(c*) the trial court failed to give sufficient weight to the personal circumstances of the appellant in its consideration of the appropriate sentence; and *(d)* the sentence imposed by the trial court is excessive and grossly inappropriate as to induce a sense of shock.

[12] At issue in this appeal is whether the court *a quo* was correct in its finding that the guilt of the appellant had been proved beyond a reasonable doubt and whether it failed

to exercise its sentencing discretion properly which resulted in its sentence being vitiated by irregularity or material misdirection or being shocking and disproportionate.[1]

[13] In *S v Van der Meyden,*[2] Nugent J set out the test to be applied in determining whether the guilt of the accused has been proved in these terms:

> 'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of the test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.'

[14] I shall first deal with the assertion that the trial court failed to exercise the necessary caution when evaluating the evidence of the complainant. It was the finding of the trial court that the evidence of the complainant was credible and reliable. That the trial court was cognisant of the need for it to treat the evidence of the complainant with caution is clear from the record of proceedings.[3] The court further found that the evidence of the complainant that there was an act of sexual penetration was corroborated by the fact that the appellant's DNA was found in the complainant's genital organ, despite there being no visible injuries suffered by the complainant.[4] This finding by the trial court is indeed justified by the evidence, as the presence of the appellant's DNA on the vaginal vault swab obtained from the complainant is strong corroboration which renders the appellant's

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[1] *S v Rabie* 1975 (4) SA 855 (A) at 857*; S v Petkar* 1988 (3) SA 571 (A) at 574*; S v Malgas* 2001 (1) SACR 469 (SCA), *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA).
[2] 1992 (2) SA 79 (W) at 82 [2] See also *S v Van Aswegen* 2001 (2) SACR 97 (SCA) para 6 and *S v Shilakwe* 2012 (1) SACR 16 (SCA) para 11.
[3] See the record at page 78, line 9.
[4] See the record at page 79, line 2.

version that he has never engaged in an act of sexual penetration with the complainant implausible. There is no way this evidence could have been disputed, which is why the appellant could not explain how his DNA came to be inside the complainant's genital organ.

[15] The trial court was also correct in its rejection of the appellant's version that he was being falsely implicated by the complainant because he used to chastise her for her misbehaviour, like he did after the incident with the Buthelezi boy. It reasoned that it is impossible that this version could be true, when considered in conjunction with the DNA evidence. Of significance in this regard is the fact that it is the complainant herself who volunteered information about an incident involving the Buthelezi boy when she testified. It is also noteworthy that she testified that she did not report the incident which happened immediately thereafter to anyone as the appellant had threatened that he would kill her if she did. Therefore, the particular incident was not the one which led to the arrest of the appellant, and this is inconsistent with the appellant's version that she lied about him because she was aggrieved by the fact that he would chastise her. For these reasons I find no basis for interfering with the finding that the appellant's guilt has been proved beyond a reasonable doubt.

[16] Regarding sentence, it needs to be restated that punishment is pre-eminently the prerogative of the trial court. Unless the trial court committed a material misdirection, a court exercising appellate jurisdiction cannot simply substitute the sentence imposed with the one it believes would have been more appropriate, as 'to do so would be to usurp the sentencing discretion of the trial court'.[5] However, interference will be justified where the sentence imposed by the trial court differs so greatly from the one which would have been imposed by the court of appeal.[6] A well-considered sentence is one which factors in principles of the triad, being the crime, the offender and the interests of society,[7] and

[5] *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.
[6] *S v Kgosimore* 1999 (2) SACR 238 (SCA) para 10.
[7] *S v Zinn* 1969 (2) SA 537 (A) at 540G.

purposes of punishment, being deterrence, prevention, rehabilitation and retribution, as well as all other mitigating and aggravating circumstances which are relevant to a particular case.

[17] It is averred that the trial court failed to place sufficient weight on the personal circumstances of the appellant. These are highlighted as the age of the appellant at the time of sentencing, being 44; his level of education; the fact that he has 4 minor children aged 4,6, 7 and 15; the fact that he is casually employed and is the one who is a breadwinner in his family as well as the fact that he is a first offender and is capable of rehabilitation. These circumstances, it is argued, makes the sentence of life imprisonment excessive and disproportionate. It appears from the record of proceedings that the learned magistrate did in fact consider the appellant's personal circumstances, which he found to be far outweighed by interests of society, and he thereafter proceeded to deal with the seriousness of the offence. Therefore, the allegation that he failed to consider the appellant's circumstances or to accord them sufficient weight as submitted is incorrect. The fact that he says they are 'outweighed' by other factors clearly indicate that he had applied his mind thereto and that he also evaluated them.

[18] The final submission by the appellant is that the sentence imposed by the trial court is grossly disproportionate in that it induces a sense of shock, because of its severity. In determining whether or not this submission has merit it needs to be emphasized that because there is a statutorily prescribed minimum sentences applicable in this case, the trial court was not at liberty to impose whatever sentence it considered appropriate upon 'a clean slate', but was enjoined to impose the prescribed minimum sentence, unless substantial and compelling circumstances are present that justify a deviation from it. It is quite evident from its judgment that the trial court approached the issue of sentencing being 'conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed',[8] which is not a misdirection on its part.

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[8] *S v v Malgas* 2001 (1) SACR 469 (SCA) par 8.

[19] I also cannot find any misdirection in the finding of the trial court that there were no substantial and compelling circumstances justifying it to deviate from the prescribed sentence of life imprisonment. This is based on fact that it is precisely because of the 'alarming burgeoning in the commission of crimes of the kind specified' in the Act, that the legislature decided that it was 'no longer to be 'business as usual' when sentencing for the commission of the specified crimes'[9] and that what was required was 'a severe, standardised, and consistent response from the courts to the commission' of those crimes.[10] It is impermissible for the court to deviate from a prescribed sentence 'lightly and for flimsy reasons', notwithstanding that all factors relevant to determining sentence should still be taken into account. However, where the imposition of the prescribed minimum sentence would be unjust or 'disproportionate to the crime, the criminal and the legitimate needs of society' that in itself constitutes substantial and compelling circumstances, justifying a deviation from that sentence.[11]

[20] The finding by the trial court found that the personal circumstances of the appellant were far outweighed by other considerations relevant to sentencing is based on what it highlighted as constituting aggravating factors in this case. These are the prevalence of cases of child and women abuse, especially of a sexual nature;[12] the fact that the offences were 'committed with premeditation and calculation' and 'systematically';[13] that the appellant had abused his own child, thus abusing his position as a father, a position of trust;[14] that the abuse happened over a long period of time, giving the appellant time to reflect and stop what he was doing;[15] that the abuse had devastating effects on both the physical and emotional well-being of the complainant; [16] and further that there was 'not

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[9] *S v Malgas (supra)* par 7.
[10] *S v Malgas (supra)* par 8.
[11] S v Malgas (supra) par 22; *S v Fatyi* 2001 (1) SACR 485 (SCA) par 5; *S v Dodo* 2001 (3) SACR 382 (CC) par 40 *Vilakazi* 2009 (1) SACR 551 (SCA) par 15.
[12] See record page 87 line 2.
[13] See record page 87 lines 9 and10.
[14] See record page 87 lines 10 and 15.
[15] See record page 87 line 12.
[16] See record page 87 lines 16 -20.

even an iota of evidence' indicating that the appellant was remorseful for his deeds.[17] All these factors are well-grounded, based on the evidence.

[21] There is thus no merit in the submission that the sentence is shocking or disproportionate given the above. In addition, no material misdirection has been demonstrated. For these reasons the following order is made:

(a) The appeal against conviction and sentence imposed by the trial court is dismissed.

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MOGWERA AJ

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K PILLAY J

[17] See record page 88 line 1.

Appearance

Counsel for Appellant	: A Hulley
Instructed by	: Justice Centre, Pietermaritzburg
Counsel for Respondent	: N Kunene
Instructed by	: Deputy-Director of Public Prosecutions, Pietermaritzburg.