

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

Case no: AR348/2021

In the matter between:

LULAMA DULELA

APPELLANT

and

STATE

RESPONDENT

Coram: Koen et Chili JJ

Heard: 10 June 2022

Delivered: 15 June 2022

ORDER

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

- (a) The appeal against conviction is dismissed.
- (b) The appeal against sentence is upheld, the sentence of life imprisonment is set aside and is substituted with a sentence of twenty five years' imprisonment antedated to 31 March 2021.

JUDGMENT

Koen J (Chili J concurring)

[1] The appellant was convicted in the regional court sitting at uMzimkhulu on a charge of rape. It was alleged in the annexure to the charge sheet that s 51(1), Part 1 and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 applied, as the appellant had sexually penetrated the complainant victim more than once and was therefore liable to a sentence of life imprisonment. I also mention that the complainant was an 11 year old female, her birth certificate handed in by consent reflecting that she was born on 20 October 2008. The learned magistrate found, notwithstanding the State only having charged the appellant with one count of rape, that the appellant had indeed raped the complainant both on 31 December 2018 and on 1 January 2019 and that these were clearly two separate incidents. Having found that there were no substantial and compelling circumstances the magistrate on 31 March 2021 sentenced the appellant to life imprisonment. The present appeal is against both conviction and sentence, pursuant to the appellant's automatic right of appeal by virtue of the provisions of section 10 of the Judicial Matters Amendment Act 42 of 2013.

[2] The State had adduced the evidence of the complainant and her mother. The J88 completed in respect of a medical examination of the complainant by Doctor NE Mancini was handed in by consent. This is a practice unfortunately often followed, but which is to be discouraged, as it does not allow for clarification of the terse notes recorded on the J88.

[3] As regards the conviction, in short, the evidence of the complainant established that the appellant was her mother's boyfriend. She referred to him as uncle Babana. He would spend nights at their home. On 31 December 2018 the appellant was at the complainant's home. Her mother left for town during the day. At some stage in the afternoon, whilst her mother was away, the appellant sent her siblings to a neighbour's house to collect an aux cable. After they left he called the complainant to the bedroom of the two-roomed structure where he penetrated her vaginally on the bed. She did not report the incident to her mother on her mother's return home that evening because she described the appellant as a violent person, and she was scared that the appellant would fight with her mother and he would assault her mother or she would assault him.

[4] On 31 December 2018, being New Year's Eve, the complainant and her siblings attended at a neighbour's house with her mother, from which they later returned home. The complainant's mother was quite inebriated by the time she, the complainant and the complainant's siblings returned to their home to sleep.

[5] In the early hours of 1 January 2019, around 2 am, the appellant returned to the home of the complainant. The complainant's mother let him in as the children were all sleeping. She was at the time sleeping on a sponge/mattress with one of the neighbour's children. It seems that he managed to wake up the complainant's mother who then allowed him access. The appellant was sleeping with her mother and two of the complainant's siblings on her mother's bed in the bedroom. At one stage the appellant came to her, woke her up, took her to where there is a carpet on the floor, where he raped her again. She tried to shout for her mother but the appellant put his finger to her lips, and told her to shut up. After having raped the complainant, the appellant returned to the bed on which the complainant's mother was sleeping. The complainant's mother did not hear her probably because she was drunk and tired. She in fact slept through until 7am the next morning when she was woken up by the appellant, who was leaving. He never used to leave so early.

[6] Unlike the previous afternoon, after the first rape, when the complainant had not reported the rape to her mother, the next morning the complainant reported the rape to her mother as she did not want the appellant to continue treating her like that. The complainant's mother thereafter reported the incident to the police, and the complainant was taken to the doctor who completed the J88. The doctor recorded that he conducted a vaginal examination on the complainant, noted a discharge, noted that the hymen was 'cracked' at 7 o'clock, and concluded that a 'sexual assault is highly likely' and is 'likely to have happened.' Some specimen was also taken and handed to a Constable Sinina, but there is no explanation as to what this specimen was or what the outcome of any examination thereof might have revealed.

[7] The learned magistrate who had the benefit of observing the complainant testifying, although she had testified via CCTV camera and was assisted by an intermediary, concluded that she was a good witness who narrated to the court exactly what happened and how the two separate incidents occurred. Furthermore, that she did not contradict herself, nor was she shaken under cross examination. The magistrate described the complainant as a 'brilliant child' who was quick to give good answers. She furthermore found corroboration for the complainant's evidence in the observations recorded by Dr Mancini in the J88, particularly where it was noted that the hymen of the complainant was 'cracked at 7 o'clock.'

[8] The learned magistrate furthermore also found that the complainant's version was corroborated by her mother who confirmed what the complainant reported to her on the morning of 1 January 2019. It is indeed so that the complainant's first report to her mother on 1 January 2019 was consistent with the version of the complainant in all material respects. The complainant's mother also testified that the appellant and his uncle later came to her home to apologise for what had happened.

[9] The appellant was the only defence witness. He testified that he was not at the complainant's house during the day on 31 December 2018 at the time when her mother had gone to town in uMzimkhulu. He said that he was at a traditional ceremony at his homestead preparing goats and preparing to slaughter some cows. It was on his version therefore a ceremony of some significance, although he did not say what exactly the ceremony involved. He did not however call any witness who was present at that ceremony to corroborate his alleged alibi. He also denied that he had come to the complainant's mother some two days later as she testified, with his uncle, to apologise for what happened, although he admitted meeting with the complainant's mother in the company of his twin brother (which the complainant's mother denied) after he heard of the allegations against him, not his uncle, and not to apologise. He did not call his brother to corroborate this part of his version either. He denied having sent the complainant's siblings to fetch an aux cable and denied having raped the complainant.

[10] The learned magistrate found the appellant to be an evasive witness and pointed to what she considered to be a contradiction in his evidence as to whether the lights were switched on at the home of the complainant on the evening of 31 December 2018 to 1 January 2019. She pointed out that in his evidence he stated that the lights were on but under cross examination said he did not know whether the lights were on. The evidence in this regard was however confusing, and might have been misunderstood. The appellant's evidence was that it was dark inside the house on his arrival, but that having woken the complainant's mother, she switched the lights on and they thereafter slept with the lights on. Further under cross examination he said he did not know whether the complainant's family normally slept with the lights on, or, that on that night he did not notice that they were on. The complainant testified that the lights were on when they went to sleep. Her mother testified that the lights are always left on. But when the complainant was raped the lights had seemingly been switched off. The complainant thought that the appellant must have switched off the lights, although she did not see him switch the lights off. Her mother however testified that the complainant had reported to her that the appellant had switched off the lights. The complainant could not remember whether at the time he raped her, he had lit a phone, but she thought he did. Whether the lights were on could be material to the complainant having an adequate opportunity to positively identify who was raping her. This is significant in the context that the appellant suggested that there was another person who was at the complainant's house that night, stating that after he had entered the house after the complainant's mother opened for him, there was a knock later on the window and when he went to investigate he did not see any person. Whatever the position was with the lights, the complainant was in no doubt that it was the appellant who raped her, and the evidence of another person knocking on the door, thus appears to be somewhat of a red herring.

[11] In argument it was submitted that the evidence of the complainant, who admittedly was a single witness whose evidence had to be approached with caution, was not carefully scrutinised and that there were 'contradictions and inconsistencies in her evidence' which were not properly considered, and further that it was not considered

whether she might not be falsely implicating the appellant. Specifically, it was argued that the complainant was not a reliable and satisfactory witness as she had testified that the appellant was present on 31 December 2018, but that no one was called to corroborate that version. She can however hardly be blamed for the State not calling one of her siblings, particularly where her direct evidence was that she was present at their home, and the evidence of her mother was that she and her siblings had been left there.

[12] Furthermore, the appellant was critical of the complainant not having reported the rape of 31 December 2018 to her mother when she reported the rape of 1 January 2019. The complainant did however, at a time uncertain, report the first rape to the State, resulting in the allegation in the charge sheet that he had raped her twice. Her focus at the time of reporting the rape to her mother was more on stopping the appellant from raping her, as he had done earlier that morning, and the history of a prior rape might have been of secondary significance in the context of that complaint.

[13] With reference to the photo album handed in by consent depicting the floor of the house, it was suggested in the appellant's heads of argument that it did not show any beds, hence that her evidence that the first rape occurred on the bed was unreliable. That point was never pursued in the evidence. Furthermore a cursory perusal of the photos reveals that the contention that there was no bed, might be factually wrong. But it is not for this court to become a witness. This should have been raised with the complainant and her mother in cross examination. The complainant had also clearly testified that the first rape occurred on a bed and that there was a room with a bed on which her mother slept. Her mother also testified that she was sleeping on a bed where she was joined by the appellant after he arrived around 2 am on 1 January 2019. There accordingly was sufficient corroboration of that fact.

[14] It was further submitted in the heads of argument that it was highly improbable that the complainant's mother or siblings would not have heard the appellant raping the complainant on 1 January 2019 as they were in the same area. The complainant's

mother, on her own version however, was well inebriated, and the other children, keeping in mind that the complainant was the oldest of the children and they are younger, would not necessarily have woken up.

[15] It is so that the doctor was not called to explain what was meant by 'a sexual assault' and whether the tears found were fresh or healed. The J88 did however refer to the tear to the hymen at the 7 o'clock position as being a 'fresh' tear, that being what is printed on the pro forma document. Subject to my remarks earlier that the State should not lightly dispense with medical experts to explain what they had found, the recordal that there was a fresh tear stands. Furthermore, in the doctor's expert opinion, keeping in mind that the complainant was only 11 years old at the time, the cause thereof was likely to be from a sexual assault. It is not as though it was suggested that she could have sustained the tear to the hymen from some other cause. The findings recorded in the J88 do have probative value, to be assessed in the light of the totality of all the evidence

[16] Most significantly in my view, the evidence of the complainant and her mother was consistent in every material respect as it concerns the second rape. Although the complainant is a single witness in regard to the first rape, and it is unclear as to when that rape was reported, there is no reason to conclude that the complainant's evidence should not be accepted also in respect of the first rape. The appellant has been convicted of one count of rape. That is clearly established in respect of the second rape. The first rape has significance mainly in regard to the sentence imposed, that is that the complainant had been raped twice. It has not been shown that the learned magistrate erred in concluding that the appellant had raped the complainant on the two occasions alleged. The appeal against conviction must therefore be dismissed.

[17] As regards the sentence, the offence is a serious one involving the rape of a girl of tender age. It undoubtedly calls for a lengthy period of imprisonment. The appellant was 38 years old and had no previous clashes with the law, being a first offender. There was no extraneous violence, or threat, and no physical injury other than that inherent in

the offence. That is similar to the position in *S v Vilakazi*.¹ Whilst there can be no doubt as to the seriousness of the offence, courts are enjoined nevertheless to give due recognition to the varying differences in degree of seriousness that rape may take.² Furthermore the minimum sentence legislation does not provide for cases falling between rapes attracting a sentence of life imprisonment and those attracting a sentence of ten years only.

[18] The two successive rapes within a 24-hour period makes this matter a serious one. But it is also one where the general principles of sentencing, which courts are still required to apply, of themselves can constitute substantial and compelling circumstances permitting a deviation from the prescribed sentence of life imprisonment. In my view the trial court's failure to give effect to these aforesaid considerations justify interfering with the sentence. The sentence of life imprisonment is to that extent vitiated by an irregularity and is also inappropriate.³

[19] In my view an appropriate sentence would be one of twenty five years' imprisonment.

[20] Accordingly:

- (a) The appeal against conviction is dismissed; and
- (b) The appeal against sentence is upheld, the sentence of life imprisonment is set aside and is substituted with a sentence of twenty five years' imprisonment antedated to 31 March 2021.

KOEN J

¹ *S v Vilikazi* 2009 (1) SACR 552 (SCA) 55 to 57.

² *Rammoko v Director of Public Prosecution* 2003 (1) SACR 200 (SCA).

³ Cf *S v Ivanisevic and another* 1967 (4) SA 570 (A) at 575.

APPEARANCES

For the appellant:

Ms Anastasiou-Krause

(The heads of argument having been prepared by Ms A Hulley)

Instructed by:

PMB Justice Centre

Pietermaritzburg

For the respondent:

Mr E S Magwaza

Director of Public Prosecutions

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