Republic of South Africa

THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

Case number: A528/12

In the matter between:

IGSHAAN DAVIDS Appellant

versus

THE STATE Respondent

JUDGMENT delivered this day 4th of December 2012

NDITA, J:

[1] This appeal is against the appellant's conviction and sentence on three counts of rape on a 9 or 10 year old girl. He was sentenced to 20 years imprisonment with all counts treated as one

occurred on unknown dates during 2007 and the third one in June 2008. The trial was conducted before the Regional Court, Wynberg. The appeal is before us with the leave of the trial court.

[2] As earlier stated, the appellant was convicted of having sexually violated the young girl on three occasions. The allegation on all the counts is that he intentionally committed an act of sexual penetration with the complainant in contravention of section s 3 read with sections 1, 56 (1), 57, 58, 59, 60 and 61 of Act 32 of 2007, further read with 51 and or 52 of the Criminal Law Amendment Act 105 of 1997. Act 32 of 2007 came into operation on 16 December 2007, ostensibly after the dates of the first two counts of rape on the complainant by the appellant. The allegations of rape, constituting all the common law elements and requirements of rape, were detailed in the first two charges. The State requested an amendment of the relevant two charge sheets and the defence did not object. There is no prejudice to appellant if such an amendment is granted and accordingly the first two counts are substituted to read that appellant is charged with rape, read with the relevant sections relating to minimum sentencing, as charged.

[3] I turn to examine the merits of the appellant's conviction. According to the complainant, JLK, who testified approximately three years after the incidents, the first incident of sexual assault occurred on or about the year 2007. At that time she was according to her own testimony 9 years old, and in grade 3. JLK, given her recorded age and the nature of the charges, the witness understandably gave evidence through an intermediary. Her evidence is that the appellant had sought leave from her grandmother to send her on an errand to a local shop. When she returned to the appellant's house, he invited her inside and after she had entered, he locked the door. The appellant threw her onto the bed, undressed her, inserted his penis in her vagina and had sexual intercourse with her. After the sexual act, the appellant gave her a sum of R2.00 and warned her not tell anyone, otherwise he would kill her. According to JLK this incident happened in the appellant's wife's room. The appellant gave JLK her grandmother's cell phone charger so that she could return it to her. It is not in dispute that JLK did not report to her grandmother what the appellant had done to her. The reason for the failure to report is captured in her evidence when she stated that:

"Want hy het gese as ek vir enige een gaan sê, gaan hy my doodmaak. Igshaan Muller het gese as ek vir enige een gaan sê, gaan hy my doodmaak of hy gaan my slaan"

JLK testified that during the same week of the first rape, the second incident manifested when the appellant once again borrowed her grandmother's cell phone charger and the witness had to fetch it. In similar fashion, the appellant asked her to go and buy chips and on her return she entered the house and sat on the bed. The appellant undressed her and had sexual intercourse with her, whereafter he gave her the charger so that she could return it to her grandmother.

[4] With regard to the third count, JLK estimated that it also could have happened in 2007. On this occasion, her paternal grandmother had instructed her to return to her maternal grandmother's home. This instruction was issued in the presence of the appellant who was conversing with her grandmother. It is worth mentioning that the appellant and the JLK's grandparents lived in the same neighbourhood and were on friendly terms. As she left, the appellant got inside his vehicle. In order to reach her grandmother's home, JLK had to walk past the appellant's home. As she was walking, the appellant stopped the motor vehicle in

front of her and pulled her inside. JLK testified that the appellant drove to Vangate Mall, and parked the vehicle near the bushes. According to her evidence, at that time there were no buildings in the area but when she testified three years later there were new buildings. After parking the vehicle, the appellant pulled his trousers down and told JLK to suck his penis. Initially she refused but the appellant pushed his penis into her mouth and she sucked it until 'he came' and thereafter the appellant pulled up his pants. The appellant drove and stopped at Surrey Estate where JLK alighted. Unbeknown to JLK, her aunt Mrs Koopman had seen her alighting from the appellant's vehicle. The witness learnt later that the aunt had reported what she had seen to JLK's grandmother. As a result of the report, her grandmother confronted her; she then reported the sexual assault.

[5] Cross-examination focused mostly on the third count. The appellant's version that the incidents in count 1 and 2 could not have happened at his home as there always was someone during the day was put to the complainant. The witness gave a detailed account of the daily situation at the appellant's home and stated that the appellant's mother goes to the sea, his wife and eldest child would not be there and the youngest child was at crèche

during the day. In the light of this response, it was suggested that the appellant's brother's children had their meals on a daily basis at their grandmother's home where the appellant also stayed. Again, the complainant reaffirmed that the appellant's mother was never at the home during the day and his brother's children stayed in Letaba and only came to visit when their grandmother was present.

[6] Mrs Koopman, JLK's aunt confirmed that some time in 2008, she saw JLK alighting from the appellant's white vehicle at approximately 7:00 pm. In her opinion, she seemed nervous. When JLK arrived at her grandmother's home, she (the grandmother) was not at home. The child did not disclose the sexual assault that Friday evening but only did so on Sunday after Mrs Koopman had made the report about her presence in the vehicle. JLK's grandmother Ms Johnson corroborated the testimony of Ms Koopman to the extent that that JLK was reluctant to explain her presence in appellant's vehicle. However, at a later stage she did disclose to her that the appellant had taken her to the mall where he instructed her to suck his penis. In the light of these revelations, Ms Johnson testified that she took the complainant to her grandmother and the matter was reported to

the police. At the police station, and in the presence of the social worker, JLK disclosed the incidents pertaining to counts 1 and 2.

[7] It will be recalled that central to the allegations of sexual assault on the person of the complainant is a cell phone charger allegedly borrowed by the appellant from the complainant's grandmother. Ms Diane Meyer, JLK's maternal grandmother testified that it is so that the appellant had the same cell phone brand as she did. According to her evidence, the appellant on two occasions borrowed her charger. In both instances, she sent JLK to fetch it from him. Although JLK returned home after quite a while, (which she estimated at an hour and a half) when sent to the appellant's home, that did not raise any ire with her as JLK had explained that she had been sent to the shop by the appellant. After the sexual assault allegations surfaced, JLK disclosed to her as well that the appellant had told her to suck her penis and had sexual intercourse with her.

[8] At this point it is, for the sake of the flow of the evidence, it is prudent to refer to the evidence of Sister Bartlett, a witness called by the court. She is a nurse manager employed by the Department of Health as a sexual assault forensic nurse. The witness

examined JLK on 17 June 2008 and observed that her hymen was torn in the seven o'clock position, a clear indication that such tear was caused by blunt trauma. In her opinion, the injury was old, and in all probability it could have happened six months prior to examination. Furthermore, in her opinion the injury was consistent with penal penetration on more than one occasion. Under cross examination she, for obvious reasons could not say whether the complainant' s alleged sexual encounter was consensual or forced. A puzzling aspect of Sister's Bartlet's evidence which was not explored during the trial is that she recorded on the medical report that the last consensual intercourse JLK had was with the appellant on 1 June 2008. I revert to this aspect later in this judgment.

[9] The version put up by the appellant is simply that he did not commit the offences with which he had been charged. Neither had he ever sent JKL to the shop. Besides, during the period of the alleged incidents, he was working at Coke; he would leave his home early in the morning and return at about 5:00 pm. Although the appellant admitted owning a white Toyota motor vehicle, he vehemently denied taking JHL to Vangate Mall in it. Similarly, he denied possessing a cell phone similar to the JKL's grandmother 's

and borrowing the charger. In fact, according to his evidence, he did not own a cell phone during the period it is alleged he borrowed a charger. In a nutshell, he is being falsely implicated in the commission of the offences. He testified that although he stayed in the same yard as his mother, he had a separate dwelling where he stayed with his family. The appellant persisted with his version that there was always someone at his home during the day.

[10] The grounds of appeal reveal that the conviction is assailed on the following grounds:

1. That the trial court misdirected itself in accepting the evidence of the state witnesses, particularly the complainant as credible and reliable as she was a single witness and her evidence was not coherent as she could not give a chronological order of the sexual incidents and was not always sure of how they happened. To this end, so it was argued, the trial court did not apply sufficient caution in evaluating the evidence of the complainant.

2. The evidence of JKL was contradictory with regard to the Vangate Mall incident. For example she testified that the appellant told her to suck her penis whereas later during her testimony in

court at one stage and in the charge sheet she referred to sexual penetration.

[11] A further ground of appeal which appears for the first time in the appellant's Heads of Argument is that the age of JKL had not been proved. The relevance of this contention lies in the submission that if she was twelve years old, it is possible that she consented to sexual intercourse. Linked to this issue is a submission that even though the complainant was below 16 years of age '*she was wise to the world and she consented to the sexual act*'. The basis on which this contention is made is unclear as it is not borne out by evidence, more so that the appellant himself vehemently denied having sexual intercourse with the complainant. To top it all, this version was not put to the complainant when she was giving evidence, neither did the appellant allude to it in his own evidence.

[12] It is a well-established principle governing the hearing of appeals against findings of fact that in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and can only be disregarded if the recorded evidence shows them to be clearly

wrong. See **S v Hadebe &Others** 1997 (2) SACR 641 (SCA). The magistrate made favourably credibility findings in respect of the witnesses. In my view, those were justified and there is clearly no basis for this court to interfere with them. Even though the trial made similar findings in respect of the appellant, his version was rejected as not being reasonably possibly true. Again this is justified when regard is had to the totality of the evidence, the probabilities and proved facts.

[13] The complainant was consistent in her evidence with regard to the sexual assaults in respect of which the appellant was convicted on count 1 and 2. It is in my view, readily acceptable that she did not immediately report because she according to her evidence was scared and had been threatened by the appellant. Despite arduous cross-examination, she stuck to her version. She readily admitted being confused with regard to other sexual assault incidents, as a result of which the appellant was acquitted on two additional counts. It is also clear from the medical report that the complainant was subjected to a sexual penetration. As borne out by the record, her evidence with regard to the two counts was clear and consistent and it cannot be said that there were any material shortcomings. She gave a detailed account of the

appellant's house, the bedrooms, kitchen and bathroom, and her evidence in this regard was not challenged despite the persistent denial by the appellant that she had ever been at his home. The only way she could be able to give such an unassailable account is if she had been inside the house. Neither was her bold assertion that the appellant apologised to her grandmother and asked that the charges be withdrawn challenged or denied by the appellant, both in cross-examination and when he gave evidence.

[14] However, with regard to the third count, it must be said that her evidence is mostly entirely different from the allegations as they appear on the charge sheet. She testified that the appellant instructed her to suck his penis, which she did, whereas the charge sheet alleges that he penetrated her vagina. The conviction on this count is not sustainable as the charge sheet was not amended and brought in line with the evidence, which was contradictory in any event.

[15] Ms Koopman corroborated the evidence of the complainant to the extent that she was in appellant's vehicle, and it is only thereafter that the complainant disclosed the sexual assault. The witness was, during cross-examination quizzed on her

identification and knowledge of the appellant. She was steadfast in her testimony that she knew the appellant well and could clearly see him through the windscreen of his white Toyota vehicle. In the same vein, the complainant's grandmother gave clear evidence with regard to the cell phone charger that had been borrowed by the appellant. She even described it as a Samsung E 530. The complainant's grandmother was in her evidence not certain about the time lapse between the two cell phone incidents, but in my view, that cannot be held against her as she testified almost three years after the commission of the offences. No serious aspersions can be cast on her testimony in this regard as her evidence is clear about the number of times she borrowed the appellant the charger. The incidents relating to the charger and the vehicle may be of little significance to the charges against the appellant. However, when weighed in totality with the rest of the evidence, they support the trial court's finding that the version of the appellant could not be possibly true.

[16] I revert to the issue of age and consent. It was contended on behalf of the appellant that the age of the appellant was not proved and therefore it was possible that she was 12 years old and could consent to sexual intercourse albeit being a minor. According to

the appellant, the evidence shows that sexual penetration occurred with the complainant's consent. It is so that in the proceedings in the trial court, no documentary proof was produced showing the exact date of birth of the complainant. However, it is clear from the evidence that she was below the age of 16 years. The appellant latches on what was recorded by Sister Bartlet on the medical report 'as sexual intercourse with consent'. I have earlier on indicated that Sister Bartlet was not examined on this aspect of her recording. The basis on which she made the recording on the medical report remains unclear. Neither was the complainant examined on this aspect. It is in my view, opportunistic for the appellant to latch on this aspect in total disregard of his own defence as well as the evidence tendered. It casts further reasons to doubt the truthfulness of the version he tendered during the trial.

[17] The appellant's version that he could not have committed the offences as he was at work during the day is unsustainable because all the elements point towards its improbability. The complainant's evidence is credible and acceptable despite being a single and child witness with regard to the actual sexual assault. It is highly improbable that the State witnesses would corroborate

themselves in the manner in which they did in this matter in a bid to falsely implicate the appellant. They even gave details of the cell phone as a white Samsung. The appellant's denial of borrowing the charger and driving with the complainant is in my view insincere and is an attempt by the appellant to distance himself from any association with the complainant. Furthermore, the appellant's denial of the charges flies in the face of submissions made on his behalf during argument in the trial court that there was a possibility that sexual intercourse was consensual. Had this been the case, the appellant surely should in his evidence have given a proper context around the issue of consent. His version was correctly rejected as not being reasonably possibly true. It therefore stands to reason that the appeal against conviction on the first and second count must fail.

[18] With regard to sentence, the offences for which the appellant had been convicted are serious offences. The trial court was satisfied that there were substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of life imprisonment, thus it imposed a sentence of 20 years imprisonment. This finding cannot be faulted. The appellant now contends that the sentence imposed on him is disturbingly

inappropriate and that the trial court misdirected itself in its approach to sentence. I disagree. The only basis on which this court can interfere with the otherwise appropriate sentence is the conclusion it has reached that the conviction on the third count cannot stand.

[19] When considering sentence, the trial court had due regard to the appellant's personal circumstances when it imposed a sentence of 20 years imprisonment in respect of all the counts. He was at the time of sentence 45 years old and a first offender, married for 18 years, and has a 23 year old son who had a challenge with Tik addiction. He also has a six year old son. The appellant's family support was regarded as good by the trial court. It is on record that the appellant was also helping with his two younger brothers who were unemployed. The appellant enjoys good health, was employed at Coke and earned a sum of R3500.00 per month. On the other hand, the complainant was a young girl who before reaching the prime of her life was subjected to two instances of sexual assault. The violation of such a young person by the appellant who fed his lust on her is morally reprehensible. These kind of offences have become a regular occurrence within society. The sentence that the court must

impose ought to reflect the moral indignation rightly felt by members of the community to such crimes. As earlier pointed out in this judgment, the only basis on which this court must interfere is the success of the appeal on the third count. Even so, the appellant must be sentenced to a lengthy term of imprisonment.

[20] For all these reasons, the following order is issued, the appeal against the convictions in respect of count 1 and 2 is dismissed. The appeal against conviction on the third count is upheld and the conviction is set aside.

The appellant is sentenced to undergo a term of direct imprisonment for 16 (sixteen) years. Both counts 1 and 2 are treated as one for the purpose of sentence. The sentence is antedated to 8 June 2012.

NDITA; J

I agree

Steyn; J