IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE, HIGH COURT DIVISION)

Case Number: A103 / 2021

Lower Court Case Number: SHF / 64/2017

In the matter between:

MBUYISELO KEVA **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Wille, J *et* Montzinger, AJ

Heard: 22nd of October 2021

Delivered: 29th of October 2021

JUDGMENT

WILLE, J *et* MONTZINGER, AJ: (concurring)

INTRODUCTION

[1] This is a criminal appeal from the lower court in connection with both conviction and sentence. The appellant was convicted on a single count of rape. The offender was legally represented for the duration of his trial. He declined to offer up a plea explanation and reserved his right to remain silent. Further, he elected not to make any formal admissions in terms of the Criminal Procedure Act.[1]

[2] The rape charge preferred against the appellant was formulated under and terms of the provisions of The Sexual offences and Related Matters Act.[2] The allegations against the appellant were that he raped the complainant who was (7) years old at the time. Initially it was alleged that this offence occurred on the 19th of December 2016.

[1] Act, 51of 1977 ('CPA').
[2] A contravention of Section 3 of The Sexual Offences and Related Matters Act, 32 of 2007 ('SOA').

This ‘time-period’ was however the subject of an amendment in terms of the CPA to indicate a period from the 1st to the 14th of December 2016.

[3] The appellant was convicted of rape and was sentenced to life imprisonment as the victim was a minor[3]. The appellant was correctly alerted to the provisions of the minimum sentencing regime prior to the progression of the trial against him. The name of the appellant was also subsequently entered onto the official roll for sexual offenders. The appellant was (41) years old at the time of the alleged commission of the offence.

THE GROUNDS OF APPEAL

AD CONVICTION

[4] The matter comes before us with leave of the lower court against both conviction and sentence. Generally, on conviction, the averment is made that the lower court erred and ‘misdirected’ itself by convicting the appellant and by its finding that the respondent had established and proved the guilt of the appellant beyond a reasonable doubt. By way of elaboration, it is generally also submitted that the appellant’s version was not fanciful and is reasonably possibly true and that consequently, he fell to be acquitted.

[5] Moreover, the appellant submits that he did not enjoy a right to a fair trial. This because this right affords to him, the right to be informed of the charge levelled against

[3] The complainant was (7) years old at the time of the alleged offence.

him, with sufficient detail and particularity to be able to answer and defend the allegations levelled against him.

AD SENTENCE

[6] As far as the life sentence imposed upon the offender is concerned, he submits that there were indeed substantial and compelling circumstances sufficient to deviate from the minimum sentence regime. It is submitted that the court a quo misdirected itself by not deviating from the minimum sentence. The appellant submits that his personal circumstances warrant a lesser sentence and that another court may exercise its discretion to impose a different sentence upon him, tempered with an element of mercy.

THE RELEVANT FACTUAL MATRIX

[7] The circumstances surrounding the alleged commission of the offence, are briefly these: that the complainant returned from school on that day: it was raining and she was experiencing some difficulty in locating her house keys so as to enter her home: that the complainant sought assistance at the home of her neighbor: that her neighbor was unable to assist her to gain access to her home (her mother's home): that the neighbor invited her into her home and offered the complainant something to eat: that she encouraged the complainant to take a 'nap': that soon thereafter she left her home leaving the appellant, the complainant and the appellant's young son all sleeping in the same bed: that according to the complainant it was during this time that she was raped by the appellant:

that the appellant instructed the complainant not to report the crime: that the appellant threatened the complainant with reference to a firearm: that the appellant's girlfriend (her neighbor), subsequently returned from the supermarket: that the complainant was visibly upset and in tears and that the complainant subsequently left and went to her mother's cousin's home.

SUBSEQUENT EVENTS

[8] The complainant remained silent about her ordeal. Eventually she reported that she had been raped. This was triggered sometime later when the appellant offered a lift to an elderly grandmother. The complainant spoke out as she feared for the latter's well-being. The complainant's mother and grandmother were informed that she had been raped and she consulted a medical practitioner. She was then referred to the Red Cross Memorial Children's Hospital and the police were subsequently notified.

THE CASE FOR THE RESPONDENT

THE COMPLAINANT

[9] She testified 'in camera' and via the medium of a closed-circuit television in terms of section 153 of the CPA. This, by consent. The lower court carefully and correctly put into place the necessary and appropriate measures required of an

'intermediary' in terms of the CPA. A proper and well-grounded basis was presented for the introduction of this evidence, with the appropriate safeguards in place.

[10] She testified that she knew the appellant as he was a friend of her father's. She was unable to recall the precise date upon which she was raped by the appellant. She testified that she was (7) years old at the time. She had returned from school. It was raining and she was having difficulty in locating her key to her mother's home.

[11] She was observed by her neighbor (the appellant's girlfriend), who invited her into her home and offered her something to eat. The said girlfriend (Ms N[....]), then instructed her to take a 'nap'. She protested as she did not want to sleep. Ms N[....] then insisted that she takes a 'nap' and the latter then left her home. Ms N[....] stated that she was going to the local shop to secure some provisions.

[12] She was sleeping on the appellant's bed with the appellant and the latter's young son. The appellant woke her up, undressed her and raped her. She cried. The appellant was naked. The complainant described how she was raped by the appellant in detail by reference to a male 'doll' and a female 'doll' which, were used as mannequins.

[13] Thereafter, the appellant heard the noise of the front gate to his home which no doubt signaled the return of his girlfriend. The appellant got dressed and placed his firearm on a table in the nearby vicinity. The appellant threatened that he would kill the

complainant if she mentioned that she had been raped. The complainant thereafter left and went to her mother's sister's home.

[14] The complainant did not tell anybody that she had been raped until an unrelated 'grandmother' sometime later was about to get into the motor vehicle of the appellant. This triggered the complainant to 'warn' the grandmother not to get into the appellant's motor vehicle, as he was a 'rapist'.

[15] This sparked an enquiry from the complainant as to whom had been allegedly raped by the appellant. The complainant replied that she had been raped by the appellant. The complainant's mother was then informed about this allegation of rape. The complainant was eventually taken to the Red Cross Children's Hospital for examination and the matter was reported to the police.

[16] Some engagement followed with the complainant during cross-examination to the effect that the appellant's girlfriend did not go to a supermarket when she left the appellant's residence. The complainant was adamant in connection with this part of her testimony as she stated that she observed the 'Shoprite' plastic bags upon the return of the appellant's girlfriend, to the appellant's home.

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[17] The complainant resided with her. She is the complainant's aunt. The appellant resided next door to her, together with his girlfriend. She could not recall the precise date when the alleged rape of the complainant was conveyed to her. This happened about (3) years prior to the trial, which commenced in the lower court on the 21st of February 2018.

[18] Sometime thereafter, the appellant was going to take a 'grandmother' who lived next door to the hospital in his motor vehicle. The complainant protested as she proclaimed that the appellant was a 'rapist'. Upon further enquiry, it transpired that the complainant had been allegedly raped by the appellant. The appellant's girlfriend further corroborated the testimony of the complainant as to what had transpired when she was allegedly raped by the appellant.

MS KINGSTON - RODOLF

[19] She is a medical doctor who was at that time performing her duties at the Red Cross Children's Hospital. She is highly qualified and with vast experience. She examined the complainant on the 12th of December 2016. She completed the customary 'J88' medical report. According to her, she examined the complainant about (1) month after the incident. Her findings were, inter alia, that the complainant had endured a penetrative sexual injury to her vagina.

THE CASE FOR THE APPELLANT

THE APPELLANT

[20] The appellant testified in his own defense and called one witness in support of his version of events. He denied that he had raped the complainant. He confirmed that it was raining on the day in question and confirmed that the complainant had some issue with the key to her home, which was next door.

[21] He testified that the complainant entered his home, and his girlfriend gave the complainant something to eat. After her meal, according to him, the complainant felt tired, and she wanted to sleep. He was lying on his bed with his young son. The complainant was lying on the opposite side of the bed and her feet were facing towards his direction.

[22] His girlfriend left them alone for a few minutes while she went to fetch water from a tap outside. When his girlfriend returned, he got up and went to enquire about a recording made of a wrestling match that he wanted to view. This, before he went to work.

MS N[....]

[23] She is the appellant's girlfriend and testified on his behalf. She is the mother of the appellant's young child. She offered the complainant some food on the day of the alleged rape. She conceded that she told the complainant to go and take a 'nap' after the complainant had eaten. She went to fetch water at a nearby tap and when she returned,

she noticed the complainant was no longer sleeping on the appellant's bed. The complainant was alongside the bed and was crying. Upon enquiry, the complainant said that she wanted to go and play with her friends. Most significantly, during the period, after collecting the water from the tap and returning into the appellant's home, the complainant was no longer on the appellant's bed, and she was crying.

DISCUSSION RE THE CONVICTION

[24] The core issue in this appeal relates to an analysis of the approach which was adopted by the lower court. Of equal importance, is then the approach to be adopted and the legal test to be applied, by a court of appeal, in circumstances when it is submitted that the appeal court is faced with two diametrically opposed versions, which in some respect, seem mutually destructive of each other.

[25] Moreover, if a finding is made that the version of events as presented by the appellant, is not reasonably possibly true and falls to be safely rejected, then in that event, to what extent does this finding elevate (if at all), the evidence presented by the respondent, to meet the threshold of 'proof beyond a reasonable doubt'.

[26] In our view, what is required is a careful analysis of the evidence, viewed holistically. What stands out is that the evidence of the complainant is corroborated in several material respects. Further, most notably, no challenge or engagement was chartered against the evidence about the threat by the appellant and his alleged possession

of a firearm. This was not in any manner meaningfully engaged with during cross-examination and this throws serious doubt on the version offered up by the appellant.

[27] In addition to this, the appellant conceded the presence of the complainant on the day of the alleged rape and that his girlfriend left him alone on his bed with the complainant. Also, when the appellant's girlfriend returned to his home, the complainant was tearful.

[28] We turn now to the 'conspiracy theory' advanced by the appellant. This in the main, was premised on some notion of 'jealousy' of him. This theory was never fully expanded upon or indeed engaged with on behalf of the appellant during the trial, to the extent, that it never became 'material' and 'worthy of evaluation' by the lower court.

[29] Besides, the medical evidence in my view, cannot be described as 'neutral' and the scales in this connection fall to be tipped in favor of the respondent. The complainant did endure vaginal penetration. This cannot be disputed.

[30] What we are left with at the end of the day is an analysis of the probative weight of the evidence tendered by the respondent, considering the demeanor findings and credibility findings in the court a quo, coupled with an 'aerial-view' of all the evidence, not looked at compartmentally, but holistically.

[31] The demeanor, character and credibility findings favor the respondent as it cannot be advanced that the respondent's witnesses were bad witnesses who could not be

believed. The conspiracy theory is euthanized by the complainant's reluctance to mention her ordeal to any person.

[32] The appellant's girlfriend confirmed that upon her return to the appellant's home, the complainant was upset and crying. The probative weight of this evidence is high, and it cannot be simply ignored.

[33] The probative value and weight of all the evidence presented must also be tested and considered in the correct context as the evidence incriminating the appellant and the evidence possibly exculpating the appellant, should not be considered in separate compartments.[4]

'Independently, verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence, must of necessity, be evaluated, as must corroborative evidence'[5]

[34] The court must not consider the probability of the version of the appellant in isolation. In this appeal, the probabilities linked to the version offered up by the appellant, must be considered against the totality of the above-mentioned mosaic of evidence. In our view, considering all the evidence holistically and weighing up the probative weight thereof, whilst at the same time, considering the safeguards of a 'cautionary' approach necessitated in circumstances such as these, the evidence overwhelmingly supports the conviction returned against the appellant and the trial court

[4] *S v Van Der Meyden* 1999 (1) SACR 447
[5] *S v Trainer 2003* (1) SACR 35 (SCA.

was correct in rejecting the version of the appellant as not being reasonably possibly true and false.

[35] Further, the evidence presented by the respondent meets the threshold needed to convict the appellant of the offence listed in the indictment. This, beyond reasonable doubt. We say this because the appellants complaints are limited to these: that the complainant's testimony is that of a single witness: that the cautionary rule finds application: that the complainant was inconsistent and unreliable in her testimony and that the evidence of the first report was incorrectly evaluated in that there are material discrepancies about the reporting of the incident.

[36] It is contended on behalf of the appellant that there were material contradictions between the complainant's evidence and the first report to the police and that this renders the complainant's evidence unreliable and inconsistent. We disagree. A careful analysis of the reasoning in the judgment in the lower court clearly demonstrates that the court *a quo* was acutely mindful that the complainant was a single witness and that her evidence had to be treated with some degree of caution. Further, there were in existence only very minor contradictions (if any), which were clearly not material when considering the mosaic of evidence presented on behalf of the respondent.

THE RIGHT TO A FAIR TRIAL

[37] In a final throw of the dice it is argued that there existed an irregularity in the charge sheet, which in turn, impacted on the fairness of the appellant's trial. This may be

dealt with swiftly. Before any ruling in this connection, the presiding officer in the lower court granted to the appellant's legal representative an unfettered opportunity to object to the charge sheet as it was then currently formulated.

[38] It was agreed and recorded by all that no prejudice flowed from the way the charge sheet was formulated and that the shields and defenses to these charges would not be influenced in any manner as a result thereof. We fail to understand how in this case, even after an amendment of the charge sheet, the alleged lack of precise detail could or would have prejudiced the appellant in connection with his defense.

[39] Section 88 of the CPA[6], was introduced for this very purpose to overcome technical issues in connection with charge sheets. Section 88 provides that where a charge is defective for want of an averment which is an essential element of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, fall to be cured by evidence proving the matter which, should have been averred.

[40] Marais, J (as he then was) in *Thobejane*[7], made the following penchant remarks in connection with the formulation and particularity required in a charge sheet, namely:

'…the accused, according to the principles of a fair trial, is entitled to sufficient information to:

[6] The Criminal Procedure Act 51 of 1977.
[7] *S v Thobejane* 1995 (1) SACR 329 (T).

(a) Enable him to understand what the charge against him is and what conduct on his part is alleged to constitute an offence, and

(b) Sufficient information to enable him to instruct his legal adviser and to prepare his defense (which in practice would largely overlap with (a) above), and

(c) Insofar as the charge sheet and summary of facts supplied by the state is inadequate for the above purposes to such further disclosure or information that may be required to achieve such purposes'

[41] In our view, what this really means is that a charge sheet, particularly in a lower court, should contain sufficient particulars to inform the accused of the case that he faces. In the present case, identity is not in issue, and it is not disputed that the appellant and the complainant were alone together on that specific rainy day. We cannot follow how the appellant in these circumstances, could have suffered prejudice.

DISCUSSION ON SENTENCE

[42] It is trite law that in sentencing, the punishment should fit the crime, as well as the offender, be fair to both society and the offender, and be blended with a measure of mercy.[8] In *S v Masda*[9], in referring to the case of *S v Mhlakaza and Another*[10], Saldulker AJA (as he then was), eloquently remarked as follows:

[8] *S v Rabie* 1975(4) 855 (AD) at 862 G.
[9] 2010 (2) SACR 311 (SCA) at 315.

'A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public'

[43] In *S v Rabie*[11], the philosophies and principles applicable in an appeal against sentence were set out by Holmes JA, namely, that in every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and should be careful not to erode such discretion. Hence the further principle that the sentence should only be altered if the discretion has not been '*judicially and properly exercised'*. In *S v Anderson*[12]**,** in dealing with the applicable legal principles to guide the court when requested to amend a sentence imposed by a trial court, Rumpff JA, affirmed as follows:

'These include the following: the sentence will not be altered unless it is held that no reasonable man ought to have imposed such a sentence, or that the sentence is out of all proportion to the gravity or magnitude of the offence, or that the sentence induces a sense of shock or outrage, or that the sentence is grossly excessive or inadequate, or that there was an improper exercise of his discretion by the trial Judge, or that the interest of justice requires it'

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[10] 1997 (1) SACR 515 (SCA) at 315.
[11] *S v Rabie* 1975(4) 855 (AD) at 862 G
[12] 1964 (3) SA 494 (AD) at 495 D-H.

[44] Moreover, as held in *Malgas*[13]**,** a court of appeal is enjoined to consider all other circumstances bearing down on this question, to enable it to properly assess the trial court's finding and to determine the proportionality of the sentences imposed upon the offender.

[45] The constitutional court[14], has described an appeal court's discretion to interfere with a sentence only: when there has been an irregularity that results in a failure of justice: or when the court *a quo* misdirected itself to such an extent that its decision on sentencing is vitiated: or when the sentence is so disproportionate or shocking that no reasonable court could have imposed it.

[46] As alluded to previously and from the record of the proceedings in the court *a quo*, it may very well be that the appellant and his girlfriend may have to some extent, facilitated this crime. This because the appellant's girlfriend conveniently left the appellant and complainant alone on his bed together on the day in question. This conduct indicates a deliberate attempt to leave the appellant with the complainant unsupervised for a significant period and is consistent with the complainant's recollection that the girlfriend returned with Shoprite bags. During her testimony the girlfriend, surely being aware that whether she went to Shoprite or just to a nearby tap will throw doubt on the

[13] *S v Malgas* 2001 (1) SACR 469 (SCA).
[14] *S v Boggards* 2013 (1) SACR (CC) at [4].

respondent's case, was satisfied to give a version that was aimed at protecting the appellant. Further, the record does not reflect any suggestion that the appellant showed any form of remorse at all. Regrettably, he does not exhibit any insight into the seriousness of the crime committed by him. This, in turn goes to the issue of his moral blameworthiness.

[47] By contrast the victim impact report by the complainant and entered into the record, highlights how this traumatic event has influenced her life. The statement reveals, inter alia, a position of trust by the complainant towards the appellant, by way of the following:

'*...I loved him as an elder brother, and this happened'*

'...He was very helpful towards me'

'...I will never forgive him for the rest of my life'

...When I go to school, I must be accompanied by someone because I am scared in the road'

[48] In addition, the court *a quo* highlighted the position of trust between the complainant and the appellant. The threat of violence against the complainant can also not be ignored. The sentence imposed upon the appellant must accordingly in some measure, also reflect a censure to this sort of conduct and behavior. Considering that

which has been stated above, we are unable to unearth any misdirection or irregularity on the part of the court *a quo* when it imposed the sentence upon the offender in this matter. We also find no room to interfere with the sentence imposed in this matter.

[49] Put in another way the personal circumstances contended for on behalf of the appellants are by themselves, in no manner substantial or compelling. They simply are the following: that he is a first offender: that he is (45) years old: that he was gainfully employed and that he has (5) dependents.

[50] Accordingly, in all the circumstances, the following order is granted, namely:

1. That the appeal in connection with the *conviction* of the appellant is dismissed.

2. That the appeal in connection with the *sentence* imposed upon the appellant is dismissed.

3. That both the *conviction and sentence* of the appellant are hereby confirmed.

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WILLE, J

I agree:

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MONTZINGER, AJ