IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A152/2022

In the matter between

LUVO BILIKWANA **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: Wille J *et* Wathen-Falken AJ
Heard: 21st of October 2022
Delivered: 26th of October 2022

JUDGMENT

WILLE, J:

Introduction

[1] This is a criminal appeal from the lower court directed against both conviction and sentence. The appellant was convicted of the rape of a minor[1] and was sentenced to imprisonment for a period of eighteen (18) years. The lower court also declared him unfit to possess a firearm and directed that his name be logged in the appropriate register for sex offenders.

[1] A contravention of section 3 read with the provisions of sections 1, 56 (1), 56 A as amended 50 (2) (a) and 50 (2) (b), 57,58, 59, 60, 61 and 68 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, further read with the provisions sections 94, 256, 261 and 281 of the Criminal Procedure Act 51 of 1977. Further read with sections 51 (1) of the Criminal Law Amendment Act, No. 105 of 1997, as amended. Further read with section 1, 2 and 120 of the Children's Act 38 of 2005.

[2] The appellant was legally represented for the duration of his trial. He pleaded not guilty, offered up no plea explanation and exercised his right to remain silent. The complainant testified via the medium of an intermediary and not in the immediate presence of the appellant in accordance with the appropriate provisions in terms of the Criminal Procedure Act. The matter is before us with leave having been granted by the judicial officer of the lower court against both the conviction and sentences. The essential features of the charge against the appellant in the lower court were that the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant, who was fourteen (14) years old at the time, without the consent of the said complainant and he thus raped the complainant.

[3] The record of the proceedings in the lower court raises an issue of concern and this issue bears further scrutiny. The issue is this. The presiding officer in the lower court at the inception of the trial warned the appellant that certain provisions of the minimum sentencing regime found application. The offender was advised that he faced a possible sentence of fifteen (15) years imprisonment. This was manifestly incorrect as the minimum sentencing regime that was of application was life imprisonment as the victim of the rape was a person under the age of sixteen (16) years old. This notwithstanding, when the offender was sentenced, the presiding officer found substantial and compelling circumstances to deviate from a sentence of life imprisonment and imposed upon the offender a sentence of eighteen (18) years imprisonment.

[4] Against his conviction, the appellant recites the usual vanilla grounds of appeal namely: (a) that upon the evaluation of the totality of the evidence, the respondent failed to prove its case against the appellant beyond a reasonable doubt: (b) that the court *a quo* erred by the rejection of the appellant's version as false; (c) that the court *a quo* erred in its finding that the evidence of the complainant was credible, reliable and satisfactory in all material respects and, (d) that the court *a quo* failed in not applying the cautionary approach in the evaluation of the evidence of a single witness.

Overview

[5] The following is common cause namely: (a) that the complainant and the appellant were neighbours; (b) that the complainant had known the appellant for several years; (c) that on the evening in question the complainant met the appellant and it was suggested that she accompany him, which she did; (d) that the appellant and the complainant went to a shack not belonging to the appellant; (e) that it was in this shack, that the appellant had sexual intercourse with the complainant and, (f) that at the time of the incident the complainant was (14) years old and was a scholar.

[6] The medical examination of the complainant on the day following the incident recorded the injuries to the complainant which were consistent with the history of an alleged sexual incident.[2] On the day after the alleged rape the complainant reported her ordeal by way of a letter to her mother, who in turn reported the matter to the police.

[7] The complainant testified that she acquiesced to accompany the appellant on the day in question because she knew him, and he was her elder. There existed some measure of trust between them, and she trusted him as her brother. Thereafter, she was forced into a shack by the appellant, and she was raped against her will. After she had been raped, the appellant unlocked the door of the shack, and she was allowed to go home. The appellant, in turn, went in a different direction.

[8] The complainant reported the rape the following day. This was by way of a letter to her mother in which she explained how she met the appellant and accompanied him, and he thereafter lured her into a shack and raped her. The complainant made an election to report the rape to her mother. The complainant was engaged in this election and why she failed to disclose the rape to her aunt. She gave a very plausible explanation, namely that she was afraid of her aunt who was known to discipline her by way of lashes.

[9] The testimony of the complainant was the subject of some corroboration in that she reported the rape to her mother by way of a letter. The alleged confusion about whether the letter was in her apron or in her handbag is not material but, is rather indicative of the lack of conspiracy between the witnesses to falsely implicate the appellant.

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[2] The results of the medical examination by Dr Haffegee did not elicit any engagement or dispute.

[10] When compared to the evidence of the appellant the following is significant, namely: (a) that the appellant was aware of the complainant's age; (b) that the appellant explained that he was offended by the complainant referencing him by his first name; (c) that inexplicably according to the appellant, sexual intercourse was the complainant's idea and, (d) that the appellant was inconsistent about the arrangements that were made and how they ended up in the shack.

[11] Most significantly, the appellant never engaged in any way with the manner in which the complainant described how she was undressed which was inconsistent with consensual sexual intercourse. In addition, there was not an iota of evidence to suggest why the complainant would falsely implicate the appellant.

Consideration

[12] 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 respects, seem mutually destructive of each other.

[13] 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. In our view, what is required is a careful analysis of the evidence, viewed holistically.

[14] 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 medical evidence tendered by the respondent. 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. I say this because the medical evidence in my view, cannot be described as 'neutral' and the scales in this connection fall to be tipped in favour of the respondent. That the complainant endured vaginal penetration cannot be disputed.

[15] I turn now to the conspiracy theory advanced by the appellant. This in the main, was premised on some notion that the complainant harboured a fear from her aunt as to an explanation as to her whereabouts on that evening. 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.

[16] What I am left with at the end of the day is an analysis of the probative weight of the evidence tendered by the respondent, considering the demeanour findings and credibility findings of the court *a quo*, coupled with an 'aerial-view' of all the evidence, not looked at compartmentally, but holistically.

[17] The demeanour, character and credibility findings favour 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 but, to rather pen a letter to her mother. The probative weight of this evidence is high, and it cannot be simply ignored.

[18] 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.[3]

'…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…'[4]

[19] 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 my view, considering all the evidence holistically and weighing up the probative weight thereof, whilst at the same time, considering the safeguards of a

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

‘cautionary’ approach necessitated in circumstances such as these, the evidence overwhelmingly supports the conviction returned against the appellant and the trial court was correct in rejecting the version of the appellant as not being reasonably possibly true and accordingly false. Further, the evidence presented by the respondent meets the threshold needed to convict the appellant of the offence listed in the indictment. This, beyond a reasonable doubt.

[20] I say this because the appellant’s complaints are limited to these: (a) that the complainant’s testimony is that of a single witness; (b) that the cautionary rule finds application; (c) that the complainant was inconsistent and unreliable in her testimony and, (d) that the evidence of the first report was incorrectly evaluated in that there were material discrepancies about the reporting of the incident.[5]

[21] It is contended on behalf of the appellant that there were material contradictions between the complainant’s evidence and the first report and that this renders the complainant’s evidence unreliable and inconsistent. I disagree. A careful analysis of the reasoning in the judgment in the lower court clearly demonstrates that the judicial officer in the lower court 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.

[22] It may be advanced that there existed an irregularity in the charge as formulated against the appellant in that he was advised of the incorrect minimum sentencing regime that found application at the outset of the trial proceedings, which in turn, may have impacted the fairness of the appellant’s trial. This may be dealt with swiftly. This ‘irregularity’ clearly goes to the issue of the sentence with which I will now deal.

[23] 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

[5] The letter penned by the complainant to her mother.

of mercy.[6] In *S v Masda*[7], in referencing the case of *S v Mhlakaza and Another*[8], Saldulker AJA (as he then was), eloquently remarked as follows:

'…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…'

[24] In *S v Rabie*[9], 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.

[25] 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*[10]**,** 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…'

[26] Moreover, as held in *Malgas*[11]**,** 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. The constitutional court[12], has described an appeal court's discretion to interfere with a sentence only: (a) when there has been an irregularity that results in a failure of justice; (b) or when the court *a quo* misdirected itself to

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[6] *S v Rabie* 1975(4) 855 (AD) at 862 G.
[7] 2010 (2) SACR 311 (SCA) at 315.
[8] 1997 (1) SACR 515 (SCA) at 315.
[9] *S v Rabie* 1975(4) 855 (AD) at 862 G
[10] 1964 (3) SA 494 (AD) at 495 D-H.
[11] *S v Malgas* 2001 (1) SACR 469 (SCA).
[12] *S v Boggards* 2013 (1) SACR (CC) at [4].

such an extent that its decision on sentencing is vitiated and, (c) or when the sentence is so disproportionate or shocking that no reasonable court could have imposed it.

[27] As alluded to previously and from the record of the proceedings in the lower court, it is indeed unfortunate that the appellant was incorrectly advised in connection with the prescribed minimum sentencing legislation. After his conviction and during the sentencing proceedings the judicial officer in the lower court correctly indicated that the prescribed minimum sentence was that of life imprisonment. This however was too late.

[28] The court *a quo* correctly highlighted the position of trust between the complainant and the appellant. Also, the appellant locked the door of the shack when he raped the complainant. The sentence imposed upon the appellant must accordingly in some measure, also reflect a censure to this sort of conduct and behaviour. Considering that which has been stated above, I am unable to unearth any substantial and compelling circumstances to the benefit of the appellant.

[29] Put in another way. the personal circumstances contended for on behalf of the appellant are by themselves, in no manner substantial or compelling. They simply are the following: (a) that he is a first offender; (b) that he was (22) years old at the time of his arrest and, (c) that he was gainfully employed and that he had a dependent.

[30] 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.

[31] The incorrect reference by the judicial officer to the prescribed minimum sentence that found application in this matter at the inception of the trial goes to an irregularity in connection with the sentencing of the appellant. Of significance is the question of whether the appellant was put in a position to appreciate the

consequences of any decision taken in response to the charge sheet. The test is whether or not the appellant suffered any prejudice.[13]

[32] In this case, the appellant was not made aware at the inception of the trial of his being subjected to any enhanced punishment over and above that punishment brought to his attention by the judicial officer in the lower court. As a matter of logic, this was to his prejudice and the appellant cannot as a consequence be sentenced to a higher form of punishment when the applicable legislative provisions had not been explained to him.[14]

[33] It must be pointed out that in this case the lower court was in any event ordinarily clothed with the necessary sentencing jurisdiction to impose upon the offender a sentence of fifteen (15) years imprisonment for the offence of the rape of a minor. That having been said, it falls to be emphasized that it is crucially important for the prosecution to draft and accurately formulate the charges which they wish to prefer against an accused person. It must be made abundantly clear to an accused person, at the inception of the trial proceedings, the precise nature and extent of the charges to be preferred by the prosecution.

[34] 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 *sentences* imposed upon the appellant is *partially* upheld and the portion of the sentence (dealing with the imprisonment of the appellant in the lower court), is set aside and substituted for and with the following:

> '*That the appellant is sentenced to fifteen (15) years imprisonment to run with effect from the date of his sentence on the 15th of December 2021'*

3. That the *conviction and remaining sentences* imposed upon the appellant are hereby confirmed.

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[13] *S v Kolea* 2013 (1) SACR 409 (SCA) at para 18.
[14] S v ZW 2015 (2) SACR 483 (ECG) at para 41.

WILLE, J

I agree:

WATHEN-FALKEN, AJ