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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A342/2015

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

Date:

WHG VAN DER LINDE

In the matter between:

Matshevha, Tshimangadzo

Appellant

And

The State

Respondent

JUDGMENT

Van der Linde, J:

Introduction

- [1] This is an appeal against both conviction and sentence in terms of s.51(1), read with part I of schedule 2, of the Criminal Law Amendment Act, 105 of 1997 ("the Act"), also referred to as the minimum sentencing legislation. The conviction was of rape on 16 July 2011 of a victim under the age of 16 years, as envisaged in paragraph (b)(i) of the description of "*Rape*" in part I of schedule 2 of the Act. In those circumstances s.51 (1) provides that a court "*shall sentence*" a person to imprisonment for life, and that is what has occurred in the regional court sitting in Roodepoort on 16 May 2014.

The State case

- [2] The complainant was 11 years old at time of the rape. The appellant was known to her at the time; they were, in fact, neighbours. According to her version, which was accepted by the magistrate, he had called her over and had asked her to go buy him cigarettes. When she got to his house, he closed and locked the door behind her. He forced her into the room under threat of her life and that of her parents, and in the process brandished a knife and a firearm in aid. He undressed her, put her on the bed, unzipped his trousers, and started raping her. He clamped her mouth shut when she started screaming.
- [3] He only stopped when there was a knock at the door. He stood up, zipped up his trouser and went to the door. The complainant got up and dressed, and also went to the door. When the appellant open the door, she slipped out. The person at the door was her friend [R.....'s] mother, Ms [M.....], who recognised her, and was there to enquire about what he was doing.
- [4] When the complainant got home she did not immediately tell her parents what had happened. She was afraid that they would be killed if she did, bearing the appellant's threat in mind. When her mother spotted her awkward gait the next day, a Sunday, she examined her, and saw the injuries to her vagina. This is when the complainant told her mother that the appellant had raped her. The complainant's father was then involved, and they took her to the church. On the Monday she went to school, and so too on Tuesday and Wednesday.
- [5] On the Thursday she was brought home by the deputy principal and her teacher who also delivered a letter asking that her mother attend school with her. Since she could not do this on the Friday, the complainant's mother went to school with her the next Monday. After discussion with them, they went to talk to the Crisis Centre, accompanied by the complainant's teacher, where the complainant explained what had happened to a social

worker. She was then referred to a doctor who examined her. This was on 25 July 2011, according to the doctor's evidence, some 12 days after the alleged assault. After he had done so, he advised them to lay a charge at the police station, and this they did.

- [6] The doctor testified that the complainant had reported two incidents of sexual intercourse to him, once on 13 July 2011 and once on 16 July 2011. He testified to four lacerations to the complainant's vagina, one of which was extensive and in the actual wall of the vagina. He testified that three of the lacerations were inside the vagina, and he recorded contemporaneously that there was thus strong evidence that the complainant's vagina had been penetrated beyond the hymen. He opined that the injuries he observed were consistent with the complainant's version of having been raped. The appellant's legal representative, Mr Nelson, had no questions for the doctor.

The trial court's analysis

- [7] The trial court expressly alerted itself to the dangers of relying on the evidence of a single witness. It alerted itself also to the dangers of accepting the evidence of a small child, and particularly of the potential for lack of judgment and for imaginativeness. The court thus approached its assessment of the evidence of the complainant on the basis that two cautionary rules reigned; that pertaining to a single witness, and that pertaining to a child witness.
- [8] The court informed itself that it should expressly articulate these warnings; should then examine the evidence to see whether the witness' evidence was clear and satisfactory in every material respect; should then look for corroboration; and should, failing corroboration, look for some feature in the evidence that would give the implication by a single child witness enough of a hallmark of trustworthiness to reduce substantially the risk of a wrong reliance on her evidence.
- [9] Having so informed itself, the court a quo then provided a detailed appraisal of the complainant as a witness. It concluded that she was a self-composed young girl, who gave her evidence without hesitation or discomfort and in a calm even-voiced manner. The court saw no signs of difficulty in separating fact from fiction, and found nothing in her version that would cast doubt on its accuracy or reliability. The court found corroboration for the version in the medical evidence and in her awkward gait the day after the event.

[10] As regards the appellant, the trial court found that he had a propensity to fabricate. In particular, when testifying the appellant suggested that one Eric was the rapist; but only did so in cross-examination. This was never put to the State witnesses, not referred to in his own evidence in chief. Ultimately the court a quo rejected his exculpatory evidence as false.

The approach on appeal

[11] As regards the approach of courts of appeal to trial court findings of fact generally, the Constitutional Court has most recently in *Makate v Vodacom (Pty) Ltd*¹ restated the position. Trial courts have advantages that appeal courts do not have. The former are steeped in the matter; they observe witnesses, and are able and required to assess probabilities as they manifest within the circumstances prevailing, and as they apply to the particular witnesses testifying. In the result, unless the factual findings of the trial court are clearly wrong, or unless the trial court will have misdirected itself, those findings are not to be upset on appeal.

[12] It is instructive to quote the relevant portion of the judgment of Jafta, J in *Makate*:

“[37] In these circumstances, interference with the factual findings made by the trial Court is neither necessary nor justified. Ordinarily appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial. In Bitcon, Wessels CJ said:

‘[T]he trial judge is not concerned with what is or is not probable when dealing with abstract business men or normal men, but is concerned with what is probable and what is not probable as regards the particular individuals situated in the particular circumstances in which they were.’

[38] In our system, as in many similar systems of appeal, the cold record placed before the appeal court does not capture all that occurred at the trial. The disadvantage is that the appeal court is denied the opportunity of observing witnesses testify and drawing its own inferences from their demeanour and body language. On the contrary, this is the advantage enjoyed by every trial court. Hence an appeal court must defer to the trial court when it comes to factual findings. In Powell & Wife, Lord Wright formulated the principle thus:

¹ [2016] ZACC 13 at [37] to [41], in a judgment handed down on 26 April 2016.

'Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.' ”

[13] The complainant was young, she was a single witness, and the complaint was of sexual assault, implying the application of what has been described as the so-called cautionary rule. None of these features stood in the way of a conviction. S.208 of the Criminal Procedure Act 51 of 1977 (“the CPA”) expressly permits a conviction on the evidence of a single witness, although the cases have held that the evidence of single witness must be clear and satisfactory in every respect.²

[14] The application of a cautionary rule in sexual assault cases has received stringent criticism by the Supreme Court of Appeal.³ That court described the application of this rule in sexual assault cases as based on an irrational and out-dated perception, unjustly stereotyping complainants in such cases as particularly unreliable.

[15] More importantly, in this matter no misdirection or clearly wrong finding has been illustrated. The criticism that there was no immediate raising of the hue and cry, as was demanded in medieval England, is met by the fear of harm to the complainant’s family. The criticism of the delayed report to a doctor and the police ought to be directed to the complainant’s parents, and not her. The criticism that the doctor’s recording of the complainant’s version did not match her evidence is a matter that ought to have been taken up with the doctor when he testified. His recording may simply have been wrong.

[16] And the criticism that Ms [M.....], when called by the court as a witness, did not corroborate the detail of the complainant’s version (although she did place the complainant on the scene at the crucial time), really just underscores the problems inherent in the court calling a witness when battle-lines have been drawn clearly. The incentive for giving evidence that fits both versions, or helps no version, is known.

² S v Sauls and Others, 1981 (3) SACR 172 (A) at 173.

³ S v Jackson, 1998 (1) SACR 470 per Olivier, JA at 476 e – f.

[17] The difficulty that the appellant's argument cannot overcome is the complete absence of any incentive on the part of the complainant falsely to implicate the appellant. Once one has set aside the suggestion of fanciful imaginativeness, and once one has accepted that a serious rape has been perpetrated, and once one accepts that falsely implicating the appellant undoubtedly exposes the complainant and her parents to real physical danger, then it becomes very difficult to construct an explanation for falsely fingering the appellant and not the mystical Eric.

[18] We are not able to conclude, in these circumstances, that the magistrate had committed a misdirection or was clearly wrong, and the factual findings of the court a quo must stand. That implies that the conviction remains.

Sentence

[19] Sentencing is really, in the context of the minimum sentencing legislation, subject to the same approach by a court of appeal. S.51(1), read with schedule 2 part I, and paragraph (b)(i) under the description of "*Rape*", of the Act, compels ("*shall sentence*") the imposition of a life sentence. The approach to be followed by courts with reference to the minimum sentencing legislation is set out by the Constitutional Court in *S v Dodo*:⁴

"A Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the

⁴ 2001(3) SA 382 (CC) at [11], adopting *S v Malgas*, 2001 (2) SA 1222 (SCA).

legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.

H In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided."

[20] Here the court a quo expressly considered whether substantial and compelling circumstances were present, but found none. It was submitted that there were no physical injuries; that the evidence was of a poor quality; that there was no DNA evidence; that the case was opened 12 days after the crime had been committed; that it was astonishing that the lacerations of the complainant had not completely healed; and that the court a quo was in the dark as to whether or not the complainant was a virgin or sexually active.

[21] In our view none of these factors constitute substantial and compelling circumstances, and the trial court, after considering whether there were any, rightly found that there were none.

Accordingly the sentence imposed by the court a quo must also remain.

[22] In consequence the following order is made:

The appeal against both conviction and sentence is dismissed.

WHG van der Linde
Judge, High Court
Johannesburg

I agree.

HW Sibuyi
Acting Judge, High Court
Johannesburg

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