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

CASE NO: A288/2016

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

.....**27 February 2017**.....
DATE SIGNATURE

In the matter between:

JOHN TEBOGO RAFUTHO

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

RATSHIBVUMO AJ:

1. This is an appeal noted in terms of sec 309 (1) (a) of Act 51 of 1977 (the Criminal Procedure Act). From the heads of argument filed together with the notice of set down, Mr. Rafutho, the appellant was appealing only against the sentence of life imprisonment imposed by the Regional Court in Johannesburg. However, on the date of the hearing, his counsel indicated that he would also appeal against the conviction. He did not require more time since the basis of the appeal were very generic and simple. Counsel for the State did not oppose this request. We allowed counsel for the appellant to present his argument in appealing against the conviction since sec 309 (1) (a) of the Criminal Procedure Act does not require of the appellant to apply for leave to appeal from the trial court.¹
2. The appellant was charged with a crime of contravening sec 3 of Act 32 of 2007 (rape), read with the provisions of sec 51(1) of Act 105 of 1997 (the Criminal Law Amendment Act). He pleaded not guilty. He was however found guilty as charged following a trial. The Criminal Law Amendment Act was applicable in that the victim was 10 years old at the time she was raped (she was born on [...] January 2001) and this happened on several occasions.
3. Facts that led to the conviction and eventually the sentence can be set out briefly as follows. The appellant came from the province of Free State to Gauteng in search of employment in 2010. He was accommodated in a house in Crosby Slovo Park that belonged to the

¹ *S v Chake* 2014 (1) SACR 177 (SCA)

victim's grandmother who happened to be a sister to his grandfather. The appellant was allocated his own room while the victim shared a room with the grandparents in the same house. The victim's mother stayed in the same area but she did not stay with them. In October 2011 the victim's mother took the child to the clinic because she had a rash on her private parts. It was clinically found that she was sexually violated. It was at that stage that the appellant was uncovered as the culprit.

4. According to the victim, the appellant had sexual intercourse with her on three different occasions in their grandmother's house. The first time he did it, she and her grandparents were sleeping in one room at night, when the appellant walked in and picked her up and took her to his room where he put her on the bed and raped her. On one occasion she had just arrived from school and found him alone in the house. He took her to his room and raped her. The last occasion was when she was preparing food in the kitchen, when he summoned her to his bedroom and raped her. On all these occasions she was threatened with death if she was to tell what happened. Although the appellant disputed the version by the victim, the court accepted it and convicted him.
5. It was submitted on appellant's behalf that the trial court erred in convicting him because identity was not proved beyond a reasonable doubt since the victim could not describe the culprit when she gave evidence. The argument goes on to imply that given this failure and the victim's tender age, there could be credence in a suggestion that there was an ulterior motive in laying charges against the appellant.
6. It is trite law that a court of appeal will not disturb the factual finding of a trial court unless the latter had committed misdirection. An appeal court will only reverse it where it is convinced that it is wrong. In such a

case, if the appeal court is merely left in doubt as to the correctness of the conclusion, then it will uphold it.² The conviction of the appellant is challenged on very generic submissions. The approach by courts in circumstances where identity is disputed is guided by the principles laid down in *S v Mthethwa*³ where Holmes JA held,

“[B]ecause of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as *R v Masemang*, 1950 (2) SA 488 (AD); *R. v Dladla and Others*, 1962 (1) SA 307 (AD) at p. 310C; *S v Mehlahe*, 1963 (2) SA 29 (AD).”

7. The identity of the person who raped the child *in casu* is being challenged because the victim, who testified through closed circuit TV and with the assistance of an intermediary, indicated that she could not give a description of the suspect when asked to. This argument seems to turn a blind eye to the fact that giving a description of a person is such a difficult task that even adults would resort to testifying on heights, complexion, haircuts and clothes that the suspect wore on a particular day, aspects that do not help much. This must be an even more difficult

² See also *DPP v S* 2000 (2) SA 711 (T) & *S v Leve* 2011 (1) SACR 87 (ECG).

³ 1972 (3) SA 766 (A) at 768A-C.

task for a child under 12 years old; such as the victim in this case was at the time she gave evidence.

8. The learned magistrate in analysing the evidence did take all these aspects into consideration. It is common cause that appellant resided with the victim in the same yard. The victim's mother testified on how she was related to the appellant and her evidence on that aspect was not challenged. The failure to give any description of the suspect did not mean that she was not raped or she did not reside with the appellant. She failed to give a description of a person that resided with her in the same house irrespective of whether he committed any crime or not. She named the suspect as Tebogo and at the end of her evidence she was able to point the appellant in the dock as Tebogo and a man who resided in the same yard as her at the time of the incident. Although the first time she was raped it was at night, on two other occasions she was raped during the day. Failure on her part to give a description of the suspect can only be attributed to the difficulty in giving a description of a person especially to a child, and how the question is phrased. I therefore do not find any misdirection on the finding of the trial court in this regard.
9. Before I consider the arguments advanced by the appellant in respect of the sentence, it is useful to remind ourselves of the proper approach by the appeal court in matters where the sentence imposed by the trial court is challenged. The approach should be guided by the collective principles from various decisions of the High Courts and the SCA. In *S v Salzwedel and Others*⁴, the SCA held per Mohamed CJ that An appeal Court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is 'disturbingly inappropriate', or totally out of

⁴ 1999 (2) SACR 586 (SCA)

proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirections of a nature which shows that the trial court did not exercise its discretion reasonably.

10. In *S v Malgas*⁵, the same court laid further guidelines in how to approach the substantial and compelling circumstances requirement for purposes of deviating from the prescribed sentences. It held,

“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. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.”

11. The learned magistrate found no substantial and compelling circumstances that justify imposing a lesser sentence than the mandatory life imprisonment. The appeal is in respect of that finding. It was submitted that the court should have found substantial and compelling circumstances in that the appellant was 27 years old at the time the offences were committed and that because he was young, he was capable of rehabilitation. It was submitted further that he was a first offender, a father of a minor child and that the victim sustained no serious injuries.

⁵ 2001 (1) SACR 469 (SCA) para 8 & 9.

12. The role of age or youthfulness as a mitigating factor was revisited by the SCA in *S v Matyityi*⁶, when a 27 year old man was sentenced following a guilty plea. Ponnann JA writing for the appeal court held,

“The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. Thus, whilst someone under the age of 18 years is to be regarded as naturally immature, the same does not hold true for an adult. In my view a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating factor. At the age of 27 the respondent could hardly be described as a callow youth. At best for him, his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness. He chose not to go into the box, and we have been told nothing about his level of immaturity or any other influence that may have been brought to bear on him, to have caused him to act in the manner in which he did.

13. The argument that substantial and compelling circumstances exist because the victim sustained no injuries ignores the provisions of sec 51 (3) (aA) which provides,

“(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- (i) ...
- (ii) an apparent lack of physical injury to the complainant;
- (iii)...

Although the courts had in the past relied on apparent lack of injuries as a reason to deviate from the prescribed sentence, since the amendment of the Criminal law Amendment Act, through Act 32 of 2007 (the

⁶ 2011 (1) SACR 40 (SCA) para 14

Sexual Offences and Related Matters the courts have moved with the times in line with the legislative developments.⁷

14. In *S v Moyo*⁸, this court dismissed an appeal against life imprisonment imposed on a 40 year old offender who raped a 7 year old child. Opperman AJ concluded that the courts have a duty to protect children younger than 10 years and that it cannot be business as usual when it comes to their protection.⁹ The Criminal Law Amendment Act ordained life imprisonment as the proper sentence for rape of children under the age of 16. Rape perpetrated against any other person is punishable with a minimum sentence of 10 years imprisonment¹⁰ unless it is in circumstances where listed in sec 51 (1) of the Criminal Law Amendment Act where it is also punishable by life imprisonment.¹¹
15. While it common knowledge that nothing of particular importance takes place on the date a child turns 16, it is acceptable that the closer the child gets to losing the title of being a child (turning 16) the courts are inclined to listen and in deserving cases, find substantial circumstances through which a sentence other than life imprisonment may be imposed.¹² When it comes to children whose age is further and younger from 16, the hearing of the soft approach by the courts gets hardened by the fact that it cannot be “business as usual”¹³ when it comes to the younger children, to the

⁷ See *S v SMM* 2013 (2) SACR 292 (SCA) & *S v MDT* 2014 (2) SACR 630 (SCA).

⁸ [2014] JOL 32349 (GJ)

⁹ See *S v Moyo supra* para 34 where Opperman AJ quotes from *S v Matyityi*, 2011 (1) SACR 40 (SCA) at 46D-E.

¹⁰ See sec 51 (2) (b) of the Criminal Law Amendment Act.

¹¹ Example of these would be rape where the victim is raped more than once, or the offender acted as part of a group of more than one person in furtherance of common purpose or where the victim is mentally or physically disabled.

¹² See *S v Vilakazi* 2009 (1) SACR 552 (SCA) where the SCA found substantial and compelling reasons to impose a sentence other than life when the child raped was ‘possibly over 15.’

¹³ See *Dube v The State* (89/16) [2016] ZASCA 123 (22 September 2016), *S v DC De Beer* ZAGLD A283/15 29 June 2016,

extent that “the prescribed sentence cannot be departed from lightly or for flimsy reasons.”¹⁴

16. It is for these reasons that the discretion exercised by the learned magistrate cannot be faulted. She did not misdirect herself in any manner and we are not at liberty to interfere with her findings and the resultant sentence. I agree with the sentiments expressed by Majiet JA in *S v SMM*¹⁵ to the effect that our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continues unabated. The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct.

17. In the result I would make the following order:

1. Appeal against the conviction and sentence is dismissed

¹⁴ *S v Malgas, S v Matyityi & S v Moyo supra.*

¹⁵ *Supra* at para 14.

TV RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

WHG VAN DER LINDE
JUDGE OF THE HIGH COURT

FOR THE APPELLANT : **ADV PHETOE**

INSTRUCTED BY : **JOHANNESBURG JUSTICE CENTRE**
: **JOHANNESBURG**

FOR THE RESPONDENT : **ADV EN MKHARI**

INTRUSCTED BY : **DIRECTOR OF PUBLIC**
: **PROSECUTIONS JOHANNESBURG**

DATE HEARD : **23 FEBRUARY 2017**

JUDGMENT DELIVERED : **27 FEBRUARY 2017**