

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no: A27/2023

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

In the matter between:

T[...] M[...]

APPELLANT

and

THE STATE

RESPONDENT

CORAM: REINDERS, J et BUYS, AJ

HEARD ON: 29 JANUARY 2024

DELIVERED ON: 29 JANUARY 2024

JUDGMENT

BUYS, AJ

[1] This is a judgment in the appeal by the appellant against the conviction of rape and the sentence of life imprisonment. The appellant was convicted of rape and subsequently sentenced to life imprisonment on 28 June 2018.

[2] Without providing a plea explanation, the appellant pleaded not guilty to the charge of raping the complainant on or about October 2014 and at or near Bloemfontein more than once. The complainant was 14 years at the time.

[3] The grounds of the appellant's appeal can be summarised as follows:¹

[3.1] In challenging the conviction of guilty referred to above, the appellant contends firstly that the respondent failed to prove, beyond a reasonable doubt, that the appellant had sexual intercourse with the complainant without her consent, and secondly, referring to that alleged rape in Limpopo Province, the appellant contends that the court *a quo* did not have jurisdiction over this alleged rape.

[3.2] In challenging the sentence of life imprisonment, the appellant contends that the sentence imposed is "shocking and inappropriate" in that the court *a quo* erred by finding no substantial and compelling circumstances to deviate from the prescribed minimum sentence set out in Section 51(1) of the Criminal Law Amendment Act².

[4] Dealing with the first ground of appeal referred to above, in argument, it is submitted on behalf of the appellant that:

[4.1] With reference to the cautionary rule relating to single witnesses, the court *a quo* should have evaluated the evidence of a single witness with the necessary caution.

[4.2] The court *a quo* erred in not considering the various material contradictions in the evidence presented by the respondent, namely:

¹ Record, Notice of Appeal, pages 324 and 325.

² Act 105 of 1997.

[4.2.1] The position of the complainant, according to the second State witness (the complainant's mother), when she found the complainant being raped by the appellant, compared to the evidence of the complainant.

[4.2.2] The complainant contradicted her own evidence relating to where her mother was at the time of the rape.

[4.2.3] The complainant contradicted her own evidence as to which of the two rapes she testified about occurred first.

[4.2.4] The complainant never testified that she was on the floor when the appellant raped her. The court *a quo* erred in the inferences drawn from the words uttered by the complainant to her mother, namely that the appellant "is on top of her", by finding that the words uttered refer to evidence by the complainant that she was on the floor when she was raped by the complainant and secondly that the complainant changed positions and therefore the complainant was raped more than once by the appellant.

[5] The evidence of the complainant can be summarised as follows:

[5.1] She was raped by the appellant in the kitchen of the place she was residing with her mother, the appellant and her siblings. In questions posed by the court *a quo*, she testified that the incident was in August 2014.

[5.2] In her description of the incident, she testified that she was holding on to a pole in the kitchen, she was standing and the appellant undressed her and inserted his "penis" "in front" of her (the place she "urinate by" – her words).

[5.3] It was painful and she wanted to run away, but her mother caught the appellant "red-handed, because she was sleeping in the kitchen". In questions posed by the court *a quo*, she testified that her mother was in the bedroom sleeping when the appellant raped her.

[5.4] She told her mother that her husband “is on top of” her, and she is a child.

[5.5] She was raped twice by the appellant, the incident in the kitchen and once at the appellant’s parental home in Limpopo. In questions posed by the court *a quo*, it seems as if the complainant was confused which incident happened first. However, she testified that the incident in Limpopo was the second time the appellant raped her. Nothing turns on this.

[5.6] The appellant was wearing her pants when he raped her. In cross examination she testified that she wore a size 16 and the jeans did not fit the appellant well, it went up to mid-thigh.

[5.7] She did not scream because there is bad blood between them and the neighbours.

[5.8] During cross-examination she testified that:

[5.8.1] Although the appellant is not her farther, she respected him and their relationship was very good, her mother and the appellant were always fighting and because of the fighting and appellant not working, she wanted the appellant to leave them and go and stay in Limpopo.

[5.8.2] According to her, rape means when somebody undresses you forcefully and wants to “break your virgin” (her words).

[5.8.3] The pain she felt was not because of the penetration, but because of a pimple she had in front.

[5.8.4] She confirms the statement she made before an officer of the South African Police Services (“SAPS”), and although the statement was not read back to her, she confirms the correctness thereof. According to her evidence, the issues not dealt with in her statement and the differences in her evidence compared to the statement

are the result of her forgetting about it. She further explained that the incident happened a long time ago and the appellant threatened to kill her “like a dog” if the incident is reported by her.

[5.8.5] On questions posed to her why no reference is made in the complainant’s statement about her holding on to the pole while being raped, she testified that she mentioned the “pole” to one “Mr Ali”. The complainant further confirmed a question posed to her by the appellant’s legal representative, referring to her evidence that she demonstrated with dolls that she was laying on her back, that “in other words” she “told them” that she was laying on her back while being raped by the appellant. The State and the appellant’s legal representative agreed later during re-examination of the complainant that the complainant illustrated the rape with dolls to the SAPS official who took down the complainant’s statement. According to the complainant’s explanation she only remembered when she testified about the incident that she demonstrated the rape with a doll.

[5.8.6] In questions posed to the complainant about her laying on the bed, she testified that she was not disputing laying on her back (she stated that it is the truth) - the time was around “half past 4”. However, she further testified that it was “a little bit late”, but she “cannot recall the time it was”. She further testified that her mother appeared from the bedroom and that is when the appellant stopped, but she was unable to clarify when she lay on the bed, because it was a long time back and she cannot recall.

[5.8.7] She denied that she was falsely implicating the appellant, because she does not want the appellant to stay with her, her mother and her siblings in their home.

[6] The evidence of the second witness for the State, M[...] D[...] (the complainant’s mother), can be summarised as follows:

[6.1] She found the appellant in the kitchen when he was putting the complainant down. While he was putting the complainant down, the appellant was having sex with the complainant.

[6.2] She screamed at the appellant and while she was crying, the appellant came to her and stopped her from crying.

[6.3] The complainant wanted to run to the street but the appellant followed her and took her back into the house. The appellant then threatened to kill them if they speak to anyone about the incident.

[6.4] They kept quiet about the incident until the complainant talked about it to the nurse at school.

[7] In cross examination M[...] D[...] testified that the complainant was only dressed in a skirt when she caught the appellant raping her, the complainant was not standing holding a pole at the time, and when asked at the complainant's school about the rape incident, she first "beat around the bush" (her exact words) about the incident, and only after being persuaded by the school personnel to tell the truth, did she end up telling the truth. Although she confirmed that they were not happy to reside with the appellant anymore, and they wanted the appellant to leave, the complainant did not frame the appellant.

[8] The evidence presented by the appellant amounts to a bare denial. However he was not aware that the complainant's mother did not report the rape and that she was not behind the complainant reporting the rape. The appellant further testified that the complainant made up the rape allegations herself. However, according to him the allegations of rape premised from the private meetings between the complainant and her mother.

[9] The appellant agrees with the statements made in cross-examination, namely that the complainant is a special needs child and she is "retarded".

[10] Both the representatives for the appellant and the respondent correctly referred to the legal principles and case law dealing with the relevant issues raised, especially:

[10.1] The powers of the Court of Appeal to interfere with the findings of the trial court (*S v Francis*³);

[10.2] The onus on the State to prove its case beyond a reasonable doubt and if the version of the appellant is reasonably possibly true, he is entitled to an acquittal (*S v Sithole and Others*⁴ and *S v S*⁵).

[10.3] The evaluation of evidence presented by children (*Woji v Santam Insurance Co Ltd*⁶).

[11] In *S v Chabalala*⁷ the Supreme Court of Appeal held:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of the inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

[12] The highlight of the appellant’s case is the contradictions in the evidence of the complainant compared to the statement she deposed to and the evidence of her mother referred to above. The issue this court is called upon to adjudicate is whether the court *a quo* correctly found that the respondent has made out a case beyond a reasonable doubt regardless of the above contradictions. Although the trustworthiness of a child depends on various factors, namely, the child’s power of observation (does the child appears to be intelligent enough to observe), the child’s

³ 1991 (1) SACR 198 (A) at 204D.

⁴ 1999 (1) SACR 585 (W) at 590F.

⁵ 2000 (1) SACR 453 (SCA) at 455A-C.

⁶ 1981 (1) SA 1021 (A) at 1028B-D.

⁷ 2003 (1) SACR 134 (SCA) at 139I-J.

power of recollection and the child's power of narration (the ability to frame and express intelligent answers), the question to be asked is whether the child, while testifying, appear to be honest, namely is there a consciousness of the duty to speak the truth (*Woji v Santam Insurance Co Ltd supra*).

[13] The court *a quo* correctly referred thereto that the evidence of the complainant should be approached with caution, not only because the complainant is a child, but also because she is a child with special needs. I align myself with the findings of the court *a quo* when the evidence of the complainant was evaluated, namely:

[13.1] With reference to the incident of rape itself, the complainant's manner of description of the rape is consistent with a child of her age and understanding.

[13.2] She gave a clear account of how she was raped, namely she was standing holding the pole – this position could not be a normal position in a child's mind.

[13.3] She testified that the rape was painful. However, it was the pimple "in front" and not the penetration that was painful. This is an honest experience by the complainant and intimate knowledge she shared without any hesitation.

[13.4] She confines herself to two incidents of rape, one incident in Bloemfontein and the other in Limpopo.

[13.5] She was forthcoming when asked about her relationship with the appellant and testified that she respects the appellant and their relationship was good up until the incident.

[13.6] She was consistent in her evidence relating to the rape itself, and when confronted in cross-examination about certain facts stated in her statement not testified in examination in chief (her being kissed by the appellant and her breasts being touched by the appellant), she agreed with the facts as true and correct.

[13.7] She confirmed that she was laying on her back when she was raped by the appellant, but she cannot remember at what time exactly this happened. However, she is persistent that she was standing, holding the pole when she was raped by the appellant.

[13.8] Although the complainant wanted the appellant away from their home, it is clear from the evidence by the complainant's mother that the rape was never reported. The rape only came to light when the complainant was confronted by the social worker and the nurse at school – this confrontation only took place as a result of the complainants behaviour at school. If the complainant and her mother had any motive to frame the appellant, the incident of rape would have been reported immediately and not in the manner as testified by the complainant's mother.

[14] I have not been convinced that the court *a quo* erred:

[14.1] In accepting the evidence presented by the State and rejecting the evidence of the appellant;

[14.2] In respect to the finding that the appellant, beyond reasonable doubt, have raped the complainant.

[15] I can however not align myself with the finding of the court *a quo* that an inference should be drawn that the appellant raped the complainant more than once on the specific day in August. The evidence does not suggest such an inference. Within the meaning of Part I of Schedule 2 to the Criminal Law Amendment Act *supra* a person is raped more than once by one person if the evidence shows that the accused formed the intent, after the first rape, to rape again.⁸ Mere repeated acts of penetration cannot be equated with separate acts of rape.⁹ Accordingly, the court *a quo* erred in convicting the appellant of raping the complainant more than once (own emphasis). It is, however, undisputed that the complainant was 14 years of age

⁸ See S v Ncombo 2017 (2) SACR 683 (ECG).

⁹ See S v Blaauw 1999 (2) SACR 295 (W) at 300A-D and S v Tladi 2013 (2) SACR 287 (SCA) at para [13].

at the time of the rape and furthermore she was also mentally disabled. Accordingly, the prescribed minimum sentence of life imprisonment as per Section 51(1) of the Criminal Law Amendment Act *supra* is applicable under the circumstances set out in Part I of Schedule 2 thereto, namely:

- “(b) where the victim-
- (i) is a person under the age of 18 years;
- ...
- (iii) is a person who is mentally disabled..”

[16] The appellant raised a further ground in its heads of argument, namely the date of the rape as set out in the charge sheet differs from the evidence presented. It should be mentioned, the appellant never objected to the charge sheet – this objection transpired only during argument.

[17] Section 88 of the Criminal Procedure Act¹⁰ deals with a defective charge sheet and provides as follows:

“Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgement, be cured by evidence at the trial proving the matter which should have been averred.”

[18] Although no objection was raised to the charge sheet by the appellant and no formal request was made to amend the charge sheet by the respondent, the evidence presented by the State witnesses clearly confirmed the date of the rape as being on or about 14 August 2014. This date has not been disputed by the appellant during the trial and consequently is the evidence undisputed regarding to the date of 14 August 2014. In my view the incorrect date on the charge sheet as to when the rape occurred has been cured in terms of Section 88 of the Criminal Procedure Act

¹⁰ Act 51 of 1977.

referred to above by virtue of the acceptance by the court *a quo* of the State witnesses' evidence.

[19] It follows that the conviction of rape by the court *a quo* does not stand to be interfered with by this court and that the appeal against the conviction stands to be dismissed.

[20] In dealing with the appellant's second leg of its appeal, namely sentencing, the appellant relied on the grounds that life imprisonment is shockingly inappropriate.

[21] As referred to in paragraph [14] above, the complainant was not only 14 years of age at the time of the rape she was also mentally disabled.¹¹ The conviction of rape involved the consideration of whether substantial and compelling circum[...]stances exist which could have caused the court *a quo* to deviate from the minimum mandatory sentence of life imprisonment.

[22] The court *a quo* duly considered the tests enunciated in *S v Malgas*.¹² The court *a quo* took into consideration the personal circum[...]stances of the appellant, the gravity of the offence and the interest of society. Although the appellant was a first offender, his personal circum[...]stances did not warrant a deviation from the minimum sentence, more specifically considering the impact of the offence on the complainant as set out in the Victim Impact Report. The aggravating circum[...]stances outweighed the factors in mitigation by far.

[23] Accordingly, I am in agreement with the findings by the court *a quo* that no substantial and compelling circum[...]stances existed which could have caused the court *a quo* to deviate from the minimum mandatory sentence of life imprisonment.

[24] It follows thus that the appeal against the sentence imposed by the court *a quo* stands to be dismissed.

¹¹ See Section 51(1) of the Criminal Law Amendment Act *supra* read with Part I of Schedule 2 thereto.

¹² 2001 (1) SACR 469 SCA.

[25] Accordingly the following order is made:

The appeal against the conviction and sentence is dismissed.

J J BUYS, AJ

I concur

C REINDERS, J

On behalf of the Appellant: M[...]. V.C. AbrahamaM[...]
Legal Aid South Africa
Bloemfontein

On behalf of the Second Respondent: Adv N.M. Tshefuta
Office of the Director of Public Prosecutions
Bloemfontein