

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

Appeal number: A69/2022

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the Appeal between:

THABO ENOCK LESOETSA

Appellant

and

THE STATE

Respondent

CORAM:

VAN ZYL, J et DANISO, J

HEARD ON:

17 OCTOBER 2022

JUDGMENT BY:

DANISO, J

DELIVERED ON:

16 FEBRUARY 2023

[1] On 6 February 2019 the appellant was convicted by the regional court after pleading not guilty for raping his 9-year-old niece. He was subsequently sentenced to

life imprisonment the court having found no substantial and compelling circumstances warranting a deviation from the minimum sentence prescribed in terms of the Criminal Law Amendment Act 105 of 1997 (the CLAA).

[2] The appellant is aggrieved by both the conviction and sentence. He challenges his conviction and sentence on the grounds that in convicting him, the trial court erred in:

- 2.1. finding that the complainant was a credible witness;
- 2.2. drawing a negative inference of the appellant's version and not making a credibility finding in favour of his testimony; and
- 2.3. finding that the state proved its case beyond reasonable doubt.

[3] As regards the sentence, the appellant contends that:

- 3.1. the sentence is shockingly inappropriate and induces a sense of shock;
- 3.2. the severity of the offence was overemphasized at the cost of the personal circumstances of the appellant; and
- 3.2. the court erred in finding that there were no compelling and substantial circumstances present to deviate from the minimum sentence.

[4] It is settled that the appeal court will not interfere with or tamper with a trial court's judgment or decision regarding either conviction or sentence unless, it (the court of appeal) finds that the trial court misdirected itself as regards its findings of facts or the law. See *R v Dhlumayo & Another* **1948 (2) SA 677** (A). The principle was also restated in *AM & Another v MEC Health, Western Cape* **2021(3) SA 337** (SCA) at paragraph 8.

[5] The appellant was convicted on the testimony of the complainant, her mother, Mrs J[...] N[...] T[...] (her first report) and that of the medical doctor Dr Olgali Denameseres Odien Puerto who examined the complainant after the incident.

[6] The complainant's evidence was the following: the appellant is her uncle. It was in the morning or during the day of the 3rd January 2018 when the appellant arrived at the complainant's home to ask for medicine. After he was given the medication he went back to his house. The complainant was then informed by her brother that the appellant was looking for her. She went over to his house but he sent her away and told her to return alone. The complainant went to her friend's place, but the appellant went and called her. When she went back to his house he asked her to massage his waist and after she was done, he went to his bedroom took off his clothes and came wearing only an underwear. He lay down on the mattress on the kitchen floor. He then grabbed her, threw her on the floor and shove a piece of cloth into her mouth. He undressed her by removing her purple shorts and a panty. He also took off his underwear, parted her vaginal lips, climbed on top of her, penetrated her with his penis and raped her. When she screamed he closed her mouth with the cloth and then he stood up and got dressed. He wiped her vagina with a cloth and told her not to tell anyone what had happened especially her mother and he will give her R10.00. The complainant went home and spontaneously reported that she was raped to her mother.

[7] The complainant's mother corroborated the complainant's first report of the rape incident. She told the court that the appellant is her "brother", their mothers are siblings. On the day of the incident, the complainant came home running and whispered into her ear that the appellant had just raped her. She was so startled and started to scream with the result that her husband also heard what was said. The complainant's father went to the appellant's home to confront him, followed by the complainant's mother. The appellant denied raping the complainant, the complainant's mother went home to get her phone in order to call the police. When she returned to the appellant's residence he was nowhere to be found. The complainant was accompanied to the police station to report the matter, thereafter she was taken for a medical examination at National Hospital where she was admitted.

[8] On the next day, the complainant was examined by Dr Puerto who also completed the medical report J88 handed in as Exhibit "B". The gynaecological examination indicated vaginal injuries consisting of redness and swelling on the *labia minora* and the posterior *fourechette*. The injuries were found to be consistent with sexual penetration.

[9] According to the complainant and her mother, the relationship between them and the appellant has always been cordial. The appellant visited the complainant's family regularly and the complainant's mother also took care of the appellant whenever he was not well and even accompanied him to the clinic.

[10] At the time of the incident, the appellant was HIV positive. Exhibit "D" is a copy of the appellant's medical file. It was handed in by concurrence of the State and the defence.

[11] The appellant was the only witness who testified for the defence. He confirmed the State's version only as far as it related to his visit to the complainant's home to seek pain medication. He told the court that the medication that he was given did not provide him with relief as a result, he sent the complainant's brother to the shops to buy him pain medication and went back to his house where he laid down on a mattress that he had placed in the kitchen. It was his testimony that he did not rape the complainant, she did not even come to his house, the rape charge was fabricated by the complainant's family as a result of the feud between him and the complainant's mother over the family house.

[12] In the record of the proceedings it is clear that the trial court was confronted with mutually destructive versions with regard to whether the appellant raped the complainant or not. The trial court was alive to the fact that as a child witness and also a single witness implicating the appellant in the rape offence the complainant's evidence had to be approached with caution.

[13] In terms of section 208 of the Act an accused may be convicted of any offence on the evidence of any competent single witness. The court need only find that the evidence was trustworthy and that the truth has been told in that case, corroboration is

not even necessary. See *S v Sauls and Others* **1981 (3) SACR 172** (A) at 173 and *S v Mahlangu* **2011 (2) SACR 164** (SCA) at 171 B.

[14] The trial court undertook a thorough analysis of the evidence proffered and having appropriately applied cautionary rule to the complainant's evidence, the trial court was satisfied that the complaint's evidence was satisfactory in all material respects and could be safely relied upon as the truth of what she alleged and this was based on the grounds that she was able to describe in detail the circumstances under which the rape took place namely; what she and the appellant wore on that day; where exactly in his house did the rape occur; how he undressed her and himself. The manner in which she was raped was also concisely described including with the use of the anatomically correct dolls. The trial court was satisfied that she could not have made up those details and that her evidence was also corroborated in all material respects by that of her first report and the J88 medical evidence.

[15] Regarding the contradictions, the trial court found that the contradiction between the evidence of the state witnesses relating to whether the appellant had used a condom or not when raping the complainant was immaterial, it was merely an error resulting from a language issue rather than an incorrect exchange of information as the doctor was of Spanish origin with limited understanding of South African Languages.

[16] I am in agreement with the trial court's conclusions. A child witness's veracity and ability to give a succinct version of the events is an important consideration in applying the cautionary rule.¹ It is also important to note that her version remained intact even after vigorous cross-examination.

[17] The trial court's finding that the contradictions between the State's witnesses were immaterial cannot be faulted as the issue of whether the appellant wore a condom or not during the rape was not relevant for the determination of whether the appellant raped the complainant or not. It has been said that if the evidence satisfied the standard of proof, the court must convict even if there were some discrepancies

¹ *S v Sauls* **1981 (3) SA 172** (A) at 180E – G and *Woji v Santam Insurance CO Ltd* **1981 (1) SA 1020** (A) at 1028B-C.

between the complainant's evidence and that of the other witnesses.² In *J v R*³ it was held that:

"...the exercise of caution should not be allowed to displace the exercise of common sense. If a judicial officer, having anxiously scrutinized such evidence with a view to discovering whether there is any reasonable possibility of conscious or unconscious fabrication, is satisfied that there is no such possibility and that the evidence... may ... be safely accepted as proving the guilt of the accused beyond reasonable doubt, he should not allow his judgment to be swayed by fanciful and unrealistic fears."

[18] On the other side, the appellant's version was rejected as false beyond a reasonable doubt on the grounds that despite the State's overwhelming evidence against him his version was simply a bare denial and that his defence of false implication was merely a fabrication designed to mislead the court. The trial court took into account that the version was never put to the State witnesses during cross-examination, the appellant could not even remember when the dispute arose. The other version that he gave was that his father had resolved the dispute. Furthermore, the evidence by the complainant and her mother that before the incident they had a very good relationship with the appellant, the complainant's mother even took care of the appellant when he was sick, was not disputed; therefore, to accept the appellant's version would mean that Dr Puerto was also involved in this conspiracy as her evidence also corroborated the complainant's evidence and that was highly improbable.

[19] It is a trite principle that there was no obligation on the appellant to prove his innocence and having elected to provide a version of his defence, his version ought to have been reasonably possibly true to warrant an acquittal. The version provided by the appellant did not pass muster. The fact that the complainant reported the rape immediately to her mother when she arrived home militated against the appellant's claim of false implication as there was not enough time for the complainant to contemplate the purported false charges including her parents for that matter. The medical evidence corroborates her testimony that she was sexually penetrated barely

² *R v Abdoorham* **1954 (3) SA 163** (N) at 165E; *Sauls* supra at fn 1 at 180E-F.

³ **1958 (3) SA 699** (SR).

a day after the incident. Furthermore, it is trite that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine the witness upon the facts which he intends to prove in contradiction, so as to give the witness an opportunity for explanation. Similarly, if the court is to be asked to disbelieve a witness, that witness should be cross-examined upon the matter which it will be alleged to make his case unworthy of credit. It is highly irregular to let a witness' evidence go unchallenged in cross-examination and afterwards argue that they must be disbelieved.

[20] The discrepancies in the appellant's version affected his credibility. The trial court correctly rejected it as false. I am thus satisfied that on the available facts, the dispute between the State and the defence with regard to whether the appellant had raped the appellant on that day was resolved appropriately. See also *S v Trainor* **2003(1) SACR 35** (SCA) at para 9.

[21] The trial court correctly found that the State had proved the guilt of the appellant beyond a reasonable doubt, he was correctly convicted.

[22] It is common cause that in terms of section 51(1) of the CLAA life imprisonment is the prescribed sentence in respect of the offence the appellant was convicted of, unless the trial court found substantial and compelling circumstances justifying a lesser sentence.

[23] It is the appellant's case that the trial court erred in its conclusion that there were no substantial and compelling circumstances justifying a lesser sentence than life imprisonment because, it underemphasized the appellant's personal circumstances and the fact that no serious injuries were sustained by the complainant, including the fact that there was no evidence that the complainant sustained any lasting trauma; instead, the trial court overemphasized the aggravating factors, the prevalence of the offence, his HIV status at the time of rape and the interests of the community. It was argued on behalf of the appellant that this rape was not one of the most serious rapes where a sentence of life imprisonment would be appropriate, the sentence must therefore be reduced to 15 years' imprisonment.

[24] The appellant's personal circumstances as recorded by the trial court namely that;

24.1 He was 41 years old;

24.2 He had passed grade 8;

24.3 He was married with two minor children aged 10 and 6 years;

24.4 Employed at a construction company and also self employed as a Sangoma earning R8 000.00 and R1000.00 per month respectively;

24.5 He was in good health despite the fact that he was afflicted with the HIV disease; and

24.6 He was a first offender in relation to this offence.

[25] The trial court found that the appellant's personal circumstances paled in comparison to the following aggravating factors: the age of the complainant at the time of the rape, that at such a tender age of 9 years old she was raped by a person who was HIV positive thus exposed to the HI virus, that as her uncle, the appellant was entrusted in his care. The trial court took into account the fact that because at the time of the rape the appellant was aware that he was HIV positive made the offence the worst category of rape.⁴

[26] It is trite that the traditional mitigating factors such as the offender's personal circumstances cumulatively, can be taken into account as factors to be considered as substantial and compelling circumstances; however, they must be weighed against the aggravating factors as on their own they constitute the flimsy reasons which *Malgas*⁵ warned should not be elevated to the status of substantial and compelling circumstances to deviate from the prescribed minimum sentence.

⁴ *S v Snoti* **2007 (1) SACR 660** (E).

⁵ *Malgas* supra para 9.

[27] In this matter, there is a number of aggravating factors namely, the age of the complainant and the circumstances under which she was violated. At the tender age of 9 the complainant was raped by her own uncle, the person who was supposed to protect her by virtue of him being in a position of trust and also similar to that of a parent.

[28] It is equally aggravating that the appellant raped this child well aware of his HIV status thereby exposing her to the virus.

[29] The gravity of sexual violations of children in the domestic sphere was succinctly summed up by Cameron JA in *S v Abrahams*⁶ as follows:

“Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter’s best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter’s body constitutes a deflowering in the most grievous and brutal sense.”

[30] These crimes cause an outrage in the society. A failure by our courts to respond appropriately could result in vigilantism which undermines our constitutional order, it is for this reason that the sentences that the courts impose must have an element that speaks to the plight of the society.⁷

[31] The appellant’s complaint that the trial court overlooked the fact that the complainant did not sustain any serious injuries or lasting trauma is unsound when regard is had to the provisions of section 51(3) of the CLAA which specifically states that on its own, the absence of serious physical injuries does not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence. See also *S v Nkawu*.⁸

⁶ **2002 (1) SACR 116** (SCA) at page 123 at para 17.

⁷ *S v Mhlakaza and Another* **1997 (1) SACR 515** (SCA) at 519d-e.

⁸ **2009 (2) SACR 402** (ECG) at para 17.

[32] Lack of serious physical injuries does not make the crime less heinous. Rape leaves the victims with life-long emotional and psychological scars. In fact, the SCA recently “took counsel to task” for exactly this evidently erroneous contention. See *Maila v The State*,⁹ quoting *Amanda Spies ‘Perpetuating Harm: Sentencing of Rape Offenders Under South African Law’* (2016) (2) SALJ 389 at 399 Mocosie JA said:

“[47] Counsel for the appellant submitted that the trial court did not take into account the appellant’s personal circumstances. It also, according to counsel, did not take into account that this was not one of the ‘brutal cases’, as the complainant was not physically injured. Counsel was taken to task during the exchange with the members of the bench on this submission, but he could not take the argument further. Correctly so, because apart from this minimising the traumatic effects of rape on any victim and more so a child, it is well documented that ‘irrespective of the presence of physical injuries or lack thereof, rape always causes its victims severe harm.’”

[48] The Legislature has specifically amended the Criminal Law Amendment Act to provide categorically that the fact that a complainant was not injured during a rape cannot be considered as compelling or substantial. In terms of s 51(3) (aA) of Act 105 of 1997, which came into operation in December 2007:

‘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:

....

(ii) an apparent lack of physical injury to the complainant;

....

(iv) any relationship between the accused person and the complainant prior to the offence being committed.”

⁹ (429/2022) [2023] ZASCA 3 delivered on 23 January 2023.

[33] The appellant has deliberately overlooked the Victim Impact Statements submitted to the trial court by the complainant and her mother as Exhibit ‘F’ and ‘G’ respectively. Both the complainant and her mother allude to both the emotional trauma and the physical ailments arising from the rape incident. The complainant has developed a fear of playing with other children, to go to school and to the shops. She is overwhelmed with sadness as a result of what the appellant did to her whilst she still loves him as her uncle and her mother’s brother.

[34] The complainant’s mother relates how she has been left with self-blame and anger, sometimes she thinks about leaving all behind. She now suffers from constant headaches and has lost weight. She has noticed behavioral changes in the complainant and her siblings. The complainant has become moody, stubborn and angry. Her brothers are mistreating the complainant; they refuse to play with her or share their bedroom with her. They also seem to be blaming her for the rape.

[35] The nature and the seriousness of a rape of a child can never be over emphasized. In *S v D* **1995(1) SACR 259**(A) it was held that:

*“Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and all too often do. ...” Appellant’s conduct in my view was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the courts disapproval and hopefully acting as a deterrent to others minded to satisfy their carnal desires with helpless children.*¹⁰

[36] Having regard to the seriousness, despicable and endemic nature of the offence the appellant was convicted of, I am of the view that the trial court exercised its discretion properly and judicially by imposing the sentence of life imprisonment.

[37] In the circumstances, the following order is issued:

1. The appeal against conviction and sentence is dismissed.

¹⁰ At page 260 f-g.

NS DANISO, J

I concur

C VAN ZYL, J

On behalf of Appellant:

Instructed by:

Mr PL van der Merwe

Legal Aid SA

BLOEMFONTEIN

On behalf of respondent:

Instructed by:

Adv AM Ferreira

Director of Public
Prosecutions

BLOEMFONTEIN