

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

Case Number: A134/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

MKHULU MOFOKENG

Appellant

and

THE STATE

Respondent

CORAM: MUSI, JP *et* CHESIWE, J

HEARD ON: 23 JANUARY 2023

DELIVERED ON: 30 MARCH 2023

JUDGMENT BY: CHESIWE, J

[1] The Appellant was convicted in the Regional Court: Bethlehem, of raping a 12 year old female child in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters), Amendment Act 32 of 2007 and sentenced to 25 years' imprisonment. He successfully applied for leave to appeal.

[2] The Appellant was legally represented by Mr Khumalo, at the trial court. The Appellant was informed of the implications of section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, and that the relevant minimum sentence of life imprisonment would be applicable if he were to be found guilty and the court finds no substantial and compelling circumstances.

[3] The facts are briefly as follows. The Complainant testified that on the 30th March 2019, she was visiting her grandmother M[....] C[....] M[....]1 (M[....]1). At approximately 21h00, she prepared her blankets on the floor and slept. While she was sleeping, she felt something heavy on top of her. She immediately woke up and saw that it was the Appellant. The Complainant attempted to push the him away. The Appellant proceeded to insert his penis in her vagina and had sexual intercourse with her. The Complainant then told the Appellant that she was going to tell her grandmother what had happened. The Appellant threatened the Complainant that if she does tell, she will see what he will do to her. The Complainant testified that she did not know how the Appellant removed her panty and pyjamas.

[4] The next day, that is, 31 March 2019, the Complainant woke up to find that Mokoena and the Appellant had left her in the house. She went back to her mother's S[....] M[....]2 M[....]2 (M[....]2), house. When she got home, she told M[....] what happened and they immediately went to the police station. M[....] corroborated the Complainant's testimony that the Complainant came home early in the morning. Which, according to M[....], was unusual, as the Complainant usually returns a day before schools reopen.

[5] Appellant's version was that the Complainant called by waving at him on two occasions. He refused to go to the Complainant and instead made a sign with his thumb that it was wrong for her to wave at him. The Appellant denied that he had sexual intercourse with the Complainant.

[6] Mr. Mokoena, on behalf of the Appellant, explained that the written heads of argument were drafted by Mr Mokena. He intimated that he stands by those heads and submitted that alcohol played a role in the commission of the offence.

[7] Adv. Ferreira, on behalf of the Respondent, submitted that the trial court evaluated the evidence and contradictions between the testimonies of the Complainant and that of the grandmother and concluded that despite the contradictions, the Complainant was truthful, honest and an impressive witness. She submitted that the appeal ought to be dismissed.

AD CONVICTION

[8] It is trite that the state bears the onus of proving the guilt of an accused person beyond reasonable doubt. Indeed, the Complainant was a single witness pertaining to the sexual violation. The trial court evaluated her evidence in its totality and approached it with caution because she was a single witness and a child. Although caution was applied to her testimony, she was found to be a trustworthy witness who had a good recollection of the incident. The trial court took into account all the evidence of the State witnesses as well as the evidence of the Appellant.

[9] Section 208 of the Criminal Procedure Act, 51 of 1977, provides that an accused may be convicted of an offence on the evidence of single and competent witness. The court *a quo* not only referred to the cautionary rules, but in my view, duly applied them. The trial court cannot be faulted in that regard.

[10] It is trite that the court must approach the question of identification with caution, because false identifications present a great threat to the achievement of our ideal legal system, that no innocent person should be convicted and punished. The trial court dealt with the issue of identification in its judgement. It took into consideration the time the Appellant was with the Complainant; and the time the Complainant has known the Appellant before the incident. The Appellant is her grandmother's partner and she has on many occasions visited at the grandmother's place while the

Appellant was there. To the extent that the Complainant calls the Appellant Mkhulu (grandfather).

The Appellant admitted that he knows the complainant because he has a love affair with her grandmother.

The Complainant's testimony in respect of the identity of Appellant was clear and logical, as she knew him well, and that cannot be faulted. Nor is there any evidence as to why the Complainant would falsely implicate the Appellant for something he has not done.

[11] Furthermore, Mokoena's evidence is clear that the doors were locked the night they went to sleep. Neither was there any evidence that there was forced entry or someone tampered with the doors. This excludes the possibility that someone other than the Appellant and Mokoena entered the house that night.

[12] The Appellant's version that the Complainant, who is a minor child, waved and gestured towards his direction, ought to be rejected in its totality. Even if the Complainant waved at the Appellant, he is the adult and ought to have conducted himself as such. To have allegedly taken the offer to sleep with a minor child is disgusting on the part of the Appellant. He was 64 years of age and the grandfather of the Complainant. The trial court in its judgement dealt with this aspect and said:

"...this was a 13 year old calling him, an adult an aged man above the age of sixty, so there was something sinister about him being called by the child."

[13] It is trite that an appeal court will only tamper with the trial court's credibility findings under very limited circumstances. The trial court with the evidence before it was satisfied in that the State proved the Appellant's identity beyond reasonable doubt. It correctly came to the inescapable conclusion that the Appellant was the person who had sexual intercourse with the Complainant and correctly convicted him. There is no reason to doubt the correctness of the credibility findings made by

the trial court. In my view, the trial court correctly convicted the Appellant and there is no reason to tamper with the trial court's findings on conviction.

AD SENTENCE

[14] Mr. Mokoena submitted that the trial court has already deviated from the prescribed sentence of life imprisonment. He urged the court to take into consideration, the Appellant's age; that he does not have a criminal record; that he has three children aged 39, 17 and 5 years and was in custody for more than one year. He submitted that the sentence be reduced to 15 years.

[15] Adv. Ferreira submitted that the trial court took into consideration the Appellant's personal circumstances and deviated from the life imprisonment to 25 years' imprisonment. She mentioned that the trial court took into consideration the aggravating factors, namely, rape is not only prevalent, but a serious offence. The Complainant was 13 years old; she was at her grandmother's place, a place where she was supposed to feel safe. She further submitted that the Appellant showed no remorse. She contended that that the appeal against sentence ought to be dismissed.

[16] It is trite that sentencing is a matter of discretion by the trial court. A court of appeal will only interfere if the sentencing court has failed to exercise its discretion reasonably. This will be in situations where the trial court misdirected itself or committed an irregularity or the sentence is shockingly inappropriate. This means the discretion must have been exercised wrongly.

[17] The Appellant was convicted of a very serious offence. Ordinarily a sentence of life imprisonment must be imposed unless the court finds that there are substantial and compelling circumstances which justify the imposition of a lesser sentence, taking into account what was said in **S v Malgas 2001 (1) SACR 469 (SCA)**. However, the trial court took into consideration the Appellant's personal circumstances and deviated from a sentence of life imprisonment.

[18] The Appellant was in a position of authority and trust in respect of the Complainant. Given the gravity of the offence which was committed, there is no doubt that the Appellant abused the trust the Complainant had in him. The mere fact that the Appellant was the Complainant's grandmother's boyfriend, alone is aggravating.

[19] According to the testimony of Musila Rebecca Nhlapo, a Forensic Nurse, the Complainant sustained posterior fourchette scarring, increased swelling and bruising of the hymen ring with increased friability; annular swelling with two bumps. Even though the trial court stated in its judgment that the Complainant did not sustain any physical injuries, she presented vaginal injuries. The rape trauma will be with her for the rest of her life, even if the Victim Impact Report was not filed at the trial court, in my view the vaginal injuries are quite serious.

[20] In **S v M**¹, the court said:

*“Furthermore, the responses of rape survivors are as surely complex and multi-layered as are the individuals who experienced rape. You must therefore expect the manifestations of the impact of rape to be varied in every respect. Some responses will be publicly displayed and others privately endured. Some rape survivors will collapse while others bravely soldier on.”*²

[21] Rape is a repulsive crime. It is an invasion of the most private and intimate zone of a woman and strikes at the core of her person and dignity.³ In **S v Chapman**⁴, the court called it a ‘humiliating; degrading and brutal invasion of the privacy and the violation of a person’s dignity’. It further said that:

¹ *S v M* 2007 (2) SACR 60 (WLD).

² *Ibid* para 99.

³ *S v Vilakazi* (567/02) [2008] 87; [2008] 40 ALL SA 396 (SCA) 2009 (1) SACR 55 2 (SCA) (2012) (6) SA 353 (SCA) (3 September 2008).

⁴ (345/96) [1997] ZASCA 45; 1997 (3) SA 341 (SCA); [1997] 3 ALL SA 277 (A); (22 May 1997).

“Women in this country have a legitimate claim to walk peacefully on the streets to enjoy their shopping and their entertainment to go and come from work and to enjoy the peace and tranquillity of their homes without fear of the apprehension and the insecurity which continually diminishes the quality and enjoyment of their life.”⁵

[22] The trial court took into consideration the Appellant’s personal circumstances, and in its view, there was exceptional personal circumstances. It was very generous. The question is, did the trial court commit a misdirection or irregularity? If none exists, then this court is bound by the sentence imposed by the trial court.

[23] After careful consideration of all the relevant circumstances I could neither find that there are circumstances which justify the imposition of a lesser sentence than the sentence imposed by the trial court. There is nothing that persuades me to impose a sentence different from that imposed by the trial court. The sentence imposed is just and appropriate to this particular offence and there is no justification to tamper with it.

[24] Consequently, the following order is made;

1. The appeal against the conviction and sentence is dismissed.
2. The conviction and sentence of 25 years, imposed by the trial court, are confirmed.

S. CHESIWE, J

I CONCUR

C.J. MUSI, JP

⁵ Ibid para 4.

On behalf of the Appellant: Mr P Mokoena
Instructed by: Legal Aid South Africa
BLOEMFONTEIN

On behalf of the Respondent: Adv. AM Ferreira
Instructed by: Director of Public Prosecutions
BLOEMFONTEIN