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

APPEAL NUMBER: A37/2023

Reportable: YES/ NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/ NO

In the matter between:

SEBABETSANE ANDREW MOKUPI

APPELLANT

and

THE STATE

RESPONDENT

HEARD ON: 17 JULY 2023

CORAM: DAFFUE J *et* NAIDOO, J

JUDGMENT BY: NAIDOO, J

DELIVERED ON: 20 JULY 2023

[1] The appellant faced four charges, namely

1.1 Count 1 - Sexual Assault

1.2 Count 2 – Assault

1.3 Count 3 - Sexual Assault

1.4 Count 4 – Rape

1.5 The appellant was convicted on 24 October 2022, in the Regional Court sitting at Thaba Nchu, in respect of counts 3 and 4, and was sentenced on 26 October 2012 to life imprisonment, both counts having been taken as one for the purpose of sentence. The appellant approaches this court in terms of his automatic right of appeal, and the appeal lies against both his conviction and sentence. Mr P Van Der Merwe represented the appellant and Mr Lencoe represented the respondent.

[2] The Appellant's grounds of appeal against the conviction and sentence are, in essence, that the court *a quo* erred in:

2.1 finding that the state had proved its case beyond reasonable doubt;

2.2 finding that the complainant was a credible witness;

2.3 not considering that the rape incident was never reported by the complainant to either her relatives or the police, but only during consultation with the prosecutor;

2.4 drawing a negative inference in respect of the appellant's version and not making a credibility finding favourable to him;

2.5 attaching too much weight to the factors in aggravation (of sentence), over-emphasising same and not attaching any weight to the appellant's personal circumstances; and

2.6 finding that no substantial and compelling circumstances existed to justify a deviation from imposition of the prescribed minimum sentence.

[3] The appellant is the biological father of the complainant, whose mother passed away prior to the incidents relevant to this matter.

After the passing of her mother, the complainant stayed with her maternal aunt, but after allegations of abuse by the aunt, the complainant stayed with the appellant and his girlfriend, N[...] T[...] (N[...]), at the appellant's mother's home. The appellant and N[...] thereafter moved out to live in rented premises. The complainant went to live permanently with the appellant and N[...] in October 2021. The incidents in counts 3 and 4 occurred in December 2021 and January 2022 respectively. The incidents relevant to counts 1 and 2 were alleged to have occurred in September 2021. Due to the complainant being the only witness in respect of the sexual assault (count 1) and the assault (count 2), and the evidence that the complainant went to live with the appellant in October 2021, the court *a quo* was not satisfied that the state had proved its case beyond reasonable doubt in respect of those two counts and found the appellant not guilty in respect of counts 1 and 2.

[4] The state alleges in Count 3 that on or about 25th to 26th December 2021, the appellant sexually violated the complainant by touching her breasts and in Count 4 that on or about 14th to 15th January 2022, he raped the complainant by penetrating her vagina with his finger. The complainant was 14 years old at the time of the two incidents. The appellant's sister was one of the state witnesses who testified that N[...] and the complainant arrived at her home looking scared, and reported what the appellant had done to the complainant. N[...] had injuries, consistent with her version that the appellant had assaulted her when she confronted him about his conduct towards the complainant. N[...] herself testified for the state, confirming that she and the appellant had argued over his conduct towards the complainant, especially in view of the complainant's previous allegations of abuse of the complainant by him.

[5] The court *a quo* was aware of and reminded itself that the complainant was a single witness and a child, so that the court should observe the necessary caution when dealing with such evidence. The court undertook a detailed analysis of the evidence in respect of counts 3 and 4, dealing with inconsistencies and the fact that the complainant mentioned only to the prosecutor for the first time that the appellant had inserted his finger into her vagina. Her explanation for not mentioning to anyone else was that she was threatened by the appellant that he would kill her if she did. The court

accepted this explanation, in view of the fact that the complainant had not been successful in previously getting the attention she required in this matter. The court expressed the view that family members, in spite of the complainant's previous allegations, simply "swept the matter under the carpet". The complainant realised that the family would not believe her if she reported to them what the appellant had done. Therefore, the first time she mentioned it was to the prosecutor.

- [6] The court *a quo* weighed this against all the other evidence that had been led, and concluded that there was nothing sinister in this, nor did the court accept that the complainant was falsely implicating the appellant, as he alleged. The court found that the versions of the appellant's sister Manana Mokupi, N[...], and Kgape, the young friend of the complainant to whom she had reported what the appellant had done to her, lent corroboration to the version of the complainant that there were several incidents of sexually inappropriate behaviour on the part of the appellant towards the complainant, which fortified the version that she had proffered in court. Mr Van der Merwe argued that this should be a matter of concern and ought to cast doubt on whether this incident of rape did in fact occur. As I indicated, the court *a quo* dealt in detail with this aspect and found that the surrounding evidence and circumstances enabled the court to accept the complainant's version.

- [7] In this regard, the dictum of Mocumie JA in *Maila v The State*(429/2022) [2023] ZASCA 3 (23 January 2023) at para 1 is apposite:

"Rape remains under-reported nationally, but there may be no rapes more hidden than those committed within families. Sexual violence victims 'often experience a profound sense of shame, stigma and violation'. These factors are compounded by attempts from family members of the victim or the perpetrator to influence the victims not to file charges or, if charges have been filed, to withdraw the case so that the families can resolve the problem amicably. Often the perpetrator offers to pay the medical costs for the victim's medical treatment, including psychological treatment, and even maintenance of the family in cases of indigent families."

The complainant in this matter was in a very similar position, where the adult family members to whom she had previously reported the appellant's sexually deviant behaviour, took no action, leaving her with the impression that they did not believe her.

[8] The court *a quo* undertook a thorough analysis of the appellant's version, which was in essence, a bare denial of the allegations against him. The court found, after considering the totality of the evidence and applying the necessary caution with regard to the complainant's evidence, that the state witnesses were truthful and honest, and that the appellant's version is not reasonably possibly true and stood to be rejected as false.

[9] It is well established in our law that the trial court is tasked with analysing and evaluating the evidence, and that an appeal court is limited in its ability to interfere with the trial court's conclusions, and may not do so simply because it would have come to a different finding or conclusion. The trial court has the advantage of seeing and hearing witnesses, which places it in a better position than a court of appeal to assess the evidence, and such assessment must prevail, unless there is a clear and demonstrable misdirection. The appellate Division set this out in *S v Francis* 1991(2) SACR 198 (A), at p 204:

"This Court's powers to interfere on appeal with the findings of fact of a trial Court are limited (*R v Dhlumayo and Another* 1948 (2) SA 677 (A)...Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony" (other case references omitted). The court in *Dhlumayo*, which was cited with approval in *Francis*, stated at p705 [the majority per Greenberg JA and Davis AJA (Schreiner dissenting)]:

"The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness and being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing their demeanour, but also their appearances and whole personality. This should not be overlooked." A similar view was adopted in *S v Pistorius* 2014 (2) SACR 315 (SCA) par 30, which cited, *inter alia Dhlumayo* with approval:

“It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para 12. It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, *this court* is not at liberty to interfere with his findings.”

[10] Dhlumayo has been applied and cited with approval in a long line of cases since 1948. More recently, the SCA in *AM and Another v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA) applied the dicta in Dhlumayo as set out above.

[11] As I indicated earlier, the court *a quo* undertook a comprehensive analysis of the evidence. The court’s impression of the honesty and reliability of the complainant and other state witnesses, was correctly fortified by the many common-cause facts, which it detailed, *inter alia*, that the complainant went to live with her father and N[...] from October 2021 to January 2022, that prior to the incident in January 2022, there were already allegations by the complainant of sexual impropriety on the part of the appellant, that on the 14th January 2022, the complainant was alone in the house with the appellant as N[...] slept at the neighbours’ house, and that the appellant’s friend Zeke or Siki was also present in the house that night, visiting the appellant. I cannot fault the reasoning of the court in this regard and its conclusion that that it was satisfied that her evidence in respect of the rape and how it occurred was reliable and that despite her youthfulness, the requirements for the application of the cautionary rule were met.

[12] With regard to sentence, the appellant argued that the sentence of life imprisonment was inappropriate, as the court *a quo* failed to properly consider his personal circumstances and erred in not finding that substantial and compelling circumstances existed to justify imposition of a lesser sentence.

The appellant's circumstances placed on record are that he was at the time of commission of the offence, 37 years old, with four children. He is a first offender in respect of this type of offence. I mention that he has a number of previous convictions (approximately eight) in respect of other offences, ranging from theft to dealing in drugs, from 2000 to 2021. Prior to his arrest, he was casually employed, earning an amount of R800.00 per week, with which he supported his girlfriend and four children. The appellant was diagnosed with prostate cancer at the beginning of 2022. In his Heads of Argument as well as in oral argument in court, Mr Van Der Merwe argued that the complainant did not sustain physical injuries and there was no evidence of any lasting emotional trauma suffered by the complainant. The appellant was deserving of a lesser sentence. He suggested a term of imprisonment of 15 to 20 years.

- [13] In its Heads of Argument, the state supported the conviction and sentence in this matter, arguing that the court *a quo* properly took account of all the mitigatory factors relevant to the appellant's personal circumstances, and found that no compelling or substantial circumstances existed to justify its departure from imposing the prescribed minimum sentence of life imprisonment. Mr Lencoe argued the court took into account and analysed all the personal circumstances of the appellant. The court indeed emphasised that it had to perform the very difficult task of balancing all the various factors relevant for sentencing, and discharging its duty to ensure that there was protection and retribution as demanded by society. The court properly assessed the appellant's personal circumstances and concluded that it could find nothing substantial or compelling in the appellant's circumstances that warranted imposition of a sentence lesser than the prescribed minimum.
- [14] An appeal court is also limited in its ability to interfere with the sentence imposed by a trial court as sentencing is within the discretion of that court, unless an irregularity has been committed or the discretion of the court has been improperly applied. [See *S V Rabie 1975 (4) \SA 855 (A) at 857 D-F*] I can find no such irregularity or improper application of the trial court's discretion.

[15] The court *a quo* mentioned that the state had not proven permanent psychological trauma, but accepted that the events must have been traumatic to her. The complainant was not only crying during her testimony but confirmed that the incidents affected her school work. Unlike her friends that talked about their fathers, she was unable to do so. The court *a quo* correctly stated that the complainant had a right to be protected by her father, but that he was 'a wolf in sheepskin.'

[16] In *S v Tshabalala and another* 2020 (2) SACR 38 (CC) at paragraphs 1 and 63 respectively, Mathopo AJ, writing for a unanimous Constitutional Court bench remarked about the sexual violence by men whereby women in this country are relegated to second-class citizens. Also, that the scourge of rape has reached alarming proportions in our country and that joint efforts are required to curb this pandemic. The following principle is now accepted as the Supreme Court of Appeal stated in *S v Kekana* 2019 (1) SACR 1 (SCA) at paragraphs 39 to 42:

"[39] Due to the seriousness of the offences, it is required that the elements of retribution and deterrence should come to the fore, and that the rehabilitation of the appellant should be accorded a smaller role. His personal circumstances similarly have to bow to the interests of society. As pointed out in *S v Vilakazi* 2009 (1) SACR 552 (SCA) (2012 (6) SA 353; [2008] 4 All SA 396; [2008] ZASCA 87) para 58, in cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Without doubt, this is one of those cases.

[40] ...

[41] In *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) ([1997] 2 All SA 185; [1997] ZASCA 7) at 519c – e this court pointed out that, given the high levels of violence and serious crime in our country, when sentencing such crimes, the emphasis should be on retribution and deterrence Harms JA went on to explain, with reference to *S v Nkwanyana and Others* 1990 (4) SA 735 (A) at 749C – D, that in other instances retribution may even be decisive. See also *S v Nkambule* 1993 (1) SACR 136 (A) at 147c – e; *S v Swart* 2004 (2)

SACR 370 (SCA) paras 11 – 12; *S v Govender and Others* 2004 (2) SACR 381 (SCA) para 32.

[42] The upshot of all these authorities is that, whatever the appellant's complimentary personal circumstances and his prospects of rehabilitation, those pale into insignificance when weighed against the aggravating factors. In all the circumstances, I am of the view that life imprisonment on each of the murder counts is the only appropriate sentence.”

[17] In the circumstances, the following order is made:

17.1 The appeal against conviction and sentence is dismissed

17.2 The conviction and sentence imposed on the appellant are confirmed.

NAIDOO, J

I concur.

DAFFUE, J

On behalf of appellant: Adv PL Van Der Merwe
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On behalf of respondent: Adv. Lencoe
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