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

Case no: A44/2023

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

CIRCULATE TO MAGISTRATES: NO

In the matter between:

LEFA PAULUS THOMAS

Appellant

and

THE STATE

Respondent

CORAM: MOLITSOANE, J *et* MTHIMUNYE, AJ

HEARD ON: 31 JULY 2023

DELIVERED ON: 10 AUGUST 2023

JUDGMENT BY: MTHIMUNYE, AJ

This judgement was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand-down is deemed to be 13:00 on 10 August 2023

[1] The appellant was convicted on a charge of Housebreaking with intent to rape and rape in contravention of section 3 of the Sexual Offences and Related Matters Amendment Act 32 of 2007) read with the provisions of Section 51 of the Criminal Law

Amendment Act 105 of 1997(count 1); Housebreaking with intent to steal and theft (count 2) and Sexual assault in Contravention of section 5(1) of the Criminal Law Amendment Act 32 of 2007 (count 3). He was sentenced to life imprisonment in respect of Count 1, five years' imprisonment in respect of Count 2 and five years' imprisonment in respect of Count 3. The sentences were ordered to run concurrently. He enjoys an automatic right of appeal and appeals both the conviction and sentence.

Ad Conviction

[2] The appellant assails the conviction on the following grounds:

(a) That the trial court erred in finding that his identity was proved beyond a reasonable doubt and not considering that the offences took place at night or in the early hours therefore it would not have been possible for the complainants to positively identify him.

(b) That the trial court erred in not taking into account that cautionary rules were applicable because the complainant, in respect of count 1 was a minor and in Count 2 and 3 relied on the evidence of a single witness in so far as identity is concerned.

[3] M[...] P[...], the complainant in count 1 testified that on the night of 26th October 2014, after hearing someone walk in the house, woke up to find the appellant, who was wearing a white T-shirt and dark blue jeans standing in her room by the bed she shared with her younger brother. She knew the appellant as Kofifi and could see him well as the kitchen light was still on. The appellant got into the bed and the complainant told her little brother to go alert the elders. The appellant undressed her and penetrated her vaginally, when she tightened her thighs, he penetrated her anally. She tried to scream but the appellant covered her mouth with his hand. When the Appellant heard the complainant's brother T[...]1 P[...] talking and coming towards the house he stopped and that is when the complainant ran out of the house towards the Pastor's house, the appellant followed her and tripped her with his feet causing her to fall and

he fell on top of her. As T[...]1 approached, the appellant ran away. She was eleven years old at that time.

[4] T[...]1 testified that on the day of the incident at about 3am he was sleeping when he was woken up by T[...]2, one of his siblings and N[...], the younger brother screaming that the appellant was doing nasty things to his sister. He went out of the room and as he came towards the other door, the complainant was coming out of the room and the appellant was coming behind him. He came face to face with the appellant whom he had known for 7 years and grabbed him by the T-shirt. He also described the appellant's scar between his eyebrows. The appellant managed to free himself from his grip and chased the complainant. T[...]1 followed suit and chased after the appellant. When the appellant reached the complainant by the pastor's gate he tripped her, causing her to fall and in turn fell on top of her. T[...]1 tried to get some stones to throw at the appellant but he managed to escape and ran into a passage and got away. T[...]1 returned to the house and that is when the complainant told him that the appellant had penetrated her vagina and anus.

[5] Nomvuyo Jonas testified that on 26th October 2014 she went to bed around 02:00am in her uncle house. At about 3:30am she woke up to find the appellant next to her bed. Thinking it was her uncle and perhaps he had fought with his wife and needed some space to sleep, she moved over. The appellant got into the bed and started touching her buttocks and genitals. Knowing her uncle would never do such, she reached for her phone and turned on the light onto the face of the person. She saw the face and the scar between the eyebrows. The appellant then wrestled the phone from her as she was screaming her uncle's name and ran out of the room with the phone. As the uncle came, he met the appellant in the sitting room and there was a struggle until the appellant got away through the window. All doors had been and were still locked. The phone was found behind the couch. The following day the police called her to identify the appellant and she did as she remembered his face well.

[6] The fourth witness was Mr Mateto Cane Jonas, the uncle to Nomvuyo. He corroborated Nomvuyo's evidence in respect of being woken up by her scream and

met an unknown person by the sitting room. He grabbed him and they struggled a bit until the person managed to get out through a broken window. When he was outside and he observed that he was wearing a t-shirt. When they tried to call the police they discovered that his and his wife's phones, a Samsung Galaxy and a Huawei were missing. The phones were found in the appellant's possession by the police.

[7] The fifth witness was Ms Phokwane Maria Mosala, a forensic coordinator at Moroka Hospital in Thaba Nchu. She examined M[...] on 26 October 2014 at about 09:56 and completed the J88. The J88 depicted that the complainant had been penetrated and sustained injuries. The J88 was accepted as evidence with no objection.

[8] Sergeant Angus Faltimus Steyn was the state's sixth witness and he testified that on 26th October 2014 at about 10:00am he was approached with information about a rape suspect and given the address. On arrival he knocked and the appellant opened the door. He searched the shack and found two cell phones i.e. a Samsung Galaxy and a Huawei between the mattress and the base. He recovered them as he suspected they were stolen. He took the appellant back to the station and he found one of the complainants who pointed the appellant out as the rape suspect. He asked about the cell phones and they were positively identified by one of the complainants. He then arrested the appellant on the spot.

[9] The appellant denied all charges and claimed an *alibi*. His version was that on the night in question he was at a tavern playing pool. He left the tavern around 5am and on his way home met a certain Sbongile who sold him the two phones for R200. He knew both the complainant in count 1 and her brother as they stay on the same street and the complainant grew up before him. He admitted that they both also know him very well. He said T[...]1 had previously laid a complaint of rape against him for raping the same complainant and he had served 10 years for that. According to him, the reason they lay false charges against him is because they owed him money and did not want to pay him. He said he was circumcised when he was in prison in 2013

but they cut too much skin and his penis could not heal properly. As a result his penis hurts when he gets an erection and he could not have raped M[...].

[10] Under cross-examination he changed and said the rape charge was in respect of a lady next door not the complainant and it was not Mr T[...]1 who owed him money but the mother. Within a minute, he changed again and said the complainant had ganged up with other ladies to bring a charge of rape against him. The amount he bought the cell phones with also changed to R250 and the seller was now Mzwandile. It was no longer T[...]1 who had brought previous rape charges against him but M[...] with other group of girls.

[11] The appellant argues that the court a quo erred in finding that his identification was proven beyond a reasonable doubt as it relied on a single witness who could not have seen the attacker properly as it was night or early hours of the morning.

[12] It is settled law that the evidence of a single witness must be approached with caution. It is within the competence of a court to convict on the evidence of a single witness. In **S v Sauls and Others 1981 (3) SA at 172 at E-G** the court said the following:

“There is no rule of thumb test or formula to apply when it comes to consideration of the credibility of a witness...The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told... It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.”

[13] In **S v Mthethwa 1972 (3) SA 766 (A)**, the Appellate Division, as it then was, set out the following approach where identification is in dispute:

“Because 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 appellant, the mobility of the scene; corroboration; suggestibility; the appellant’s face, voice, built gait and dress; the result of identification parades; if any, and of course evidence by or on behalf of the appellant. 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 evidence and the probabilities.**”

[14] The factors listed in the above paragraph have to be considered in the light of the totality of evidence and the probabilities and they are not individually decisive, see **R v Dladla and Others, 1962 (1) SA 307(AD)**. In *casu*, M[...] had prior knowledge of the appellant. She could see the appellant properly as the kitchen light was on and there was no barrier between the kitchen and the bedroom they were sleeping in as the door only had a frame but no physical door. Her evidence was also corroborated in all material respects by that of her brother T[...]1 who testified that the appellant was wearing a t-shirt and blue jeans. In fact, he grabbed him with his t-shirt before he got away. T[...]1 also testified about the kitchen light being on and the appellant tripping the complainant and falling on top of her. Nomvuyo, the complainant in count 3 was also able to positively identify the appellant with the scars between his eyebrows.

[15] M[...] and Nomvuyo’s evidence ticks a majority of boxes in the Mthethwa test. The extract from **S v Sauls** is self-explanatory, the application of cautionary rules should not be allowed to trample on the use of common sense. There is no merit in the appellant’s arsenal against the findings of the court *a quo*.

[16] The appellant’s evidence on the other hand was fraught with inconsistencies and contradictions. He was evasive and argumentative and his evidence was just

everywhere. He seemed to be focused on getting sympathy from the court about his allegedly injured penis and him not being able to bury his mother because of these allegations. One minute he is related to Nomvuyo the next minute only to the wife of the uncle. The name of the person who sold him the phones was Sbongile when his version was put to the state witnesses and during cross-examination his name became Mzwandile. He was circumcised in prison in January 2013, under cross it was May 2013 and a minute later in was in September 2013. Throughout his evidence when caught out, he would simply plead a mistake.

[17] In respect of count 2, the stolen phones were found in his possession within hours of the theft and positively identified by the complainants. Further, both Nomvuyo and Mr Jonas testified that they locked the doors before going to sleep and the doors were still locked when the appellant escaped through a broken window. His version could under no circumstances be reasonably possibly true and this court must agree with the learned magistrate that his version stood to be rejected and finding that the state had proven the appellant's identity and the overall case beyond a reasonable doubt.

Ad Sentence

[18] The appellant assails the sentence on the basis that the trial court erred in finding that there were no substantial and compelling circumstances justifying a deviation from prescribed minimum sentence in respect of Count 1, overemphasizing the seriousness of the offence, the interest of the community and the complainant and giving no weight to the personal circumstances of the appellant. He is appealing to this court to reduce his sentence in respect of Count 1 from life imprisonment to twenty-five (25) years, from five years to three years in respect of Counts 2 and 3 respectively.

[19] It is trite that in an appeal against sentence, the appellate court must be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the appeal court can only interfere if the sentence imposed by the trial court is disturbingly inappropriate or if an irregularity occurred during sentencing (**S v**

Giannoulis 1975 (4) SA 871 (A); S v Malgas 2001 (1) SACR 469 SCA at para 12); S v De Jager and Another 1965 (2) SA 616 (A) at 629.

[20] The court *a quo* sentenced the appellant to a minimum sentence as prescribed by Section 51(1) of the Criminal Law Amendment Act 105 of 1997 which reads:

“Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life. ...”

[21] The charge with which the appellant was convicted of in respect of Count 1 is listed in Part 1 of Schedule 2 as follows:

“Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007-

(a) ...

(b) Where the victim-

*(i) is a person under the age of 16 years;
...”*

[22] Having been convicted of a rape of a person under the age of 16 years, the Appellant fell squarely into the ambit of Section 51(1) of Act 105 of 1977. It is a trite principle that courts can only deviate from minimum prescribed sentences where there are substantial and compelling circumstances to do so and these cannot be flimsy reasons (**S v Malgas 2001 (1) SACR 469 (SCA)**). The responsibility to present and prove the existence of substantial and compelling circumstances rests with the Appellant.

[23] The appellant contends that the court completely disregarded his personal circumstances, which if were duly considered, the court would have found them to constitute compelling and substantial circumstances on the basis of which the court could deviate from the minimum prescribed sentence. The question this court must answer then is whether or not the Appellant's personal circumstances as presented before the trial court, are substantial and compelling to justify a departure from a prescribed sentence.

[24] The appellant's personal circumstances were that he was 31 years old at the time of the commission of the offence, doing odd jobs that paid him between R150.00 to R250.00 a day. He was unmarried and has two minor children who were 7 and 12 years old then. The children stay with the appellant's sister as both his parents are deceased. He has previous convictions of rape and possession of drugs. At the time of sentencing, he had been in custody for one year and ten months.

[25] A critical duty of a sentencing court is balancing the Zinn triad i.e. the seriousness of the crime, the interests of society and the personal circumstances of the offender (**S v Zinn 1969 (2) SA 537 (A)**). It is inarguable that the offence for which the applicant was convicted is very serious. It is one of the most horrendous criminal acts the impact of which is severe and permanent. Even more aggravating when such an act is committed against a minor child. The impact of this act on the child cannot be understated. What is more saddening is that the child was raped in the safety of her home by a neighbour, someone she trusted and to whom she should be able to look up to for protection.

[26] The Constitutional Court in **S v Jansen 1999 (2) SACR 368 (C)** at 378 G – 379B, asserted this as follows

“Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society...The Community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect societal censure”.

[27] Courts of appeal, and more specifically the Supreme Court of Appeal has been consistent in upholding sentences of life imprisonment or lengthy sentences in cases of rape of children. In **Abrahams v S [2019] ZAWCHC 62**, the accused was convicted of rape of an 11-year-old and was sentenced to life imprisonment. On appeal, his sentence was confirmed. In **Konstabel v S [2020] ZAWCHC 75** the accused was convicted of rape of an 8-year-old child and was sentenced to life imprisonment. The Supreme Court of Appeal confirmed this sentence on appeal.

[28] In *casu*, the victim was a child below the age of 16 years (she was 11 years at the time of the rape). Further the appellant has a previous conviction of a similar nature. Clearly the first sentence did nothing to deter him, and it is quite clear that he has no or very little regard for the law. Having considered this and the decisions of other appeal courts as cited above, I agree with the learned Magistrate that none of appellant's personal circumstances, individually or cumulatively, constitute substantial and compelling circumstances for the court to deviate from the prescribed minimum sentence. The learned Magistrate, correctly so, sentenced the appellant to life imprisonment as prescribed in Section **51(1) of Act 105 of 1977**. This court finds no misdirection on the part of the learned Magistrate and therefore, there is no reason for this court to interfere with the sentence imposed in respect of Count1.

[29] The appellant further avers that the fact that the Complainant in Count 1 did not sustain serious physical injuries should have been considered as a mitigating circumstance by the trial court. Evidence was placed before the trial court that the victim sustained injuries as a result of forced penetration in a form of a J88. The appellant further tripped the victim, an 11-year-old, with his leg causing her to fall and sustaining abrasions on her elbow and knee. It puzzles this court therefore how the Appellant is making this averment. Be that as it may, even if this averment was true, the following provisions of **Section 51(3) (a) of Act 105 of 1977** provide an answer thereto:

“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:

1. ...
2. An apparent lack of physical injury to the complainant”

[30] Applying this provision, in **Maila v S (429/2022) 2023 ZASCA 3**, the Supreme Court of Appeal held that the fact that a victim did not sustain grievous bodily injuries does not constitute a substantial and compelling circumstance warranting deviation from the prescribed minimum sentence of life imprisonment. It follows therefore, that the assertion that these factors are substantial and compelling, must be rejected as it was, correctly so, by the learned Magistrate.

[31] Neither in the notice of appeal nor in the heads of argument did the appellant address this court on why it should interfere with the sentences in respect of Counts 2 and 3. I have considered same and similarly, found no misdirection on the part of the learned magistrate and as such no reason to interfere with the sentences imposed in respect of Counts 2 and 3 as they are neither shocking and there was no irregularity during sentencing. Resultantly, the appeal must fail.

Consequently, I make the following **Order**:

1. The appeal in respect of the conviction is dismissed.
2. The convictions in respect of Counts 1, 2 and 3 are confirmed.
3. The appeal in respect of the sentence is dismissed.
4. The sentences imposed by the court *a quo* in respect of Counts 1, 2 and 3 are confirmed.

D.P. MTHIMUNYE, AJ

I agree.

P.E. MOLITSOANE, J

Appearances:

For the Appellant: Mr D Reyneke
Instructed by Legal Aid South Africa
Bloemfontein

For the Respondent: Ms L Mkhabela
Office of the Director of Public Prosecutions
Bloemfontein