



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

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

Case Number: A55/2023

In the matter between:

NTSIKELELO SIMON DYWILI

Appellant

and

THE STATE

Respondent

CORAM: REINDERS, ADJP *et* VAN RHYN, J

JUDGMENT BY: REINDERS, ADJP

HEARD ON: 23 OCTOBER 2023

DELIVERED ON: 24 OCTOBER 2023

- [1] The appellant was arraigned in the Regional Court in Bloemfontein on a charge of rape of a minor boy, aged 12 years, in contravention of s3 of the General Law (Sexual Offences and Related Matters) Amendment Act ¹, read with the provisions of s51(1) of the Criminal Law Amendment Act. ²

¹ 32 of 2007.

² 105 of 1997.

- [2] Appellant pleaded not guilty but, having heard the evidence of the state witnesses and the appellant, the trial court on 30 November 2022 convicted him of rape and on even date sentenced him to imprisonment for life.
- [3] The appeal came before us by way of the appellant's automatic right of appeal in terms of s309 (1) of the Criminal Procedure Act³, read together with s10 and 43 (2) of the Judicial Matters Amendment Act⁴, by virtue of the imposed sentence of life imprisonment. This appeal lies against both conviction and sentence.
- [4] The nub of the state's version of events, as accepted by the learned magistrate, entailed that the complainant on the specified date went to the appellant (their neighbour) to request assistance with his mathematical home work. He went back home to fetch his books. Shortly after his return the appellant offered the complainant water to drink, where after the complainant could recall immediately feeling dizzy and disorientated. The accused anally raped the complainant and, upon arriving at home after some hours, the complainant's mother observed him to be sleepy, very emotional and upset. A report was later made by the complainant and a case of rape was opened against the appellant.
- [5] The appellant's grounds of appeal against his conviction (as contained in the appellant's application for leave to appeal), read as follows:

“1.5.1 The Court a quo erred in finding that the State proved its case beyond reasonable doubt.

1.5.2 The Court a quo erred in finding that the evidence of a single witness was satisfactory in all material respects;

³ 51 of 1977.

⁴ 42 of 2013.

1.5.2 The Court a quo erred in not placing enough weight on the contradictory versions of the complainant and his mother regarding the disagreement of the dog and not finding that they were hiding their motive to falsely implicate the appellant.

1.5.3 The Court a quo erred in accepting the evidence of the state and rejecting the evidence of the defence in finding that the appellant was not a credible witness and therefore rejecting the version of the Appellant as not reasonably possibly true;⁵

[6] In respect of the appellant's conviction, the learned magistrate provided a comprehensive typed judgment ("the judgment") which was annexed to the record and marked as "Exhibit E".⁶ In his judgment the magistrate fully summarised the evidence of the state witnesses and the appellant, both in respect of their evidences-in-chief, cross-examination and re-examination.

6.1 It is evident that the magistrate was well aware of the fact that the complainant was not only a single witness, but also a child witness. He applied the cautionary rules in his evaluation of the complainant's evidence and found him to be a good and reliable witness. The magistrate likewise deemed the rest of the state witnesses, having taken proper consideration of minor discrepancies between them, to be reliable.

6.2 The magistrate was not impressed with appellant's testimony and found his version to be "clearly opportunistic, unreliable and untrustworthy", with reference to several contradictions, improbabilities and discrepancies in the appellant's version. This included, amongst others, the ground of appeal heavily relied upon by the appellant in respect of his version that a false charge of rape was laid against him as an act of revenge relating to the complainant's dog. The magistrate in his

⁵ Record p 225-226.

⁶ Record (supplementary bundle) p 26-32.

judgment recorded that the appellant himself testified that the incident of the dog transpired only after the charge of rape was laid against him.

Appellant's version in all respects was rejected as being false. On that basis the magistrate found the state to have proven its case beyond a reasonable doubt.

- [7] It is trite that in the absence of an irregularity or misdirection by the trial court, a court of appeal is bound by credibility findings thereof, unless it is convinced that such findings are clearly incorrect.⁷

- [8] In my view the magistrate was correct in convicting the appellant as he did. There is no indication of any misdirection in respect of any relevant evidence. He took a holistic view of all the evidence tendered before him, applied the legal principles in considering the matter and the appellant's guilt, and comprehensively indicated his reasoning for finding the state to have proven its case beyond a reasonable doubt. Therefore, there is no basis upon which we should interfere with the conviction. The result is that the appeal against conviction should be dismissed.

- [9] As mentioned, the appellant was charged with and convicted of a count of rape to be read with the provisions of Act 105 of 1997, Part I of Schedule 2. The trial court was well aware of the principles enunciated in **S v Malgas**⁸ in respect of a deviation from the minimum ordained sentence of imprisonment for life. He considered same and declined to find any substantial and compelling circumstances.

- [10] The main thrust of the appellant's grounds of appeal in respect of his sentence entails that it is shockingly inappropriate and not proportionate to the offence committed, his personal circumstances and other surrounding circumstances. Moreover, it was submitted that the

⁷ See: **S v Francis** 1991 (1) SACR 198 (A) at 204c; **J v S** [1998] 2 All SA 267 (A) at 271c

⁸ 2001(SACR) 469 (SCA).

magistrate erred in his conclusion of not finding any substantial and compelling circumstances to be present.

- [11] From the record it is evident that the learned magistrate was well appraised of the time honoured triad in *Zinn*⁹, the purposes of sentence and the principles to be applied in arriving at a fair and just sentence:

11.1 The personal circumstances of the appellant were fully dealt with by the magistrate. The magistrate took into account that the appellant was a first offender who contributed to the financial needs of his minor children who resided with their respective biological mothers.

11.2 The magistrate considered the crime and the seriousness thereof. He alluded to the fact that the Victim Impact Report of the complainant indicated that the complainant after the incident "has no confidence left; does not want to leave the house; he is thinking about committing suicide as a result of this". The magistrate deemed it to be aggravating that the appellant was a neighbour of and in a trust relation with the victim but, instead of assisting the victim, raped the victim.

11.3 The interest of the community and the deterrence of would-be offenders were addressed by the magistrate and he, in my view correctly so, rejected the submission by appellant's legal representative that the absence of physical injuries to the appellant warranted a deviation from the prescribed minimum sentence.

- [12] It has long been established that sentencing is pre-eminently the prerogative of the trial court and a court of appeal should be careful not to erode this

⁹ *S v Zinn* 1969 (2) SA 537 (A).

discretion.¹⁰ Interference is warranted in the sentence where there has been a failure of justice, or when the court a quo misdirected itself to such an extent that its decision on sentencing is vitiated, or the sentence is so disproportionate or shocking that no court could have imposed it.¹¹

- [13] Mindful of the aforementioned principles, the submissions placed before us for interference with the sentence imposed by the trial court, were considered.
- [14] The magistrate considered all factors to reach a balanced and just sentence as indicated in para 11. It must be stressed that the seriousness of rape can never be overemphasized. Our courts have consistently condemned rape in the strongest expressions as an invasion of the dignity, privacy, integrity and personal freedom of the victim.¹²
- [15] The views expressed by the Supreme Court of Appeal in **S v MM**¹³ are apposite:

'It is necessary to reiterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way.'

¹⁰ See: **S v Rabie** 1975 (4) 855 (AD).

¹¹ See: **S v Boggards** 2013 (1) SACR (CC) at [4].

¹² See: **S v Chapman** 1997 (2) SACR 3(SCA).

¹³ 2013 (2) SACR 292 (SCA) at [17].

- [16] Moreover, rape of a vulnerable child is a reprehensible crime that can and should never be tolerated in a civil society.
- [17] Having applied the principles warranting interference with the sentence imposed by a trial court the magistrate can in my view not be faulted, resulting therein that the appeal against conviction should likewise be dismissed.
- [18] Accordingly the following order is made:

The appeal against conviction and sentence is dismissed.


C REINDERS, ADJP

I concur.


IVAN RHYNE, J

On behalf of the Appellant:

Instructed by:

Ms S Kruger

Legal Aid South Africa

BLOEMFONTEIN

On behalf of the Respondent:

Instructed by:

Adv M Lencoe

Director of Public Prosecutions

BLOEMFONTEIN