



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: A18/2023

In the appeal between:

MOTLALEPULE VINCENT RAMOHOLI

Appellant

And

THE STATE

Respondent

CORAM: REINDERS, ADJP et
JORDAAN, AJ

JUDGMENT BY: JORDAAN, AJ

HEARD ON: 02 OCTOBER 2023

JUDGMENT DELIVERED ON: 30 OCTOBER 2023

This judgment was handed down in open court and on even date circulated to the parties' representatives by electronic mail communication.

- [1] The Appellant was arraigned in and convicted by the Regional Court of this Division on a charge of rape of a 7 year old girl in contravention of section 3 of

the Criminal Law Sexual Offences and Related Matters Amendment Act 32 of 2007.

[2] On the 28th of November 2022 the court *a quo* sentenced the Appellant to life imprisonment.

[3] Aggrieved with his conviction and sentence, the Appellant, who has an automatic right of appeal in terms of section 10 of Act 42 of 2013, filed his notice of appeal on both conviction and sentence on the 30th of November 2022. I turn to deal firstly with the conviction and thereafter with the sentence.

[4] While in the notice of appeal and the written submissions filed on behalf of the appellant in this Court, the conviction was assailed on the following grounds:

"4.1 *The Court a quo misdirected itself in finding that the State proved its case beyond reasonable doubt;*

4.2 *The Court a quo erred in finding that the contradictions in the complainant's testimony are immaterial;*

4.3 *The Court a quo erred in finding that the contradictions in the complainant's testimony and those in the Doctor's J88 are immaterial;*

4.4 *The Court a quo erred in accepting the evidence of the complainant, not taking into account the contradictions between her evidence and the other State witnesses' evidence;*

4.5 *The Court a quo erred in not considering the contradictions between the complainant's oral evidence and her documentary evidence;*

4.6 *The Court a quo erred in accepting the evidence of the witness by the name of Kgotso Nkoi;*

4.7 *The Court a quo erred in rejecting the Appellant's version as not reasonably possibly true;*

4.8 *The Court a quo erred in not giving the Appellant the benefit of doubt and acquit him;*

4.9 *The Court a quo misdirected itself by allowing the State to reopen its case as a result, subjecting the Appellant to an unfair trial;*

4.10 *The Court a quo erred in accepting the J88 medical report whereas the doctor was not available to testify in that regard;*"

Counsel having had regard to the transcribed record and having considered it, departed from the stated grounds as having no basis.

- [5] Counsel assailed the conviction on the ground that the trial was rendered unfair through the comments made by the court *a quo* when it ruled on the admission of hearsay evidence at the re-opening of the State case as showing towards the court *a quo* having made a finding on the guilt of the accused, while the trial was still in progress.

- [6] This Court must determine the issue whether the comment disclosed bias of the court *a quo* and that the guilt of the accused was already determined in violation of the accused right to a fair trial as encapsulated in section 35(3)(c) of the Constitution¹.

- [7] The right to a fair trial has been described by the Constitutional Court as a "comprehensive and integrated right"² and is "not to be equated with what might have passed muster in our criminal courts before the Constitution came into force".³ The "impartial adjudication of both criminal and civil cases is a cornerstone of any fair and just legal system"⁴ and "an impartial Judge is a fundamental prerequisite for a fair trial".⁵

- [8] The test whether a judicial officer should be excluded from hearing a case by reason of a reasonable apprehension of bias was articulated by the Constitutional Court in the case of the **President of the Republic of South Africa v South African Rugby Football Union**⁶:

¹ Constitution of the Republic of South Africa Act 108 of 1996

² *S v Tshilo* [2000](11) BCLR 1252 (CC) at paragraph 9

³ *S v Zuma* 1995(4) BCLR 401 (CC) paragraph 16

⁴ *S v Basson* 2004 ZACC 13 (CC)

⁵ *S v Le Grange* 2008 ZACC 102; 2009 (2) SA 434 SCA at paragraph 21

⁶ 1999 ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) SARFU

"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of counsel."

- [9] In this matter according to the applicant the court *a quo* remarked that *"the South African Law Commission accepted that in South Africa the existing criminal procedure and rules of evidence made it exceedingly difficult to convict child abusers. They referred to a submission made by the Regional Court President of Kwazulu Natal who stressed that as a result of the problems regarding the rules of evidence guilty child abusers were acquitted possibly to commit a second more serious...with other children. The Commissions' report also provided details of a survey that was conducted on the incidence of convictions in cases of child abuse which were investigated by Addington Hospital which were investigated during the period 1985 to 1986 and according to these results there were only three convictions out of 42 cases where the child witness was under the age of six."* The appellant described this remark as an indication of being unfair or of bias in favour of the State.
- [10] This is however not "a remark or a comment" by the court *a quo*. It is a quotation read into record by the court *a quo* from research material on what hearsay evidence is, under what circumstances it should be allowed and what considerations a court should take into account in deciding whether or not to allow the hearsay evidence. This quotation was taken out of context. The quotation starts with the court *a quo* stating *"I am going to **quote** from the work by K D Muller and Van der Merwe....."*⁷ The court *a quo* explained that evidence from the J88 was already introduced by the defence attorney and the court *a quo* considering everything determined that it would not be in the interest of justice not to have all the material facts placed before it in the same J88 which was introduced into evidence by the defence.
- [11] That, in my view, does not amount to bias or the perception of bias when regard is had to what transpired. I am further satisfied that the court *a quo* was not

⁷Paginated Bundle transcribed record page 289 line 1

biased against the accused nor was its conduct of the proceedings such as to provoke a suspicion of bias. Having regard to the judgment, it is my view and a view that is patently shared by Counsel in this appeal, that the court *a quo* demonstrated an ability and indeed did conduct an objective analysis based on the facts and did not readily accept the evidence of the State, but evaluated it.

[12] I therefore find that there is no substance raised in the appeal on conviction and the appeal on conviction is accordingly dismissed.

[13] I now turn to deal with the issue of sentence.

[14] The Court *a quo*'s sentence was beset on the grounds that:

14.1 *The Court a quo over-emphasized the seriousness and the impact of the offence on the complainant;*

14.2 *The Court a quo did not consider appropriately the Appellant's personal circumstances but over-emphasized the seriousness of the offence;*

14.3 *The Court a quo erred in finding that there were no substantial and compelling factors to deviate from the minimum sentence of life imprisonment.*

[15] Counsel for the appellant further submitted that the sentence of Life imprisonment imposed is harsh, there were no serious physical injuries as this was not the worst kind of rape. It was further submitted that deterrence was over emphasized, while the appellant was a first offender, with a minor child.

[16] The jurisdiction of a court of appeal to interfere with the sentence imposed by a trial court is limited. In **S v Bogaards**⁸ **Khampepe J** stated:

'Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.'

⁸ [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41

- [17] The offence that the appellant was convicted of resort under Part I of Schedule two to the Criminal Law Amendment Act 105 of 1997 and attracts the sentence of Life imprisonment as provided for in section 51(1) of the Criminal Law Amendment Act 105 of 1997. In **S v Malgas [2001] 3 All SA 220 (A)**, the Court held as follows:

" Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances."

- [18] A reading of the sentence judgment reveals that the court *a quo* had regard to the nature and background of the case; the personal circumstances of the appellant; his employment history; the nature of his familial relationships, the fact that he has a minor biological child; his persistent denial of the crime and the fact that he is a first offender.

- [19] The court had regard to the impact of the rape on the complainant who at the time of the rape was only 7years old as well as the incidence of rape of children and the victim impact statement.

- [20] It is disconcerting that notwithstanding that the absence of physical injuries is not a factor constituting substantial and compelling circumstances, arguments in this regard still persists as was advanced by Counsel in this appeal which reminds this court of its duty to restate what was stated in **S v Chapman [1997] ZASCA 45** and recently quoted in the Constitutional Court case of **Tshabalala and the State⁹ by Mathopo AJ:**

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in the country are entitled to the protection of these rights. They have a legitimate

⁹ 2019 ZACC 48

*claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go to and come from work, **and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.***" (underlining and bold, my own emphasis)

[21] I can detect no misdirection in the court *a quo*'s approach to sentence. The offence, for the reasons cited above, is a particularly serious one. The personal circumstances of the appellant have been properly weighed against the seriousness of the offence and the interests of society. Far from inducing a sense of shock, the carefully considered sentence imposed by the court below strikes me as being one that is proportionate to 'the crime, the criminal and the legitimate needs of society'.

[22] That being so, I find that no basis has been established for this court to interfere with the sentence imposed by the court *a quo*. The appeal against sentence must therefore fail. I therefore make the following order: `

ORDER

[23] The appeal against both conviction and sentence is dismissed.



JORDAAN, AJ

I concur and it is so ordered.



REINDERS, ADJP

Appearances:

Counsel for Appellant:

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(ATTORNEY FOR APPELLANT)

Instructed by:

LEGAL AID SOUTH AFRICA
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Mr. D Pretorius
(FOR THE RESPONDENT)

Instructed by:

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