



IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

CASE NO: CA224/2021

In the matter between:

MM

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

Bloem J

[1] This appellant was charged in the regional court sitting at Aliwal North with rape, in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.¹ It was alleged that on 22 September 2019 and at Aliwal North he had raped a ten-year-old girl by inserting his penis into her vagina. Despite his plea of not guilty, he was found guilty as charged and sentenced to imprisonment for life. He now appeals against both conviction and sentence by virtue of the automatic right of appeal afforded him in terms of section 309(1)(a) of the Criminal Procedure Act.²

[2] The state called the complainant and her mother and the appellant testified in his own defence. It is common cause that, for approximately three to four months before the alleged incident, which is the subject matter of the appeal, the complainant, her younger sister, her mother and the appellant shared a dwelling

¹ Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2000).

² Criminal Procedure Act, 1977 (Act 51 of 1977).

consisting of a kitchen and bedroom. The appellant and the complainant's mother were in a love relationship. He was not the father of the complainant or her sister, although the complainant viewed him as a good father.

- [3] The complainant testified that after having had supper on the evening in question, her mother went to look for the appellant. She and her sister were left alone at home. Later that evening the appellant knocked on the door and she opened from the inside. After the appellant had entered the house, she returned to bed, which was on the floor. She shared the bed with her sister who was asleep at the time. The appellant asked where her mother was. She told him that she had gone to look for him. Although he had initially asked her for food, he dished up for himself. After eating, he switched off the light. He climbed under the blankets where she was, lifted her dress and pulled down her panty. By then, his pants were already down. He inserted his penis into her vagina and had sexual intercourse with her. She screamed and asked him to get off her, but he covered her mouth with his hand. She attempted to push him off her, but failed. He assured her that he would not hurt her. When he was done, he got up, walked away and returned with a washing rag with which he wiped her and his private parts. He threatened to kill her if she told anyone that he had had sexual intercourse with her. He went to sleep on a bed which he shared with her mother. She was waiting for her mother but eventually fell asleep. She woke up when her mother knocked on the door, which the appellant opened. Her mother enquired from the appellant whether he wanted food. He declined the offer of food. Her mother went to bed. She fell asleep.
- [4] When the appellant left the house the following morning, she made a report to her mother as to what the appellant had done to her the previous evening. When the appellant returned, she stopped making a full report to her mother, who said she was going to look for tobacco. Her mother then left the dwelling. The police arrived not long thereafter and took her and her mother to hospital where she was medically examined. The appellant was arrested on a charge of rape on that day.
- [5] The complainant's mother testified that she and the appellant had agreed that, after preparing supper for the family, she would go to the house of the appellant's

sister, where he was going to have some drinks. The idea was for him to have a meal at home. Before she left home at about 21h00, she told her two daughters to lock themselves in the house and not open the door, except for herself or the appellant. She then set off but did not find the appellant at his sister's home. After knocking at the door at home, the appellant opened the door. Upon her enquiry, he informed her that he had already eaten. She laboured under the impression that her daughters were sleeping. She and the appellant went to bed.

- [6] The following morning, after the appellant had left the dwelling to relieve himself, the complainant told her that the appellant had raped her during the previous evening. The appellant returned before the complainant had made a full report to her. She left the house and, with the assistance of her maternal aunt, she called the police. She returned to the dwelling. Shortly thereafter the police arrived. It was only when they were at the hospital that the complainant told her in detail what the appellant had done to her the previous evening. After the evidence of the complainant's mother, the medical report that Dr Vuyo Ntaba completed after he had examined the complainant on 22 September 2019, was handed into court by agreement as evidence. Dr Ntaba observed a torn hymen, streaks of bleeding in the complainant's vagina, inflamed labia minora and concluded that those factors would be suggestive of vaginal penetration. The state then closed its case.
- [7] The appellant testified that upon his return home after 21h00 on the evening in question, he opened the door, which was closed but not locked. He enquired from the complainant where her mother was. The reply was that her mother had gone to look for him. He went looking for the complainant's mother but did not find her. He returned home at approximately 22h00. He then had a meal, which the complainant's mother had prepared. He undressed himself and went to bed. The complainant's mother arrived at approximately 23h00. He opened the door for her but did not make any enquiries as to where she had been. They went to bed.
- [8] When he woke up the following morning, he went to relieve himself outside. Upon his return, the complainant's mother took his cell phone and went outside, saying that she was going to get something to eat from her aunt. Not long after

her return, the police arrived. He was still in bed. The complainant's mother called her to tell the police what the appellant had done to her. The complainant did not say anything to the police in his presence. The police questioned the complainant after which they placed the appellant under arrest. The appellant denied that he had raped the complainant.

[9] The magistrate found that the complainant and her mother were credible and reliable witnesses. She found that the complainant's version was supported in material respects by her mother's evidence as well as the medical evidence. The magistrate also warned herself about of the dangers inherent in the evidence of a child and a single witness and applied the cautionary rule applicable thereto. The magistrate also had regard to the good relationship between the appellant on the one hand and the complainant and her sister on the other hand, and that they loved and trusted him. The magistrate found that the appellant's bare denial was so improbable in the light of all the facts that it cannot be said to be reasonably possibly true. The magistrate accordingly rejected his evidence as false.

[10] In *S v Hadebe and others*³ the well-established principles governing the hearing of appeals against findings of fact were restated. They are that, in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct. Those findings will only be disregarded if the recorded evidence shows them to be clearly wrong.

[11] It has not been argued that the trial court misdirected itself. The main submission made on behalf of the appellant was that there was a possibility that the appellant was falsely implicated by the complainant with her mother's support. Counsel submitted that, because the complainant and her mother are related, "*there are chances that they can agree to falsely implicate the appellant*". In *S v Ipeleng*⁴ the dangers of convicting an accused person on the basis that he cannot advance any reason why the state witnesses would falsely implicate him were highlighted. Mahomed J (as he then was) held that an accused person bears no onus to provide any such explanation. That is so because the true reason why a state witness seeks to give the evidence he does is often unknown to the

³ *S v Hadebe and others* 1997 (2) SACR 641 (SCA) at 645e-f.

⁴ *S v Ipeleng* 1993 (2) SACR 185 (T) at 189c-d.

accused and sometimes unknowable. Many factors influence prosecution witnesses in insidious ways.

- [12] An analysis of the evidence shows that until approximately 21h00 on the evening in question, the complainant and her sister were in the company of their mother. They were alone after her departure until the appellant's arrival. That evidence is common cause. The appellant testified that the complainant and her younger sister trusted him. Had the complainant been sexually assaulted by a person before the appellant's arrival, the complainant would in all probability have made a report of such assault on her to the appellant, because she trusted him. That did not happen. Assuming, on the appellant's version, the complainant was sexually assaulted by a person after the appellant had left to look for the complainant's mother, the probabilities are once again overwhelming that the complainant would have made such a report to him. She did not. The probabilities favour the complainant's version that she was sexually assaulted by the appellant upon his arrival at home, whereafter he wiped her and himself before going to bed. The complainant's delay in making a report to her mother is also understandable. On her version, the appellant threatened to kill her if she told anyone about the rape. She accordingly did not make a report to her mother when she returned home on the evening in question, albeit that she was awake when her mother arrived at home. She made a report to her mother the following morning when the opportunity presented itself. The fact that she did not give a full report to her mother while they were at home is indicative of the fact that both she and her mother took the appellant's threat seriously, hence her mother's unusual way of alerted the police to the incident.
- [13] Since the appellant did not allege or prove that the magistrate misdirected herself, and since the record reflects that each finding made by the regional magistrate is supported by the facts, the appeal against conviction must be dismissed.
- [14] In mitigation of sentence, the magistrate was informed that the 46-year-old appellant has two children who are 16 and 17 years old respectively. Prior to his arrest, he was doing odd jobs as a bricklayer and also performing garden services from time to time, earning approximately R1 200 per month. The

appellant also admitted his previous convictions. On 14 December 1992 he was convicted of theft in respect whereof sentence was postponed for five years. On 26 March 1999 he was convicted of assault with intent to do grievous bodily harm and sentenced to 180 days' imprisonment. On 15 January 2007 he was convicted of selling drugs and sentenced to a fine of R300 or 30 days' imprisonment. On 26 February 2007 he was convicted of housebreaking with intent to steal and theft and sentenced to 10 months' imprisonment. On 19 January 2007 he was convicted of unlawful possession of drugs and sentenced to pay a fine of R200. On 24 March 2010 he was convicted of two counts of unlawful possession of drugs and sentenced to a fine of R300 or 30 days' imprisonment. On 11 April 2011 he was convicted of rape committed on 6 July 2008 and sentenced to 15 years' imprisonment.

[15] In *S v Bogaards*⁵ it was held that:

"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. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."

[16] The magistrate considered the appellant's circumstances. She also considered firstly, that rape was a serious offence; secondly, the circumstances under which the rape in this case was committed, namely that a person who the complainant trusted and loved, raped her in the safety of her home where she was sleeping next to her younger sister; and thirdly, the consequences of the rape on the complainant. The magistrate also took into account that the appellant showed no remorse for the offence that he has committed approximately five months after he had been released on parole for another rape. The appellant served eight years of the 15 years' imprisonment before he was released on parole. The magistrate concluded that the previous sentence in respect of the count of rape had no impact whatsoever on him. The magistrate found that there were no substantial and compelling circumstances which would justify the imposition of a lesser

⁵ *S v Bogaards* 2013 (1) SA 1 (CC) at para 40.

sentence then imprisonment for life. She accordingly imposed that sentence.

[17] I have been unable to find any fault with the magistrate's findings or conclusions in respect of the sentence that she imposed on the appellant. Regard being had to the circumstances under which the complainant was raped, I am of the view that the sentence imposed by the magistrate was fair towards the interests of society and the appellant's personal circumstances. In the circumstances, the appeal against sentence should also be dismissed.

[18] In the result, the appeal against conviction and sentence is dismissed.

GH BLOEM
Judge of the High Court

I agree.

OH RONAASEN
Acting Judge of the High Court

For the Appellant:

Mr MT Solandi, instructed by Legal
Aid South Africa, Makhanda.

For the State:

Mr T Soga of the office of the Director
of Public Prosecutions, Makhanda.

Date heard: 17 May 2023.

Date of delivery: 23 May 2023.