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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number A77/2021

REPORTABLE: YES/NO
OF INTEREST TO OTHERS JUDGES: YES/NO
REVISED

DATE: 11 JANUARY 2022

In the matter between

TINASHE DANGA

APPELLANT

VERSUS

THE STATE

RESPONDENT

JUDGMENT

MAKWEYA AJ

INTRODUCTION:

1. The appellant appeared before the Regional Magistrate, Springs, charged with

rape in terms of section 3 of the Sexual Offences and Related Matters, Act 32 of 2007. He was found guilty and he was sentenced to Life Imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997. Although he appealed his conviction and sentence, in terms of 309(1)(a) of the Criminal Procedure Act 51 of 1977 the appellant has an automatic right to appeal his conviction and sentence.

THE FACTS

2. C[...] T[...] was the mother of the complainant. She testified that on 19 November 2018 at around 18h00, the complainant arrived home from school. She and her husband confronted the complainant and were adamant to know why she had come home late. The complainant explained that she and a friend came from U-Safe (typed "Usays") where they had gone to buy a cake. When her husband threatened her with a hiding, she reported that she was raped on two occasions by the Appellant, also known to her as Sutsu. These incidents took place at Appellant's shack. They proceeded to lay a charge against the Appellant after the complainant was medically examined and the doctor confirmed that she was sexually violated. The doctor testified that the complainant had a medical condition and that she could not hold wind due to her being anally penetrated.

3. The incidents happened on the two occasions, the 18 August 2018 and the second one on the 19 October 2018. On both incidents the complainant did not inform her parents about the rape. The Complainant only informed her parents about both incidents on the 19 November 2018 for the first time. She stated that she was afraid the Appellant will kill her as he had threatened her after both incidents.

4. The complainant, N[...] M[...], testified that her friend Eliza, asked her to accompany her to the Appellant's house to fetch a phone. When Eliza asked for the phone, the Appellant called her and said, they must come and do "stupid things". She thought they were playing as she did not understand what he was talking about, however, Eliza responded saying the 'Appellant must start with N[...]'. Thereafter she

was pushed on the bed, her one hand and feet were tied to the bed while she was laying on it. She was lay on her stomach and she was also blindfolded and undressed. A person then penetrated her anally and had sexual intercourse with her. She was thereafter threatened with death by the Appellant should she inform anyone about the incident. The appellant and Eliza were enjoying each other's company and she could be heard saying 'it's nice' while the complainant was still blindfolded and sexually assaulted by the Appellant.

5. The second incident happened when she was from school, and she was thirsty, she went to ask for water from the wife of Appellant's brother. Appellant was however alone at the house at that time when she requested water. The Appellant asked her to come inside the house, he then locked the gate and pushed her onto a bed. She was tied and her head was covered like the first time. She was also sexually assaulted anally. The Appellant again threatened to kill her should she say anything. She did not tell her parents immediately about the incidents and only did so on the day she arrived late at home on the 19 November 2018, when she was confronted for being late.

6. During cross examination of the complainant's mother she testified that the complainant was beaten twice by her father before she could tell them about the rape incident by the Appellant.

7. However, during cross-examination of the Complainant, she testified that she was not beaten by her father as she told them what had happened immediately when he was about to beat her. She told them about the incident with the Appellant because her parents did not believe her as they kept on saying she was dating someone. She further testified that she did not see what happened to Eliza because she was blindfolded, but she heard her saying it was nice. She heard that after the Appellant was done raping her and thereafter the blindfold was removed from her face. She did not see who removed it, however, the Appellant and Eliza were in the room with her.

8. It was also put to her that the Appellant was informed by the community that

complainant was raped on the 19th of November 2018, the same day when he was arrested. The complainant denied that she reported that she was raped on the day of the arrest of the Appellant. The appellant did not cross examination the witnesses any further with the crucial evidence before court and he did not even cross examine the doctor with regard to the injuries he testified about.

9. Appellant testified that on the 19th of November 2018 he went to work and only learned that he was accused of rape of the Complainant after he knocked off duty. It was said that the complainant came from his place and her bum was bleeding. He went to complainant's house where the mother of the complainant accused him of rape. According to her, the rape took place that day. He denied that the complainant came to his place during August and October 2018. He nevertheless stated that the complainant and Eliza came to his house in March 2018 to collect a phone that was charged there, but denied that he raped the complainant. He further stated that his brother and his wife were also present when the phone was collected. The Appellant did not take his evidence further.

10. During cross-examination the Appellant testified that the mother of the complainant said the complainant was coming from his house, but when she testified, she said the complainant was coming from U-Safe shop. He stated that he had a close relationship with the complainant and her parents. However, the complainant's mother falsely implicated him, because she wanted him to drink alcohol and wanted him to have girlfriends. Further, the Appellant went on to say that the complainant's mother conspired against him and the complainant did not have any problem with him.

11. **THE ISSUES**

12. The issue is whether the conviction and sentence was inappropriate and, further, whether the trial court misdirected itself in finding that there were no substantial and compelling circumstances entitling it in terms of section 51(3) of the Act to deviate from imposing the prescribed minimum sentence.

13. THE LAW

14. A court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies.

15. The trial court treated the evidence of the complainant with caution, because she was a young single witness on the aspect of rape. Even where there were some minor discrepancies between her evidence and the evidence of her mother. The discrepancies in the evidence of the complainant and her mother were properly considered by the learned regional magistrate.

16. The doctor's findings and the evidence of complainant provided corroboration in material respects for the credibility of her evidence. Doctor Thobejane stated that her observations showed that the Complainant was anally penetrated and her sphincter was damaged to an extent that she could not hold air, as a result it made her uncomfortable. The evidence of Dr. Thobejane was consistent with the evidence of the Complainant that she penetrated in the anus.

17. The question of whether the allegation was made voluntarily is a factual one and depends on the circumstances of each case. The Complainant was not pushed to implicate the Appellant in anyway. She was merely asked why she came home late and she was threatened with beating by her father, there was no mention of the appellant or any question about the rape from her parents. Everything she told them was voluntarily. Even though her mother testified that they suspected that she was dating and that she was allegedly beaten twice by her father. There was no mention of the appellant's name from them except from the complainant herself. Therefore, it cannot be said by the Appellant's counsel that the complaint was not voluntary. The trial court dealt with this

issue well, by finding that the complainant was not influenced in implicating the Appellant.

18. Despite the Appellant's denial that the Complainant and her friend came to his place on the days stated above, he admitted that they once came to his place in march 2018 to collect a phone which was left by Eliza to be charged by the Appellant. The facts which are similar to what the complainant told her parents when confronted by her father.

19. The Appellant's Counsel submitted in paragraphs 19-23 in heads of argument that the Honorable Court should draw a negative inference against the state for its failure to call Eliza as witness. The Respondent submitted that such an inference can only be made if the witness was available (at court) and not called by the state. In this instance such inference cannot be made, because the witness was not available and could not be traced.

20. Counsel further submitted that the State did not prove that penetration of the complainant took place without her consent. It is submitted that the circumstances under which the complainant was raped does not leave room for any other inference than that it was without consent. The Appellant's Counsel also argued that should we find that the Appellant had sexual intercourse with the complainant such should be taken as consensual sexual intercourse with her.

21. The Respondent submitted the Court must further take into consideration that anal penetration took place and that it is unlikely that the complainant would have consented to this. Furthermore, if it happened with consent it would not have been necessary for the Appellant to threaten the complainant that he would kill her if she mentioned it to anyone.

22. The Respondent's Counsel submitted that the circumstances under which the complainant was raped does not leave room for any other inference than that it was

without consent. The Court must further take into consideration that anal penetration took place and that it is unlikely that the complainant would have consented this. Furthermore, if it happened with consent it would not have been necessary for the Appellant to threaten the complainant that he would kill her if she mentioned it to anyone.

23. I agree with the argument of the respondent's counsel, that there could not have been consent, looking at the evidence given at trial court and the circumstances at which this incident happened, the blindfolding, anal penetration, death threats made and the age of the complainant and that of the Appellant. I am in agreement that the complainant was raped and the defence of consent an afterthought as there was overwhelming evidence against him in court.

24. It is true that the court must evaluate the evidence before it in its totality and judge the probabilities in the light of all the evidence as the trial court arrived at in its judgement. When the trial court looked at the evidence in totality it did not find any material contradictions between the evidence of the complainant and her mother. The court admitted that there were contradictions but it had to understand the circumstances it was coming from and whether it affected their credibility in a negative way. It found that the fact that the complainant said she went to U-save or pick and Pay cannot affect her credibility in a negative way.

25. The fact whether she was first hit by her father before she could talk or whether she was not hit, she just talked about the threat or being assaulted. The court looked at that and it accepted that the evidence of the complainant is true, that she at some stage went to the Appellant's place with Eliza. The court found that there was no motive to implicate the appellant by the complainant except that he was in the same room with her and Eliza when she was raped in her anal. Further to that there was no evidence before it that suggested that the complainant's family tried to influence her to implicate him.

26. In the circumstances, the court *a quo* found correctly that the only reasonable inference to be drawn from the established facts was that it was the Appellant who had raped the complainant. I can therefore find no fault with the court *a quo*'s reasoning or with its conclusion, that the state proved beyond reasonable doubt that the appellant had raped the complainant. I recommend that the appeal against the conviction be dismissed.

27. SENTENCING

28. The prescribed minimum sentence of life imprisonment is applicable due to the fact that the complainant was 12 years old at the time of the incident. It is conceded that the rape of a child is a serious offence and there is an obligation on our legal system to deal with such offences appropriately. It is submitted that a substantial period of direct imprisonment is called for in most of these cases.

29. The appeal court has to determine whether the trial court misdirected itself in finding that there were no substantial and compelling circumstances entitling it in terms of section 51(3) of the Act to deviate from imposing the prescribed minimum sentence. In determining whether or not substantial and compelling circumstances were present, the trial court relied on the personal circumstances of the appellant as stated in the pre-sentencing report and victim assessment report compiled by a Social Worker.

30. The Appellant's Counsel submitted that although the appellant was 24 years of age he cannot be regarded as immature, he still has the prospect of a long productive life ahead of him. Life imprisonment is the most severe sentence that a court can impose. It is intended to endure the length of the natural life of the offender and leaves no room for rehabilitation. The appellant can still rehabilitate and integrate into society as a useful member of the community.

31. The Respondent's Counsel submitted that the sentence is supported by the evidence of the doctor and complainant, it is respectfully submitted that the court *a quo*

did not misdirect itself or commit a serious irregularity in evaluating all the relevant factors with regard to sentence, and that the sentence is also not disproportionate or shocking. He submitted that the appeal against sentence should be dismissed.

32. The Supreme Court of Appeal in *S v Malgas 2001(1) SACR 469 (SCA)* at paragraph 25(1), laid down the determinative test in order to establish whether or not there are substantial and compelling circumstances to deviate from minimum sentences:

“If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.”

33. Further to that, in *Malgas* it was stated that in determining whether the prescribed sentence is proportionate to the particular offence, a trial court looks to the offence in the context of whether the circumstances render it unjust and disproportionate to impose the sentence. In this context the “offence” as stated *S v Dodo 2001(3) 382 (CC)* at para 3

“consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.” If on consideration of the sentence it would be unjust and disproportionate, then the court is obliged to impose the lesser sentence.

34. The Appellant’s Counsel, stated in his heads of argument that, it is conceded that comparative case law is not binding on the Court, it is however submitted that widely divergent sentences for similar cases are not ideal in any criminal justice system. [See: *S v McMillan 2003 (1) SACR 27 (SCA)* at paragraph 10.]

35. In *S v MM*; *S v JS*; *S v JV* 2011 (1) SACR 510 (GNP), The Court reduced the sentences as stated in the following paragraphs:

36. In *S v MM*, the appellant was convicted on rape of his 12-year-old stepdaughter in their family home. On appeal the sentence of life imprisonment was set aside and a sentence of 12 years' imprisonment was imposed.

37. In *S v JS*, the appellant pleaded not guilty and was subsequently convicted to life imprisonment. On appeal the court found that it was not dealing with the category of the worst rape. The sentence of life imprisonment was set aside and a sentence of 12 years' imprisonment was imposed on appeal.

38. In *S v JV* 2011 (1) SACR 510 (GNP), the appellant was convicted of two counts of rape of his two daughters. The two sentences of life imprisonment were set aside and replaced with two sentences of 15 years' imprisonment, which were ordered to be served concurrently.

39. In this case, the appellant presented the following personal circumstances at the time of the incident, he was 24 years' old, he had no previous convictions, he has no formal education but was gainfully employed as a builder and he spent 21 days short of 2 years in prison pending the outcome of the trial. As per the pre-sentence report stated that he was a good boy who had a good relationship with his siblings and he was taking care of his mother and unfortunately she died on the 24 August 2020.

40. I am of the view that the injuries sustained during the sexual assault were serious, and that it was aggravating that the appellant penetrated the complainant anally on two occasions. This calls for a lengthy term of imprisonment. However, while life imprisonment is the prescribed sentence, having regard to the trite principles in *S vs Zinn* discussed above and the cumulative effect of those principles and the personal circumstances of the appellant, I find that the learned Magistrate misdirected himself by imposing life imprisonment.

41. Dr. Thobejane testified that the complainant's anus did not have injuries but there was poor hygiene. Further to that, there was funneling and cupping, she could see rectal pink mucosa. There was no hard faeces in the rectum, but there was laxity and the tone of the anus was decreased, though her conclusion was that the anal findings were consistent with chronic anal penetration. She further testified that funneling is when the shape of the anal cavity looks like a funnel. It is a bit dilated in the exterior and it is a bit narrowed towards in the inside. She also testified that the way the anus was injured, when you touch it and it automatically dilated while it's supposed to be closed under normal circumstances. As a result of the anus which was dilated and not closed as it is supposed and the Complainant could not hold the air due to chronic anal penetration.

42. Respondent's Counsel, further stated in his heads of argument that the complainant suffered physical injuries that did not receive medical attention, because her parents did not have the financial means to help her, which the Doctor also confirmed during her evidence that the complainant was not attended by a surgeon to assist her, as her parents did not have money. It appears that, for the same reason, she also did not receive counselling for her psychological problems.

43. The learned magistrate and the victim impact report did not deal further with the consequences of the injury after Dr. Thobejane had recommended a review of the complainant's injuries having regard to his observations. The assault took place August to October 2018 and the appellant was sentenced on 29 October 2020 being two years later. No evidence was tendered as to whether after such lengthy period, the complainant still required a review to establish whether reconstructive surgery was still required, whether the complainant still had problems passing wind, or problems regarding containment of faeces in the anus. No evidence was tendered as to whether or how the injuries impacted the complainant physically growing into adulthood. The only information available is that Dr. Thobejane who testified that the mother had informed him that the complainant had not been to review due to lack of funds.

44. Although the crime committed by the Appellant was serious, in considering sentence the court quo should have regard to the triad principles in by S vs Zinn 1969 (2) SA 537 (A). Those principles and personal circumstances of the appellant taken together and also what was raised in the pre-sentence report gave rise to substantial and compelling circumstances being present.

45. In conclusion the sentence of life imprisonment imposed by the trial court is inappropriate in the circumstances and warrants interference on appeal. It is my view that had the trial court taken all the circumstances cumulatively into account, it should have found that substantial and compelling circumstance were present which called for a sentence other than life imprisonment for rape.

46. In the result the following order is made:

- 1, The appeal on conviction is dismissed,
2. The appeal on sentence is upheld. The sentence of life imprisonment is set aside and substituted with a sentence of 25 years' imprisonment which is antedated to 29 October 2020.

MAKWEYA T
(ACTING JUDGE OF THE HIGH COURT)

I agree,

TLHAPI V. V
(JUDGE OF THE HIGH COURT)

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Date of hearing — 05 AUGUST 2021

Date of Judgment: 11 JANUARY 2022