

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

Appeal number: A156/2021

In the matter between:

KENNETH PAPASHANE

Appellant

and

THE STATE

Respondent

CORAM:

LOUBSER, J *et* MPAMA, AJ

HEARD ON:

25 APRIL 2022

DELIVERED ON:

12 MAY 2022

JUDGMENT BY:

MPAMA, AJ

[1] This is an appeal by the appellant against his conviction and sentence. The appellant was convicted of rape and sentenced to life imprisonment by the Kroonstad Regional Court on the 28 May 2021.

[2] In view of the appellant's life imprisonment , the appeal is before us on the basis of s 10 of the Judicial Matters Amendment Act¹, in terms of which the appellant has an automatic right to appeal his conviction and sentence. In the written submissions filed on behalf of the appellant, counsel raised three grounds of appeal:

1. That the Court *a quo* erred in finding that the State proved its case beyond reasonable doubt.
2. That the Court *a quo* erred in finding no substantial and compelling circumstances.
3. That the sentence of life imprisonment is shockingly harsh and inappropriate.

[3] At the commencement of the trial the appellant admitted having had consensual sexual intercourse with the complainant.

The facts of this case are as follows:

On the fateful day, the complainant, MB, 15 years old at the time went looking for her mother who had visited another homestead. She left her place at about 18h30. On the street she met the appellant, a gentleman well known to her as her friend's boyfriend. Appellant grabbed her and started dragging her to his place. When they reached his place she resisted getting inside his shack. Appellant slapped her and then pushed her inside the shack. She was clad in a dress and some tights. She also had an undergarment. Appellant undressed her and had sexual intercourse without her consent. When the appellant was done, the complainant got dressed and proceeded home. Upon arrival she found her mother. She was crying and reported to her that she was raped by the appellant.

[4] Complainant's mother testified that the complainant arrived home and was crying bitterly. She enquired from her as to what was wrong and without hesitation complainant reported that she was raped by the appellant. Charges were laid at the police station and the complainant was also taken to the hospital. Complainant's friend, LT also testified. She denied that she had a

¹ 42/2013.

relationship with the appellant. She admitted that she had no knowledge of a relationship between the complainant and appellant. A J88 was handed in. Of note is that the doctor concluded that the clinical findings were consistent with rape. This concluded the State's case.

- [5] The version of the appellant as put to witnesses and testified on by him was that he was in a relationship with the complainant and they had consensual sexual intercourse as they were in a love relationship. Appellant testified that the complainant had agreed to visit him at his place on the day in question at about 12h00, however she did not honour this arrangement. At about 18h00 he met the complainant by chance on the street. Complainant offered to go with him to his place. They then walked to his place and eventually had consensual sexual intercourse. Furthermore it was put to the complainant that the appellant's brother and his friend were present in the yard when he came in with the complainant. They passed them as they entered the shack with the complainant. Surprisingly appellant testified that when he entered the shack with the complainant, his brother and his friend were at a nearby house, however facing the direction of their residence.
- [6] He went further and testified that the complainant wanted to be with him so much that evening, despite the fact that he told her that he was staying with his girlfriend and mother in the house. She insisted that she wants to be with him. On her suggestion he went inside the house to check what his girlfriend and mother were doing and to establish if he will succeed to sneak in the complainant without them noticing. He left the complainant outside, got inside the house and checked his mother and girlfriend. He went back to the complainant and they both got inside the shack without being noticed by them. It bears emphasising that this was never put to the complainant.
- [7] He testified that complainant is falsely implicating him because when their relationship started they were both seeing other people and complainant now wants him to end his relationship with his other girlfriend. On the same breath it was put to the complainant that she is falsely accusing the appellant because her mother was looking for her that evening as it was late at night.

- [8] The issue to be decided in this appeal is whether the trial court was correct in accepting the version of the State and rejecting that of the appellant. The appeal court is not at liberty to interfere with the trial court's factual findings. It shall interfere with those findings only when there are demonstrable, material misdirections and clearly erroneous findings.

The trial court was seized with the evidence of a single witness who is also a child witness. Section 208 of the Criminal Procedure Act² provides that a court can convict an accused on the evidence of a single witness. An application of cautionary rules to the evidence of a single child witness requires the court to be satisfied that the evidence of this witness is clear and satisfactory in all material respects; and that despite any shortcomings, contradictions and defects it is reliable and the truth has been told. (See *S v Mokoena*³, *Sauls & Others*⁴ and *Woji v Santam Insurance Co LTD*⁵. This court is satisfied with the trial court's finding that this witness was an honest and impressive young witness. Her evidence cannot be faulted. In the court's view she surpassed the standard of evidence required of a single child witness.

- [9] Even though there is no requirement that the evidence of a child witness should be corroborated, corroboration of any evidence enhances reliability. Her mother corroborated her evidence regarding her condition when she arrived at home; she was crying bitterly and immediately reported that she was raped by the appellant. This behaviour is inconsistent with the actions of someone who had just had consensual sex with her boyfriend. The J88 also adds some credence to complainant's version.

- [10] The appellant denied that he raped the complainant. He admitted intercourse and claimed that it was consensual. The Court *a quo* rejected this version of the appellant as not being reasonably possible true. The trial court was correct in doing so. The appellant contradicted his own version on material issues regarding what happened on this day. It was put to the complainant that his

² 51/1977.

³ 1932 CPD 79.

⁴ 1981(3) SA 172.

⁵ 1981 (1) SA 1020 (A).

brother and his friend were on the premises when he entered with the complainant and they passed them. Surprisingly appellant in his testimony said they were at a nearby house, facing in their direction and they might have seen them. His version that at complainant's suggestion he got inside the house, leaving her outside in order to check if they were in a position to sneak in without being noticed by his stay in girlfriend and mother was never put to the complainant.

[11] As a reason for the complainant to falsely implicate him, the appellant proffered two reasons: That she laid the charges because he did not want to breakup with his other girlfriend and that her mother was back home and looking for her as it was late.

[12] It is trite that the State bears an onus of establishing the guilt of the appellant beyond reasonable doubt and the converse is that he is entitled to be acquitted if there is a reasonable possibility that he might be innocent. (See *R v Difford*)⁶. The trial court was correct in finding that the State had proven the guilt of the appellant beyond reasonable doubt and convicted the appellant of rape.

[13] I now turn to deal with sentence. It is trite that an appeal court can interfere with sentence only where the sentence is affected by an irregularity or misdirection and the sentence imposed is so inappropriate that it induces a sense of shock. It was argued on behalf of the appellant that the court should have considered the fact that the appellant spent four years awaiting trial and deviate from life imprisonment. The appellant was convicted of rape falling within the ambit Section 51(1) of the Criminal Law Amendment Act⁷, and sentenced to life imprisonment as the trial court found no substantial and compelling circumstances.

[14] It is so that the court is allowed to deviate from this sentence if it is satisfied that there are substantial and compelling circumstances warranting deviation.

⁶ 1937 AD 370.

⁷ 105 of 1997.

It has been said in *S v Malgas*⁸ that the court is to refrain from deviating from this sentence for flimsy reasons. The test to determine this is whether the imposition of this sentence is indeed proportionate to the particular offence.

[15] It was argued on behalf of the appellant that he spent a period of four years awaiting trial and that constitutes substantial and compelling circumstances warranting deviation from the prescribed sentence.

[16] The trial court on consideration of sentence took into account the personal circumstances of the appellant. That at the time of sentencing he was 30 years old, employed at Country Meat, Kroonstad and with two previous convictions of assault with intent to do grievous bodily harm and murder.

[17] It is also evident from the record that the seriousness of the offence as well as the interests of the community were considered by the trial court. The offence of rape in *S v Chapman*⁹ is described as a 'humiliating, degrading, and brutal invasion of the privacy, the dignity and the person of the victim'. The complainant was a young girl, whose only sin that day was to walk on the street in search of her mother. Appellant was at the time a grown up man who took an advantage of a 15 year-old girl. There is therefore no doubt that the offence is a very serious offence.

[18] As for the argument regarding the time spent awaiting trial, the SCA approached this issue as follows in *S v Radebe*¹⁰ "the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing is a just one". The fact that the appellant spent a period of four years awaiting trial cannot in isolation be considered a substantial and exceptional circumstance.

⁸ 2011(1) SACR469 (SCA).

⁹ 1997 (3) SA 341(SCA).

¹⁰ 2013 (2) SACR 165.

The court is still required to determine if the prescribed sentence is proportionate to the crime.

[19] Rape in itself is a heinous and repulsive crime with far reaching consequences for the victim. The sentence which was imposed by the trial court fits the appellant, the crime and serves the legitimate interests of the society. I cannot find that the trial court was incorrect in finding that there were no substantial and compelling circumstances that warrant any other punishment than life imprisonment.

[20] In my view the appeal against sentence must fail.

In the premises, the following order is made:

1. The appeal against conviction and sentence is dismissed.

MPAMA, AJ

I agree and it is so ordered

LOUBSER, J

On behalf of Appellant:

Adv S Kruger

Instructed by:

Legal Aid South Africa
Bloemfontein

On behalf of respondent:

Adv. M Lencoe

Instructed by:

Office of the DPP
Bloemfontein