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

Case no: **A116/2021**

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

JEREMIA FUSI MORAILE

Appellant

and

THE STATE

Respondent

CORAM: REINDERS, ADJP *et* DANISO, J

HEARD ON: 07 MARCH 2022

JUDGMENT BY: REINDERS, ADJP

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 14:00 on 30 May 2022.

I INTRODUCTION

[1] The appellant was arraigned in the regional Court Bloemfontein on a charge of rape (in contravention of s3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act¹ read with the provisions of sec 51(1) of the Criminal Law

¹ Act 32 of 2007.

Amendment Act).² According to the indictment, on 7 to 8 October 2009 he committed two acts of penetrating the complainant vaginally, who was 15 years old at the time. The evidence later revealed that the age of complainant at the time was 14 years and 8 months, thus under the age of 16.

[2] The appellant, who enjoyed legal representation, pleaded not guilty to the afore-mentioned charge but in his plea explanation he admitted to having had sexual intercourse once with the complainant. According to him, however, it was consensual. Moreover, he laboured under the impression that the complainant was older than sixteen years. Having heard the evidence, the learned magistrate convicted and sentenced him on 4 December 2013 in terms of s51(1)³ to life imprisonment. He was also found to be unsuited to work with children in terms of s120 of the Children's Act.⁴ An order was also issued that his name be entered into the Register of Sexual Offenders. The magistrate ordered the appellant to be unfit to obtain a license for a firearm in terms of sec 103 of the Firearms Control.⁵

[3] Aggrieved by his conviction and sentence, the appellant made use of his automatic right of appeal to this court in terms of s 309(1)(a) of the Criminal Procedure Act (CPA).⁶

II GROUNDS OF APPEAL

[4] The grounds of appeal⁷ relied upon by appellant can be summarised as follows:

- 4.1. The trial court erred in finding that:
- the State proved its case beyond a reasonable doubt;
 - the evidence of the complainant as single witness was clear and satisfactory in all material respects

² Act 105 of 1997.

³ Fn 2 Supra.

⁴ Act 38 of 2005.

⁵ Act 60 of 2000.

⁶ Act 51 of 1977.

⁷ Notice of Appeal dated 28 August 2017.

- no substantial and compelling circumstances to deviate from the prescribed minimum sentence of imprisonment for life.

4.2. The sentence of imprisonment for life is shockingly harsh and inappropriate.

III THE EVIDENCE

[5] Five witnesses were called by the State. The version as accepted by the trial court as to what transpired on 7-8 October 2009 entailed the following:

5.1 The complainant testified that on 7 October 2009 she was on her way home from school (dressed in her school uniform) between 15h00 and 16h00 when she decided to charge her cell phone at a nearby farm. She was accosted by the appellant who grabbed her and took her to a nearby veld close to a railway line. Here he undressed her panty and had non-consensual sexual intercourse with her without a condom. She did not scream for help as she was threatened by the appellant. He threatened to stab her with a knife. Hereafter he took her to a structure (storeroom), made a bed for her to sleep and left her there. Later in the evening he returned and had sexual intercourse with her again without her consent and without a condom. Once again she could not scream as he repeated his threats to harm her. The following morning the appellant told her to accompany him to his workplace as he wanted to collect money due to him. The appellant's employer gave them a lift to town together with an unknown male employee. This worker asked her whether she was the sister of the appellant which the appellant confirmed. She was still afraid after having been raped. When the appellant moved to the front of the vehicle, the complainant informed the unknown male that the appellant was not her brother and that she had been raped by him. Upon their arrival in town the unknown male accompanied her to the police station to lay a charge against the appellant. Hereafter she was taken for a medical examination. At the time she was still dressed in her school attire but barefooted, as she had lost her shoes during the ordeal at the place where appellant had dragged and raped her.

5.2 The evidence of the mother of the complainant, Mrs NJ M[...], revealed that the complainant had been in trouble before for having slept out and returning home late.

5.3 The farmer Mr J Fourie testified that on 8 October 2009 he gave a few people a lift to town. This included the appellant, who was a previous part-time worker, his other employee Johannes and the complainant. The appellant was seated in the front passenger seat of his Bakkie. Upon their arrival at Central Park in town, Johannes informed him about a report that complainant had made to him that she was raped by the appellant. Whilst standing at his Bakkie, he noticed that appellant had fled. He showed Johannes and the complainant the way to the police station. Johannes is no more in his employ and he does not know about his whereabouts.

5.4 Warrant officer W Leboa testified that all his efforts to locate Johannes were unsuccessful, whilst Constable E Mopheti confirmed a witness statement by the appellant which was ruled inadmissible by the court *a quo*. Sister Seekoei confirmed the J88 and her conclusion that the complainant was already sexually active at the time of the examination.

[6] The upshot of the version tendered by the appellant was that he had seen the complainant before on several occasions but on 8 October 2009 he met her at a tuck shop near Tierpoort railway station. He did not know her age he also did not ask her about her age, but she was dressed in her school uniform. He made a love proposal to her which she accepted. He never slept with her in the vicinity of the railway station or an open field. On the day of the incident the complainant voluntarily went with him to his home where they had consensual intercourse. She later indicated to him that she did not want to return to her home as it was late, she was afraid of her stepfather. The following day in the morning they went to his employer Mr Fourie to request his wages in the amount of R700.00 (seven hundred rand). Mr Fourie indicated to him that he would withdraw the money from a bank in town. Hereafter they (himself, the complainant and another employee) caught a lift with Mr Fourie. Upon arriving in town, he was given change by Mr Fourie to go and buy a cigarette

but when he returned the complainant had left. He never went back to Mr Fourie to collect his R700.00. He was arrested about eight months later at his home.

IV THE JUDGMENT OF THE TRIAL COURT ON THE MERIT

[7] From a reading of the record it is evident that the trial court in its evaluation of the adduced evidence was well apprised of the fact that complainant was not only a single witness, but also a child witness as to what transpired on 8 and 9 October 2009 and critically examined her evidence.

7.1 S208 of the CPA provides that an accused may be convicted of any offence on the single evidence of any competent witness. There is no magic formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of a single witness and consider its merits and having done so, decide whether it is satisfied that the truth has been told, despite the shortcomings or defects in the evidence. In evaluating the evidence the court should not allow the exercise of caution to displace the exercise of common sense. The Court must ask itself whether having regard to the child's power of observation, her ability to remember and to also relate concisely what happened to her, the veracity of her evidence can be trusted despite her young age. See *S v Sauls* **1981 (3) SA 172** (A) at 180E – G and *Woji v Santam Insurance CO Ltd* **1981 (1) SA 1020** (A) at 1028B-C.

7.2 The trial court acknowledged that the complainant was a rebel as testified by her mother, stating that she might possibly have been promiscuous. It found the evidence of the complainant to be logical and chronological. According to the magistrate the complainant made a good impression on him as she never contradicted herself. He addressed to the fact that complainant did not in her statement specifically make any mention of being threatened with a knife in but was satisfied that this aspect did not affect her credibility. The trial court also found corroboration for the complainant's evidence that the appellant had sexual intercourse

with her in the tall grass as indeed her shoes were found at the scene when the police later accompanied her to the scene.⁸ The magistrate was satisfied in all the circumstances that the complainant was a good and credible witness even after a time lapse of three years since the crime had taken place.

7.3 The trial court likewise evaluated the evidence of the appellant and was less impressed. It was pointed out that the impression was formed that appellant did not play open cards with the court.⁹ He alluded to the discrepancies in the testimony by the appellant in chief and during cross-examination. The magistrate examined the probabilities of the version tendered by appellant, making mention thereof that Johannes could have shed more light on the report to him as testified by complainant. He however took a holistic look at all the evidence and especially that of Mr Fourie who testified that the appellant fled the scene upon their arrival at Central Park, thereby corroborating the version of the complainant in this regard. The appellant denied that he had fled and testified that he had merely left to buy a cigarette at the time. The trial court found the fact that appellant did not return to fetch his money from Mr Fourie improbable and indicative of a man who could not afford to return to his workplace as he was afraid of being arrested. The magistrate deemed the fact that the appellant admitted that the complainant was dressed in school clothing significant in respect of appellant's concession that he did not ask the complainant about her age. The trial court remarked that in addition, apart from his own observation in court that complainant still looked like a child, even the appellant's legal representative had remarked that she would have had injuries if she was dragged by the appellant as testified, as she was skinny ("skralerig gebou").¹⁰

⁸ Record page 149/15-21.

⁹ Record page 148/10-12.

¹⁰ Record page 57/2-5.

[8] The trial court concluded that the state had proven its case beyond a reasonable doubt and was satisfied that the complainant was raped twice by appellant as testified by her. The magistrate accordingly convicted the appellant and indicated that the appellant committed rape as envisaged in Part 1 Schedule 2 in that complainant was not only under the age of 16 (14 years 8 months at the time) she was also raped more than once.

V EVALUATION OF THE FINDING BY THE TRAIL COURT

[9] It is trite that in the absence of an irregularity or misdirection by the trial court, a court of appeal is bound by the credibility findings thereof, unless it is convinced that such findings are clearly incorrect. In order to succeed on appeal appellant must convince us, on adequate grounds, that the trial court was wrong in accepting the evidence of the complainant. Bearing in mind the advantage which the learned magistrate had of seeing, hearing and appraising witnesses, it is only in exceptional cases that an appeal court will be entitled to interfere with a trial court's evaluation of oral testimony.¹¹

[10] I am satisfied that the trial court evaluated the evidence in its totality and considered the inherent probabilities as was dealt with by Heher AJA (as he then was) in *S v Chabalala* **2003 (1) SACR 134** (SCA) para [15] as follows:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weigh so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.”

[11] It is apposite to consider the evaluation of inherent probabilities by the trial court as accepted by the Supreme Court of Appeal in *Magadla v S*, **80/2011 [2011] ZASCA 195** delivered on 16 November 2011, (unreported), at para [22] and further.

¹¹ *S v Francis* **1991 (1) SACR 198** (A) at 204C-E; *J v S* **[1998] 2 All SA 267** (A) at 271C.

[12] Having considered the judgment of the trial court and taking into account the guidelines by our courts as set out herein above, I am unable to find that the trial court erred in convicting the appellant as it did.¹²

VI THE JUDGMENT OF THE TRIAL COURT ON SENTENCE

[13] From the record it is evident that the trial court was well appraised of the time honoured triad in Zinn, the purposes of sentence and of the principles to be applied in arriving at a fair and just sentence:

[14] The personal circumstances of the appellant were dealt with by the magistrate, that: at the time of sentencing the appellant was aged 32, unmarried but father to a 7-year-old boy who had been residing with the paternal grandmother for four years as the mother of child was deceased. The appellant achieved Grade 5 at school and was previously employed, earning R1 100.00 monthly. He had spent four years in custody awaiting trial.

[15] The magistrate considered the crime and the interest of the community by stating that “the gulf of criminality in South Africa” should be stopped. The trial court alluded to seriousness of the crime and stated that it should send out a clear message that this kind of offence would not be tolerated.

VII ADJUDICATION OF THE APPEAL IN RESPECT OF SENTENCING

[16] 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 discretion.¹³ Interference is warranted where there has been an irregularity that results in the 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.¹⁴

¹² Record page 153/16-23.

¹³ *S v Rabie* **1975 (4) 855** (A) at 857D-E

¹⁴ *S v Bogaards* **2013 (1) SACR** (CC) at para 41.

[17] Counsel for the appellant referred us to *S v PB*¹⁵ **2013(2) SACR 533** SCA at para 20 in respect of the approach to be followed by a court on appeal when dealing with Act 105 of 1997:

*“What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court’s exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. **It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling or not.**”* (own emphasis)

[18] Mindful of the aforementioned principles, the submissions placed before us for interference with the sentence imposed by the trial court, were considered.

VIII EVALUATION OF THE TRIAL COURT’S JUDGMENT AND THE PARTIES’ SUBMISSIONS IN RESPECT OF THE SENTENCE OF IMPRISONMENT FOR LIFE

[19] The appellant did not testify in mitigation of sentence at the trial. His counsel, Ms Kruger both in the heads of argument and orally before us, submitted that the trial court erred by not considering the following circumstances as sufficient to cause a deviation from the prescribed sentence of life imprisonment:

The trial court did not consider the fact that no evidence was tendered that complainant suffered any trauma due to the incident.

¹⁵ **2013(2) SACR 533** (SCA)

[20] Regrettably, the trial court was not provided with a Victim Impact Report. It was however in my view responsibly acknowledged by Ms Kruger that the incident must have had an impact on complainant, but she submitted that no evidence of lasting emotional trauma was suffered by complainant. In *S v Vilakazi*¹⁶ it was held that:

“...Even though the district surgeon had observed no signs of stress it must be accepted that no woman, least of all a child, would be left unscathed by sexual assault...” I align myself with this view.

The complainant did not sustain any physical injuries or trauma, and these factors should have been taken into account by the trial court in sentencing.

[21] In respect of the absence of serious physical injuries, the Supreme Court of Appeal in *S v SMM*¹⁷ put its stamp of approval on the interpretation of sec 51(3) of the Criminal Law Amendment Act as was held in *S v Nkawu* **2009 (2) SACR 402** (ECG) by the trial judge: .

*“He correctly in my view concluded that the proper interpretation of the provision **does not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate sentence.**”* para 26.

[22] It was submitted that due to a lack of physical injuries and no evidence of lasting trauma the rapes *in casu* cannot be considered to be the worst case of rapes, holding that these are relevant factors as they are indicative of the lesser objective gravity of the offences.

[23] The principle that while all rapes are serious, there are gradations of seriousness was stated in *S v Mahomotsa* **2002 (2) SACR 435** (SCA) at 436. Ms Kruger accordingly pressed on us to find that the factors mentioned herein above,

¹⁶ **2009 (1) SACR 552** SCA at 554 para 55-57.

¹⁷ **2013 (2) SACR 292** (SCA)

together with the appellant's personal circumstances (including the time that he had spent in custody awaiting trial), are individually and cumulatively sufficient to constitute substantial and compelling circumstances which justify the imposition of a lesser sentence. She suggested a custodial sentence of 20 years' imprisonment to be just.

[24] It was contended by Mr Hoffman on behalf of the State that the factors as alluded to do not constitutes substantial and compelling circumstances which should have caused the magistrate to have imposed a lesser sentence and accordingly the sentence of life imprisonment should be confirmed. He alluded to the seriousness of rape as has been stressed by our courts over a lengthy time.

VI IMPOSITION OF LIFE IMPRISONMENT

[25] As regards the sentence, indeed there is no indication on the record whether the accused is a first offender or not and as correctly pointed out by counsel for the appellant this is one of the factors that a court takes into account when determining an appropriate sentence, however, the record also shows that on the day of the sentencing hearing, the Magistrate stated that the record of the previous proceedings relating to sentencing was not available and due to the lapse of time he was also unable to transcribe that part as a result, he asked the defence and the State to start from the beginning and address in mitigation and aggravation of sentence.

[26] The defence counsel only mentioned the fact that the appellant had a minor child as a factor to be taken into account in terms of section 51(3). When pressed by the magistrate if that was the only factor he then mentioned the financial burden of keeping an offender in jail especially for a long term.

[27] We are of the view that, it is for the party relying on a certain fact as a mitigating factor to place it before court. Even if we are wrong, the fact that the appellant was a first offender at the time of sentencing, alone or cumulatively with the fact that the appellant has a minor child would not constitute a substantial and compelling factor. On the available facts, at the time the appellant was convicted and

sentenced he was not the primary caregiver of the child. The grandmother was the primary caregiver and the allegations that she may not be able to care for the child forever was not substantiated by facts. The onus was on the appellant to adduce these facts that he relies on.

[28] Ms Kruger invited our attention thereto that from the record and the manner in which the magistrate articulated his reasoning an impression is created that the trial court was of the view that it had no option but to impose the prescribed minimum sentence and accordingly did not consider *mero motu* whether there are any substantial and compelling circumstances warranting a deviation from the prescribed sentence.

[29] The judgment by the trial court can by no means be described as a text book example of eloquence. The judgment must be read in its entirety, nit picking the lines or paragraphs of the judgment would indeed result in a distortion of the facts alluded to.

[30] The record reflects, amongst others, the following:

30.1 “Now the legislator has then decided in a matter like this [inaudible] offence that the sentence that I must impose is simply lifelong imprisonment for the accused person.”¹⁸

30.2 The trial court referred to the guidelines as enunciated in *S v Malgas*¹⁹ and stated:

“if the act is saying to me you shall impose a certain sentence I do not have much leeway in moving away from that order”

[31] From a perusal of the record the most important finding by the trial court is however the following²⁰:

¹⁸ Record page 12/ 22-25.

¹⁹ **2001 (1) SACR 469** SCA.

²⁰ Record page 178/20-25 & 179/2-8.

“I am of the opinion that [inaudible] factor, I am taking into account the seriousness of this offence, the manner in which the complainant was approached by the accused, the way in which the rapes occurred, the manner in which he ran away from the farm. And then in the first possible time where it was possible for the complainant to raise alarm, she did just that. This is indicating to me this is a fairly serious rape. The accused was opportunistic when he was making his advances. I am of the opinion that [inaudible] that the period that have been spend in jail until now combined with all the other factors, [inaudible] will serve to let me decide that there are indeed substantial and compelling circumstances present for deviating from the initial sentence that I must impose.”

The trial court hereafter concluded as follows:²¹

“I decided to myself although I am not happy with the instruction from a personal point of view, I must follow the stare decisis. I must listen to the Higher Court to what the [inaudible] and I will do exactly that, because [inaudible] and I am listening to the orders from the authority. Therefore, sir I do not have any other option but to [inaudible] as follows...” The appellant was sentenced to imprisonment for life.

[32] What can be gleaned from the judgment is that the magistrate has aptly dealt with the approach to sentencing when a minimum sentence is prescribed (page 173 of the record at paras 16-23). He went on to list the relevant authorities to substantiate his conclusion that since he is a creature of statutes he is obliged to impose the minimum sentence unless there are reasons warranting a deviation.

[33] Appeals are not intended to correct grammatical errors, what is important is whether in the record of the proceedings the reasons for the court *a quo*'s findings are set out in such a manner that it can be determined how the conclusion came about.

²¹ Record page 179/20-25.

[34] The seriousness of rape can never be overemphasized. Our courts have consistently condemned rape in the strongest language as an invasion of the dignity, privacy, integrity and freedom of women. See: *S v Chapman* **1997 (3) SA 341** (SCA) and *Sv Tshabalala and Another* **2020 (2) SACR 38** (CC).

[35] Moreover, it must be accepted that the rape of a vulnerable child is a reprehensible crime that can and should never be tolerated in a civil society. The manner in which the rapes occurred are to be considered as aggravating in my view. Not only was the complainant on her way home and dressed in her school attire when the first rape occurred near the railway lines, but hereafter she had to accompany the appellant to what seemed to be a place not even proper for human habitation. There she was left, as she testified scared of night falling. The appellant kept her there and returned later, only to rape her once again in the early hours of the following morning. It is evident from the evidence that appellant was much older than complainant and she was of slim built. Hereafter, frightened and scared, she had to accompany appellant to his employer where they were transported to town. The complainant made a report to an unknown male in her hour of need.

[36] I am however mindful of the reminder in *S v Nkomo* **2007 (2) SACR 198** (SCA) at page 200, that life imprisonment as a sentence for rape should be imposed only where the case is devoid of substantial factors compelling the conclusion that such a sentence was inappropriate and unjust. The Supreme Court of Appeal in *S v De Beer* **2018 (1) SACR 229** (SCA) held as follows at para 17:

“This court has pointed out on many occasions that injustices may occur if the prescribed minimum sentences are imposed without a proper consideration of the existence of substantial and compelling circumstances, including the question whether the prescribed sentence will be disproportionate to the offence, in the wide sense, in other words, including all the circumstances of not only the offence itself, but also the circumstances of the parties involved.”

[37] It is important in every case, to guard against an injustice being perpetrated by adhering slavishly to the prescribed minimum sentence.

VII CONCLUSION

[38] Having studied the record carefully and considering all submissions before us, I am indeed satisfied that, as found by the trial court, neither the factors individually nor the cumulative effect of the factors mentioned in paras [18] - [23] above, constitute substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence of life. It follows that the appeal stands to be dismissed both in respect of conviction and sentence.

VIII THE ORDER

[39] In the result, the following order is made:

1. The appeal is dismissed.
2. The conviction and sentence is confirmed.

C REINDERS, ADJP

I concur

NS DANISO, J

On behalf of the Appellant:	Mrs S Kruger
Instructed by:	Legal Aid Board BLOEMFONTEIN

On behalf of the Respondent:	Adv R Hoffman
Instructed by:	Office of the DPP, Free State BLOEMFONTEIN

