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

Appeal number: A36/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the Appeal between:

MOTHUSI MATLADI

Appellant

and

THE STATE

Respondent

CORAM: DANISO, J *et*, KHOOE, AJ

HEARD ON: 24 AUGUST 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for hand-down is deemed to be 13h00 on 26 October 2022.

[1] On 6 August 2021 the appellant was convicted by the regional court, Bloemfontein for the rape and sexual assault of a nine (9) year old boy. He was subsequently sentenced to life imprisonment as provided for in section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA") in respect of the rape charge and for the sexual assault, he was sentenced to twenty-four (24) months' imprisonment wholly suspended for a period of three years with conditions.

[2] The appellant was convicted after pleading not guilty to the rape charge and in respect of the sexual assault, he was convicted pursuant to his admission that he had sexually assaulted the complainant as alleged by the State. This appeal is against the conviction and sentence imposed in respect of the rape charge.

[3] The conviction is supported by the State. It arose from the incident which took place on 13 November 2019 at the student centre where the appellant was employed as a tutor. It was the State's case that the appellant raped the complainant by inserting his finger into the complainant's anus and also sexually assaulted him by pulling up his underwear in an upward motion between his buttocks thereby touching his penis and anus indirectly (this act is referred to as a '*wedgie*').

[4] The State relied on the testimony of the complainant, his mother Ms M[...], the owner of the study centre Ms Votyeka and the medical practitioner who examined the complainant after the incident, Dr Van der Walt.

[5] The summary of State's case is that, after subjecting the complainant to several *wedgies* throughout the day the appellant called the complainant who was playing with his friends into the toilet and instructed him to take off his trousers and underpants. The appellant sat on the toilet seat and instructed the complainant to sit on top of him facing away and to bend forward. The appellant then wiped the complainant's behind with a toilet paper and inserted his finger into his anus. When the complainant's friend came and knocked on the toilet door looking for the complainant the appellant told the complainant keep quiet. He (the appellant) responded and said he was busy in the toilet.

[6] The appellant told the complainant not to tell anyone about what happened in the toilet, as a result when the complainant heard Ms Votyeka calling out his name he did not respond. The appellant instructed the complainant to get dressed and when he was done the complainant exited the toilet and went over to his mother who was looking for him with Ms Votyeka.

[7] The complainant's mother demanded to know where the complainant was as she had been looking for him all over with the assistance of Ms Votyeka. She was even worried that he might have fallen into a swimming pool nearby. He told his mother that he was in the toilet. Ms Votyeka also spoke to the appellant who was nearby the toilet, he confirmed that the complainant was in the toilet.

[8] On the way home, the complainant's mother demanded an explanation from the complainant about his exact whereabouts when she and Ms Votyeka were looking for him. It was then that the complainant explained that the appellant had given him a *wedgie* in the toilet. The complainant's mother was furious, she drove back to the study centre and confronted the appellant. He denied performing a *wedgie* on the complainant.

[9] Later at home, the complainant informed his mother that the appellant had also inserted his finger into his anus. He also demonstrated how he had first wiped his behind and then penetrated his anus with his finger. The complainant's mother called Ms Votyeka and relayed what the complainant had reported to her. Ms Votyeka went to the complainant's home and after discussing the matter with the complainant's mother it was agreed that a meeting will be convened at the study centre on the next day where the matter will be discussed with the appellant before a criminal case is opened.

[10] The appellant came to the meeting with his mother and two relatives. At first he denied that he had performed *wedgies* on the complainant. He also denied that he penetrated him with his finger but when it was suggested that the complainant be called to the meeting he backtracked and admitted of having performed *wedgies* on the complainant on more than one occasion throughout the day. He said it was done as a form of punishment as the complainant was naughty. He also admitted that he

had instructed the complainant to sit on top of him while his trousers and underpants were off and that he also wiped and touched his anus. His explanation was that he was wiping the complainant because he was not clean. With regard to the penetration, he said he must have wiped too hard.

[11] The complainant was examined by Dr van der Walt three days after the incident, no injuries were observed.

[12] The appellant testified in his defence. He admitted to having performed a *wedgie* on the complainant as a form of corporal punishment. He denied having raped the complainant.

[13] It is the appellant's case that the trial court erred in convicting him of rape because, in determining whether the State had proved its case against him beyond a reasonable doubt the trial court rejected his version that the complainant's allegation pertaining to the rape charge was an afterthought and accepted the evidence of the State's witnesses and this is despite the fact that there were material contradictions between the State's witnesses.

[14] The principle applicable in appeals where the factual findings of a trial court are attacked is trite. A court of appeal is not entitled to interfere with or tamper with the trial court's judgment or decision regarding either conviction or sentence unless it (court of appeal) finds that the trial court misdirected itself as regards its findings of facts or the law.¹ The principle was also restated in *AM & Another v MEC Health, Western Cape* **2021(3) SA 337** (SCA) at paragraph 8 as follows:

"It is trite that an appeal court is reluctant to disturb findings of that character by a trial judge, who was steeped in the atmosphere of a lengthy trial and had the advantage of seeing and hearing the witnesses. Such findings are only overturned if there is a clear misdirection or the trial court's findings are clearly erroneous. That has consistently been the approach of this court...."

¹ R v Dhlumayo & Another 1948 (2) SA 677 (A); S v Mlumbi 1991 (1) SACR 235 (SCA) at 247g.

[15] The complainant was a child witness and also a single witness implicating the appellant in the rape charge therefore his evidence called for a cautionary approach before it could be accepted. In accepting the complainant's evidence, the trial court took into account that despite his young age the complainant gave a detailed explanation of how the rape occurred. His version remained intact even after extensive cross-examination which is a clear indication that it was not an afterthought but a reliable account of how he was violated by the appellant.

[16] A child witness's veracity and ability to give a succinct version of the events is an important consideration in applying the cautionary rules: *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.

[17] In this matter, the complainant's version was also corroborated by his mother as the first report of the rape incident and by Ms Votyeka who assisted the complainant's mother in looking for the complainant and later observed the appellant next to the toilet from which the complainant ultimately emerged. The trial court was thus correct in its conclusion that the complainant told the truth.

[18] In its quest to determine whether the evidence proffered by the State proved the appellant's guilt beyond a reasonable doubt, the trial court meticulously evaluated all the factors which pointed towards the guilt of the appellant against all those which were indicative of his innocence as expressed in *S v Chabalala* **2003(1) SACR 134** (SCA) at paragraph 15 that:

*“The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen **2001 (2) SACR 97** (SCA). 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 weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the*

failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence...”

[19] The appellant’s version was correctly rejected as false as he had given conflicting versions with regard to the reason for administering *wedgies* on the complainant. He stated that it was intended to be corporal punishment for ill-discipline as the complainant had pushed another child to the ground outside where they were playing. Another version was that the complainant had misbehaved in the class room. It is also peculiar that when the appellant exited the toilet he did not inform the complainant’s mother about what he was doing to the complainant in the toilet and the reason thereof.

[20] The appellant could also not give a sensible explanation why he chose to administer the “punishment” in the toilet instead of his empty classroom. The ineluctable conclusion, according to the trial court, was that the appellant took the complainant to the toilet in order to rape him.

[21] I’m in agreement with the trial court’s conclusions. The discrepancies in the appellant’s version affected his credibility. This fact is incidentally conceded in the appellant’s heads of argument.²

[22] I’m thus satisfied that on the available facts, the dispute between the State and the defence with regard to whether the appellant had raped the appellant on that day was resolved appropriately. See also *S v Trainor* **2003(1) SACR 35** (SCA) at para 9. The trial court correctly found that the State had proved the guilt of the appellant beyond a reasonable doubt, he was correctly convicted.

[23] Section 51(1) of the CLAA prescribes a minimum sentence of life imprisonment for the rape of a child unless there are substantial and compelling circumstances warranting a deviation from the prescribed sentence.

² Page 3 to 4 at paragraph 3

[24] A court may impose a lesser sentence than the prescribed sentence only when it is convinced that the imposition of the prescribed sentence would be unjust or disproportionate to the crime, the criminal and the legitimate needs of society, *S v Malgas*³, para (22). See also *S v Dodo* **2001 (1) SACR 594** CC.

[25] The trial court is criticized by both the appellant and the State for not imposing a lesser sentence. In the appellant's grounds of appeal and also the parties' respective heads of argument it is contended that the trial court erred by dismissing the appellant's personal circumstances as substantial and compelling reasons warranting a deviation from the prescribed minimum sentence and for not taking into account that the appellant's actions were not gruesome in nature and by overemphasizing the aggravating circumstances of the matter.

[26] The state and the defence are of the view that life imprisonment is shockingly inappropriate it must accordingly be set aside. According the State, a sentence that would be suitable under these circumstances is twelve (12) years imprisonment of which six (6) years imprisonment is suspended for five (5) years on condition that the appellant is not convicted of rape or an attempt thereto committed during the period of suspension.

[27] The appellant's personal circumstances as recorded by the trial court are that at time of sentencing he was 21 years old, unmarried and had no dependants. At the time the offence was committed he was employed as a tutor for Mathematics and the complainant was one of his students. He was also studying at the University of the Free State towards his Honours degree, he was a first offender and had no history of violence.

[28] The traditional mitigating factors such as an offender's personal circumstances cumulatively, can be taken into account as factors to be considered as substantial and compelling reasons. However, they must be weighed against the aggravating factors as on their own, they constitute the flimsy reasons which *Malgas*⁴ warned

³ 2001 (1) SACR 469 (SCA).

⁴ *Malgas* supra para 9.

should not be elevated to the status of substantial and compelling reasons to deviate from the prescribed minimum sentence.

[29] There is a number of aggravating factors in this matter namely, the age of the complainant and the circumstances under which he was violated. At the tender age of 9 he was violated at the place where he, including his parents thought he was safe.

[30] It is also aggravating that the complainant was violated by the person who was supposed to protect him by virtue of him being in a position of trust and also similar to that of a parent (*loco parentis*).

[31] The fact that the rape of the complainant was preceded by various sexual assaults perpetrated by the appellant on the very same day and under similar circumstances is equally aggravating.

[32] On the appellant's own admission, the complainant was not the only child that he had sexually violated by giving *wedgies*. He stated that there were two or three other occasions where he had given other children *wedgies* therefore the fact that the State proved no previous convictions against him merely means he has never been caught before not that he was a first offender in relation to these crimes.

[33] The appellant's complaint that the trial court over emphasized the aggravating factors of this matter is unsound. The nature and the seriousness of a rape of a child can never be over emphasized. In *S v D* **1995(1) SACR 259**(A) it was held that:

"Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and all too often do. ..." Appellant's conduct in my view was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the courts disapproval and hopefully acting as a

*deterrent to others minded to satisfy their carnal desires with helpless children.*⁵

[34] It was argued by both counsel that the fact that the applicant's actions were not gruesome in nature should have been taken into account as a substantial and compelling reason to impose a lesser sentence. Reference was made to several decisions particularly *S v Nkawu* **2009 (2) SACR 402** (ECG) in support of the parties' argument that a rape victim's lack of physical injuries must be a factor that must be taken into account to determine whether to deviate or not in terms of section 51(3) of the CLAA.

[35] Counsel ignore the fact that in *Nkawu* at page 406 para 17 Plasket, J duly pointed out that an apparent lack of physical injury to the complainant may be regarded as a substantial and compelling circumstance justifying a departure from the prescribed sentence when considered along with other factors cumulatively, viz: along with a basket of other factors. At paragraph 18, he stated that:

"I am mindful of the following aggravating factors, namely the tender age of the complainant, that the accused broke into her house and abducted her, that he was known to her and in this sense breached the trust that she was entitled to repose in him and that the accused was on bail in respect of a charge of housebreaking at the time. On the other hand, I take into account that the accused is young, that he was gainfully employed and supported his family and his child and that the injuries he caused to the complainant by his act of raping her were not serious or permanent and that she experienced no psychological trauma that was out of the ordinary and that cannot be treated. I consider that these factors, taken cumulatively, amount to substantial and compelling circumstances that justify the imposition of a sentence other than life imprisonment."

[36] In this matter, according to the victim impact report (exhibit "D") the appellant's actions have not only affected the complainant but the whole family has been left traumatized. The complainant is constantly moody, he picks fights with his

⁵ At page 260 f-g.

older brother, he overeats and struggles to sleep. His school performance has also been adversely affected. Since the incident, both the complainant and his brother prefer to sleep in their parents' bedroom. The complainant's mother has also not been spared of the trauma, she constantly stays awake in order to watch over her sons. There is also the financial impact resulting from the costs of psychological treatments to address emotional and psychological effects resulting from the appellant's actions.

[37] In *R v Karg* **1961 (1) SA 231** (A) at 236G-H, Schreiner JA had the following to say in a passage appearing at 2368:

"It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment"

[38] Rape has become an endemic. These crimes cause an outrage in the society which looks to the courts for protection and punishment of the offenders. A failure by our courts to respond appropriately could result in vigilantism which undermines our constitutional order. It is for this reason that the sentences that courts impose must also have an element that speaks to the plight of society.

[39] In respect of a serious and prevalent crime such as rape of a child retribution and deterrence must come to the fore.⁶ It is in that regard that I am of the view that the trial court exercised its discretion properly and judicially in imposing the sentence of life imprisonment.

[40] There is no basis to interfere with the sentence, it reflects the gravity of the crime and it also speaks to the plight of the victims and the society. In the result, I would make the following order:

⁶ *S v Mhlakaza and Another* **1997 (1) SACR 515** (SCA) at 519d-e.

1. The appeal against conviction and sentence is dismissed.

NS DANISO, J

I concur

NJ KHOOE, AJ

On behalf of Appellant:

Instructed by:

Mr Van der Merwe

Legal Aid South Africa

BLOEMFONTEIN

On behalf of respondent:

Instructed by:

Adv. B J Classens

The Director of Public Prosecutions

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