



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: A05 / 2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

18 FEBRUARY 2022

DATE

SIGNATURE

In the matter between:

COLLEN MASHEGO

APPELLANT

and

THE STATE

RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 18 FEBRUARY 2022.

J U D G M E N T

RATSHIBVUMO J:

[1] Introduction.

The Appellant was convicted by the Mhala Regional Court on a charge of contravening section 3 of Act 32 of 2007 (rape). It was alleged that on 20 August 2016, he committed an act of sexual penetration with a five-year-old child, named SG (the victim), by penetrating his anus with the penis, without his consent. He was convicted of this charge and on 18 November 2020, he was sentenced to life imprisonment. The appeal is brought in terms of the provisions of section 309(1)(a) of Act 51 of 1977 (the Criminal Procedure Act).¹ In terms of this provision, a person convicted and sentenced to life imprisonment by a Regional Court can appeal without applying for leave to appeal.

[2] Background facts

Evidence led by the State was to the effect that on 20 August 2016, the Appellant was at Mr. Mokoena's yard where there were celebrations over traditional initiations. Mr. Mokoena was his neighbour. There were many people there including the victim and other children. Around midnight, Mr.

¹ 309. *Appeal from lower court by person convicted*

1(a) Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a).

Mokoena realised that the victim was missing and so was the Appellant. People attending the celebration started searching for the victim. Information was received to the effect that the victim was last seen in the company of the Appellant. As a result, a group of those who were attending the initiation celebration walked to the Appellant's homestead. Amongst them were Mr. Mokoena, the victim's mother and Ms. Gabade who all testified about what they found at the Appellant's place.

- [3] Upon their arrival there, members of the group searching for the victim knocked at the door of the Appellant's room but there was no response. The light in his room was however on. Mr. Mokoena peeped through the keyhole and spotted the Appellant whose pants were off, and he was on top of the victim. He then hit the door with a brick and it opened. The Appellant then emerged from the room while pulling up his pants and ran away. At that stage, he was also armed with a panga. A case was opened with the police and the victim was taken to be examined by a forensic nurse. The forensic nurse found the victim's anus was in a state of dilation, funnelling and cupping, a condition she explained was caused when a foreign object had penetrated the anus from outside making the anus wider (cupping). She however noted no physical injuries.
- [4] The Appellant was the sole witness for the defence. He denied that he had anal intercourse with the victim. He admitted being at the initiation ceremony elsewhere but not at Mr. Mokoena's place. He also admitted to leaving the initiation ceremony around at around 23h00 saying he went to his place of residence. His evidence mirrors that of the State on how his room was broken open by people led by Mr. Mokoena and how he escaped armed with a panga. He however denied that he was with the victim in his room or that he had anal intercourse with him. According to him, the group

that attacked him was accusing him of having killed someone. He only heard the rape allegations for the first time once he was arrested. The court *a quo* did not accept his version of events. It found the case for the State to have been proved beyond a reasonable doubt and convicted him as charged.

Grounds of appeal.

- [5] The Appellant submitted that the court *a quo* erred in finding the case for the State to have been proved beyond a reasonable doubt. He argued further that in the absence of physical injuries in and around the anus, the court *a quo* should have found this to indicate that no anal penetration took place. He submitted further that the court *a quo* failed to take into consideration the contradictions between evidence presented by the State witnesses. Lastly in respect of the conviction, he submitted that the court *a quo* erred in accepting that the case for the State was proved beyond a reasonable doubt. In respect of the sentence, he submitted that life imprisonment was astonishingly harsh, shocking and out of proportion with the totality of accepted facts in mitigation.

- [6] Whereas it is true that there were no physical injuries noted on the victim's anus, it would be distortion of the evidence given by the forensic nurse to conclude that it means there was no penetration. Ms. Ndlovu, a forensic nurse testified that when she opened the victim's anus it was in a state of dilation, funnelling and opening wider like a cup. She believed the reason for lack of injuries may have been a result of the lubrication in a condom that was allegedly used. The victim himself testified that petroleum jelly named Vaseline was applied to his anus before he was penetrated. In consideration of the totality of evidence, there is no basis to conclude that the victim did not sustain injuries because he was not penetrated. This ground of appeal stands to be rejected on that basis.

- [7] As for the averment that there are contradictions in the accounts of events presented by various witnesses, the Appellant failed to identify. It is not for the Appellant to make a sweeping statement that the court erred in not attaching weight to the contradictions without going further to point the said contradictions. In the same breath, the Appellant alleged that the court erred in accepting that the case for the State was proved beyond a reasonable doubt. In accepting that the case for the State was proved beyond a reasonable doubt, a court makes a total evaluation of evidence as a whole.² It is the Appellant's responsibility to point out the contradictions or to unpack the basis upon which he submits that the trial court should not have reached a conclusion that the case for the State was proved beyond a reasonable doubt.
- [8] After going through the evidence presented by the State witnesses, I am unable to pick up material contradictions except those which would be normal when different people give personal accounts of what they observed. For example, one would not expect all the witnesses to testify about what Mr. Mokoena observed when he looked into the Appellant's room through a keyhole as he is the only one to have done so. This is indicative of independence of the witnesses and that they did not collude between them.³ The Appellant failed to direct this court to any contradictions and it is pointless to search for the court of appeal such in order to evaluate if they are material or not. This ground of appeal is also bound to fail.

The Sentence

² *S v Van der Meyden* 1999 (1) SACR 447 (W)

³ *S v Oosthuizen* 1982 (3) SA 571 (T)

[9] The imposition of a sentence for the crime the Appellant was convicted of is governed by the Criminal Law Amendment Act no. 105 of 1997. Section 51(1) and 51(3) of that Act provide,

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.

...

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

(aA) When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

(i) ...

(ii) an apparent lack of physical injury to the complainant;

... [My emphasis]

[10] Under Part I of Schedule 2, there is a long list of very serious crimes. Amongst them, there is “rape of a child under the age of 16.” The Appellant was alive to this provision when addressing the court *a quo* in mitigation when he asked that his personal circumstances should be seen as substantial and compelling circumstances that justify a deviation from the sentence of life to 15 years’ imprisonment.

[11] At the time of his sentence, the Appellant was 44 years old, single and was a father of three daughters aged 26, 23 and 15 years old respectively.

His children were fathered with three different women and they all resided with their mothers or maternal relatives. At school, he studied up to Grade 2. Through SAP69, the State proved a previous conviction of theft against the Appellant which was committed in 2000 in which he was sentenced to a fine of R600 or three months' imprisonment. The Appellant further informed the court *a quo* that he was also convicted of murder for which he was sentenced to 20 years in 2003. He was however released from prison on parole in 2014. He had been working as a security guard earning R1000 per month from 2017 until the date he was convicted in this case when the matter was postponed with him in custody pending the sentence. He was HIV positive and was on treatment for it. His body was responding well to the treatment.

[12] The prescribed sentence for rape of a child under 16 is life imprisonment. The closer the child gets to losing the title of being a child (turning 16) the courts are inclined to listen and in deserving cases, find substantial circumstances through which a sentence other than life imprisonment may be imposed.⁴ When it comes to children whose age is much younger than 16, "the prescribed sentences cannot be departed from lightly or for flimsy reasons."⁵ The courts have not hesitated to even increase the sentences to life imprisonment when lesser sentences were imposed when it comes to young children.⁶

[13] In *Director of Public Prosecutions, Gauteng v Grobler*⁷, the Supreme Court of Appeal set aside a sentence of 10 years' imprisonment, half of which was conditionally suspended which was imposed by the High Court

⁴ See *S v Vilakazi* 2009 (1) SACR 552 (SCA) where the Supreme Court of Appeal found substantial and compelling reasons to impose a sentence other than life when the child raped was 'possibly over 15.'

⁵ *S v Malgas* 2001 (1) SACR 469 (SCA) para 8 & 9.

⁶ See *S v De Beer* 3 All AS 746 (GJ) where a sentence of 15 years imprisonment was set aside on appeal and replaced with life imprisonment on a charge of rape of a child aged 8 years' old.

⁷ 2017 (2) SACR 132 (SCA).

sitting as a court of appeal in a matter of rape of a child aged 10 years' old. The High Court had set aside a sentence of life imprisonment that had been imposed by the Regional Court for reason that the child had acquiesced to sexual intercourse. This finding was against the express provision of section 57(1) of the Sexual Offences Act, no. 32 of 2007 which provides that 'a male or female person under the age of 12 years was incapable of consenting to a sexual act.' The matter was reverted back to the High Court for reconsideration of a sentence. This time around, the accused was again sentenced to life imprisonment.⁸

[14] *In casu*, the court *a quo* found no substantial and compelling circumstances justifying the imposition of a lesser sentence. The Victim Impact Report compiled by a Social worker was presented to the court. She noted that the victim was crying during the interview. The report contained the following regarding the impact of this crime on him:

“The victim mentioned that he is saddened by the rape incident and it has instilled a sense of fear in his life and loss of trust towards men whom he trusted to be his uncles in the community as he doesn't have a father in the family. He mentioned that he experienced recurring dreams and intrusive thoughts about the crime. He is now afraid of being left alone at home without the presence of the elder person. He feels degraded and humiliated by the incident and as a result, he lost his sense of self confidence.”⁹

[15] I cannot find any misdirection on the part of the Regional Magistrate in finding no substantial and compelling circumstances that justify the imposition of a lesser sentence. Without any misdirection, the powers of

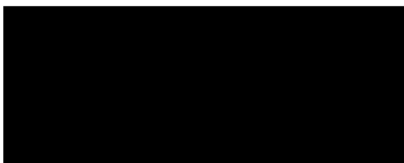
⁸ see *Grobler v S* (A40 2013) [2017] ZAGPJHC 383 (12 December 2017).

⁹ See paragraph 8.2 on p.254 of the appeal bundle.

an appeal court to interfere with the sentence are very limited.¹⁰ The appeal against the sentence stands to be dismissed.

[16] Consequently, the following order is proposed:

[16.1] Appeal against the conviction and sentence is dismissed.


TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

I agree and it is so ordered.


MF LEGODI
JUDGE PRESIDENT
MPUMALANGA DIVISION OF THE HIGH COURT

FOR THE APPELLANT:

MR. TR MALANGUTI

INSTRUCTED BY:

LEGAL AID – MBOMBELA

FOR THE RESPONDENT:

ADV Z MATA

¹⁰ *R v Dhlumayo* 1948 (2) SA 677 (A).

INSTRUCTED BY:

**OFFICE OF THE DPP -
MBOMBELA**

DATES HEARD:

28 JANUARY 2022

JUDGMENT DELIVERED:

18 FEBRUARY 2022