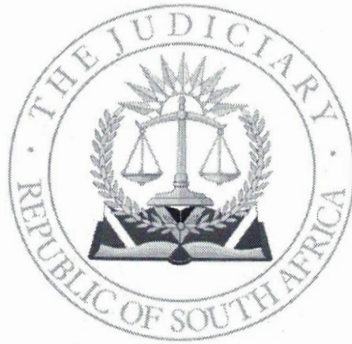


Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

CASE NO: CA&R 7/2022

In the matter between:

P[....] W[.....]

Appellant

and

THE STATE

Respondent

Coram: Lever J et Chwaro AJ

JUDGMENT

CHWARO AJ:

Introduction

[1] The appellant was arraigned before the Northern Cape Regional Court, Kimberley on one count of contravening the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997, to wit, having committed an act of sexual penetration with a 12-year-old girl who was mentally retarded. On 18 February 2019, the

appellant, who was legally represented, pleaded not guilty to the charge against him. On 28 November 2019, he was convicted as charged.

[2] On 23 March 2020, the appellant was sentenced to life imprisonment in line with the minimum sentence regime provided for in section 51(1) of Act 105 of 1997. The trial Court made concomitant declaratory orders in terms of section 24 of the Children's Act No 38 of 2005 regarding the appellant's suitability to work with children, an order that his name be included in the register of sexual offenders in terms of section 50(2) of Act No. 32 of 2007 and an order in terms of section 103(3) of the Firearms Control Act, No. 60 of 2000 declaring the appellant to be unfit to possess a firearm. The appeal before us is in respect of both conviction and sentence.

[3] The appeal was noted outside the prescribed time periods and an application for condonation was launched for simultaneous consideration and determination with the appeal. The condonation application is not opposed by the State. I have considered the reasons for the late prosecution of the appeal and the possible prospects of success and am of the view that it is in the interests of justice that condonation be granted.

Material background facts

[4] The State alleges that on the evening of 9 April 2017 and at Ritchie, the appellant committed an act of sexual penetration with the complainant, VM, who was allegedly 12 years old and mentally retarded. The appellant denied the allegations against him. The State led evidence of four witnesses and the appellant testified in his own defence and also led evidence of one witness.

[5] During the course of the proceedings, a medical report prepared by Dr Z Piotrowski, a specialist psychiatrist, was admitted by agreement between the parties. The report details the outcome of an interview which Dr Piotrowski conducted with the complainant on 26 March 2018 to evaluate her mental state. The report concluded that the complainant had a moderate cognitive impairment (mental retardation) which resulted in her not being able to appreciate the nature and reasonably foresee consequences of the sexual act at the time of the alleged offence.

[6] The record reveals that during the evening of 9 April 2017, the appellant was in the company of KW, MK and the complainant. The four of them were walking towards Pelindaba. Along their way, KW felt the need to relieve herself and diverted to the side of the road. She was joined by MK. The appellant and the complainant initially remained behind on the road but later went to stand behind a tree, which obscured their visibility from both KW and MK.

[7] Whilst busy with her business, Ms KW testified that she overheard the complainant uttering words to the effect "*ahh*" and "*you are hurting me*". She enquired from the complainant, who was visibly in pain and in discomfort, about what she overheard. She testified that the complainant told her that the appellant raped her. She did not confront the appellant about the complainant's accusation.

[8] Mr MK, who was with KW at the relevant time, testified that he did not hear the complainant uttering any words as indicated by KW. He testified that MK and the complainant were just standing behind the tree and joined them back on the road when they were suddenly confronted by members of the local anti-crime organisation, *Wanya Tsotsi*, who then ordered them into their vehicle and drove off to the complainant's grandmother's place and finally to the Modderivier police station. It was at the police station that MK testified that he heard the complainant telling police officers that the appellant raped her.

[9] Ms EN, a member of *Wanya Tsotsi*, testified that during their routine patrol on the night in question, she saw four people standing next to the road. She became more curious when she realised that one of these people was a child. She confronted them and asked the three adults as to what they were doing with a child during that time of the night. It was at that moment that the complainant told her that the appellant did naughty things to her. She also observed that there were pieces of grass and soil on the back of the complainant.

[10] She confronted the appellant about the accusation by the complainant. The appellant initially denied having done anything to the complainant but later told her that he just rubbed his penis against the complainant's thighs. She and her colleagues then

drove off with all four of them, with the complainant sitting with her in the front seat, towards the latter's grandmother's place and eventually went to the police station where a criminal case was laid against the appellant.

[11] Dr Esmè Olivier, a medical practitioner with thirty-four years' experience, testified that she examined the complainant at about 23h45 on 9 April 2017. She completed a J88 form where she recorded her observations following her examination and noted that her clothing was normal and there were no other visible physical abnormalities.

[12] She testified that all the complainant's external genitalia were swollen and tender to touch, the posterior fourchette was intact but red and tender to touch with a swollen hymen. She could not do internal investigations as it was painful to the complainant. Accordingly, she concluded that there were signs of labial and hymeneal penetration with no injuries.

[13] Dr Olivier sought to collect more evidence through the insertion of a swab into the complainant's vagina which was then sealed and sent for DNA examination. The DNA results were handed in by agreement and it revealed that there was not enough male DNA that was obtained from the relevant swab. She further testified that the injuries occurred some 6 to 8 hours prior to her examination of the complainant. She testified that there was history of an apparent sexual abuse 2 years prior to the alleged incident.

[14] The complainant did not testify as the trial court found that she was not a competent witness. The finding followed upon an enquiry that was conducted subsequent to the provisions of section 164 of the Criminal Procedure Act, No. 51 of 1977, through the assistance of an intermediary, to find out whether the complainant knew the difference between telling lies and telling the truth, whether she knew what it was to tell the truth and that it was wrong to tell lies¹. In the result the complainant could not be admonished to tell the truth nor sworn in as a witness.

¹ See also *Matshivha v S* 2014 (1) SACR 29 (SCA)

[15] An application for a discharge in terms of the provisions of section 174 of the Criminal Procedure Act was pursued on behalf of the appellant at the end of the State's case. The application was refused by the trial Court.

[16] The appellant testified in his own defence. He stated that on the evening in question, he was in the company of MK, KW and the complainant on their way to Pelindaba. He had never met KW or the complainant prior to that evening.

[17] Along their way, MK went into the nearby bushes with KW. He knew that the former was going to engage in a sexual encounter with the latter whilst he remained with the complainant behind. He later went to stand behind a tree with the complainant until they were all confronted by the anti-crime group, *Wanya Tsotsi*. He denied ever having had sexual intercourse with the complainant or admitting having rubbed his penis against her thighs as EN testified.

[18] The appellant denied having ability to be aroused as he claimed to have had a medical condition that affected his manhood, a fact that he claimed could be attested to by a medical doctor who attended to his condition.

[19] The defence's second witness, Dr Japie Bosman testified that the appellant had some medical condition related to his sexual organs, but such condition could not prevent or in any way inhibit him from engaging in sexual activity. He testified that he treated the appellant's last medical condition some few months prior to the date of the incident in this case and thus such condition cannot be attributed to the appellant's alleged failure to engage in sexual activity.

Findings by the trial court

[20] The trial Court accepted the evidence presented by the State, though with much criticism, especially on the testimony of KW and MK, who the Court found that they had something to hide in respect of what actually happened on that evening. The learned Regional Court Magistrate rejected the appellant's denial as not being reasonably possibly true.

[21] In convicting the appellant, the trial Court relied on the hearsay evidence as testified by KW and MK about what the complainant told them. In the judgment, the learned Regional Court Magistrate made the following findings:

"According to him they were talking there. I also find it strange that the child immediately after being with the accused behind a tree that evening, would mention at the Modderrivier police station that she was raped by the accused.

The accused is the only person that the child was with behind this tree. And apart from that, the child made a report to [KW] to say the accused raped her. Mr [MK] testified that the child mentioned, he heard the child at the Modderrivier police station saying she was raped.

And the child said it without persuasion and she said it out of own accord. Now that would be the second time the child mentioning that she was raped and that proves consistency on the part of the child".

[22] In its judgment, the trial Court further made findings to the following effect:

"[K] and [M] they want the court to believe that they did not see what was happening behind the tree. But the fact that the child made allegations, that is the reports and Katy seeing the pain and discomfort the child was in and the fact that the child cried "eina, jy maak my seer". The grass that was seen at the child's back, together with the clinical findings are all evidence strengthening the state's case"

Grounds for appeal

[23] Considered in their context, the appellant grounds of appeal on conviction are that the trial Court erred in relying on hearsay evidence about what the complainant told some witnesses without having made a ruling on its admissibility in terms of the relevant provision of section 3 of the Law of Evidence Amendment Act 45 of 1998, especially since the complainant was declared as an incompetent witness and that the trial Court erred in finding that the State proved its case beyond reasonable doubt in respect of the actual

rape, the age of the complainant and the appellant's knowledge that the complainant could not give valid consent due to her mental retardation.

[24] On sentence, the appellant contends that the trial Court erred in finding that there were no substantial and compelling circumstances to deviate from the imposition of minimum sentence in terms of section 51(1) of Act 105 of 1997.

Evaluation on conviction

[25] The established facts are that on the evening of the incident, the complainant was in the company of the appellant and two others, Ms KW and Mr MK. At some stage whilst they were in each other's company, KW and MK left the appellant and the complainant on their own behind a tree. KW overheard the complainant uttering the following words: "ahh" and "you are hurting me". All four individuals were then confronted by members of the local anti-crime organisation.

[26] On approaching them, Ms EN of *Wanya Tsotsi* observed grass and soil on the back side of the complainant. The complainant ended up at the police station where a criminal case was laid against the appellant and whereafter she was taken to hospital for examination. The clinical observations and findings by the medical doctor indicated signs of labial and hymeneal penetration with no injuries.

[27] Given the facts outlined above, this Court is then called upon to determine whether the trial Court properly convicted the appellant on the charge he faced and imposed an appropriate sentence.

Ruling on the admissibility of hearsay evidence

[28] It is an established principle that a court of appeal will only interfere with a conviction by a trial Court if it is satisfied that the latter court made wrong factual findings on the evidence presented.²

² See *S v Monyane and Others* 2008(1) SACR 543 (SCA) at 547

[29] It is apparent from the record and the judgment that the Learned Regional Court Magistrate placed reliance on hearsay evidence relating to what the complainant allegedly told KW and EN about having been sexually penetrated by the appellant. This hearsay evidence constituted evidence upon which the trial Court convicted the appellant.

[30] The admission of the complainant's hearsay evidence was done though the record reveals that during the trial, there was no agreement between the State and the defence on the introduction and admission of such evidence nor was there an attempt made by the prosecution to lay the basis upon which such evidence could have been admitted in terms of the provisions of section 3 of the Law of Evidence Amendment Act 45 of 1998.

[31] Notwithstanding a ruling that the complainant was an incompetent witness, the trial Court did not apply its mind to the issue relating to the admissibility of the complainant's evidence nor made a ruling on its admissibility. This failure to deal with hearsay evidence by the trial Court affected the fair trial rights of the appellant and cannot be countenanced.

[32] In *Ndhlovu*³ the Court cautioned that a trial Court must be appraised of the status of the hearsay evidence before it well in advance and must fully apply its mind to the hearsay evidence and make a ruling on its admissibility to avoid a trial by ambush.

[33] Since the trial Court failed to heed this warning, the concession made by *Mr Hollander*, on behalf of the State was, in my view, correctly made and thus the attack on this finding by *Mr Steynberg* on behalf of the appellant ought to be upheld.

Sufficiency of circumstantial evidence

[34] The record reveals that the learned Regional Court Magistrate identified the fact that KW saw the complainant to have been in pain and discomfort after having heard her uttering words to the effect that the appellant was hurting her, that EN saw grass and soil

³ S v Ndhlovu and Others 2002 (2) SACR 325 (SCA) at 338a-c

particles on the complainant's back and the clinical findings by the medical doctor to be sufficient evidence strengthening the State's case against the appellant.

[35] The *locus classicus* on circumstantial evidence is *Blom*,⁴ in which it was held that two cardinal rules of logic which could not be ignored when it came to reasoning by inference were that (a) the inference sought to be drawn must be consistent with all the proved facts and if it is not, then the inference cannot be drawn and (b) the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.

[36] In assessing circumstantial evidence, courts have been cautioned not to consider pieces of evidence on an individual basis but to assess the cumulative impression of all evidence together. This much was stated in *S v Reddy and Others*⁵ in the following terms:

"In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration whether it excludes the reasonable possibility that the explanation given by the accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in R v Blom...."

[37] On consideration of the record, the proved facts are that the appellant, KW, MK and the complainant were walking together on the night of the incident. KW and MK at some stage left the appellant together with the complainant. Whilst they were behind a tree, neither KW nor MK could see what they were doing there, except that KW overheard the complainant uttering the words to this effect: "ahh" and "you are hurting me".

[38] I must emphasise that it was not disputed that the complainant, KW, MK and the appellant were the only people who were present when the cry out from the complainant was heard by KW. There can be no serious contention that KW might have heard the words attributed to the complainant from someone else.

⁴ R v Blom 1939 AD 188

⁵ 1996 (2) SACR 1 (A) at 8C-D

[39] Ms EN from Wanya Tsotsi and KW observed grass and soil on the back side of the clothes that the complainant was wearing. Objective medical evidence following examination of the complainant confirmed that there was labial and hymeneal penetration though there were no injuries, with some swelling indicative of an incident that occurred some 6 to 8 hours before the medical examination.

[40] The fallacy of the suggestion by the appellant that it was impossible for him to engage in sexual encounter with the complainant as alleged by the State due to his medical condition was refuted by his own witness, Dr Bosman, his attendant medical practitioner.

[41] Having cumulatively considered all these established facts, it is my view that the inference was correctly drawn that the appellant was guilty of rape of the complainant. His conviction ought to stand.

Admissible evidence on the age of the complainant

[42] Though the charge sheet spelt out that the appellant was being accused of rape involving a victim who was 12 years of age, it is apparent from the record that the State did not lead any admissible evidence to prove the age of the complainant at the time of the commission of the offence.

[43] In the absence of any credible and admissible evidence demonstrating the age of the complainant at the time of the commission of the offence, the trial Court erred in convicting the appellant as charged and as will be discussed below, sentencing him in accordance with the provisions of section 51(1) read with Part I of Schedule 2 of Act 105 of 1997.⁶

[44] This aspect was readily conceded on behalf of the State and consequently, there was no basis upon which the appellant's conviction and consequent sentence would have

⁶ See *S v Tshimbudzi* 2013 (1) SACR 528 (SCA) at para 6

been premised on the application of section 51(1) read with Part I of Schedule 2 of Act 105 of 1997.

Evaluation on sentence

[45] This Court's power to interfere with the sentence imposed by the trial Court is limited. The limitation was expressed in the following manner by the Constitutional Court in *Bogaards*⁷:

"It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it"

[46] In my view, the trial Court's finding and its imposition of the minimum sentence regime as prescribed in section 51(1) of Act 107 of 1997 was a clear misdirection which calls for interference by this Court. The imposition of a sentence of life imprisonment falls to be set aside and be replaced with an appropriate sentence as determined in section 51(2) of Act 107 of 1997.

[47] The reconsideration of an appropriate sentence calls upon this Court to consider the conviction, the totality of the triad of facts and to exercise its discretion judicially and in a proper manner by, amongst others, considering the personal circumstances of the appellant, the circumstances surrounding the offence and the interests of society.

[48] The above factors must be considered in line with the established principles of punishment, being retribution, prevention of crime, deterrence of would-be criminals and reformation of the offender.

[49] The appellant's personal circumstances are fully canvassed in the pre-sentence report and the correctional supervision report presented before the trial Court. At the

⁷ *S v Bogaards* 2013 (1) SACR 1 (CC) at para 41

time of his sentencing, the appellant was 55 years old, unmarried man with an unidentified chronic condition. He had a 36-year-old daughter. He relied on pension grant for a living and attended school up to standard three. Upon being sentenced, he had been in custody for 4 years awaiting trial and was diagnosed with asthma whilst in custody.

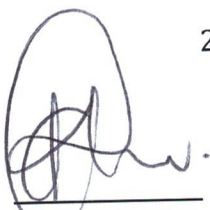
[50] The seriousness of the offence of rape cannot be overemphasised. This must also be seen against the personal circumstances of the complainant who had to undergo medical attention as a result of her experience with the appellant. The appellant committed a serious and dehumanising offence which the Legislature found it appropriate to prescribe minimum sentences.

[51] On a consideration of the totality of the appellant's personal circumstances, the interest of society and the offence upon which he was convicted, I find that there are no compelling and substantial circumstances which dictate the imposition of a lesser sentence than the prescribed minimum sentence as provided for in section 51(2) read with Part II of Schedule 2 of Act 105 of 1997.

Order

[52] In the premises, the following order is made:

1. The appeal against conviction is refused.
2. The appeal against sentence is upheld and the order of the trial Court is set aside and replaced with the following order:
 - 2.1. The appellant is sentenced to ten (10) years imprisonment.
 - 2.2. The sentence in paragraph 2.1. above is antedated to 23 March 2020.



OK CHWARO
ACTING JUDGE OF THE HIGH COURT

I concur

L. Lever

L LEVER
JUDGE OF THE HIGH COURT

DATE OF HEARING: 09 May 2022

DATE OF JUDGMENT: 20 May 2022

APPEARANCES:

For the Appellant:

Mr H. Steynberg
Instructed by:
Legal Aid South Africa
Kimberley

For the Respondent:

Adv Q Hollander
(With him Adv S Sauls)
Director of Public Prosecutions: Northern Cape
Kimberley