

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA

Case No.: C.A &R 240/2021

In the matter between:

GCINIKHAYA NTENTILE

Appellant

and

THE STATE

Respondent

JUDGMENT

RAWJEE AJ:

[1] The appellant, a 38 year old male, was convicted of the rape of a 12 year old child (first charge) and of sexual assault of a 28 year old female (second charge) and he was sentenced to life imprisonment on the charge of rape and to four years imprisonment for the sexual assault in the Regional Court, Port Elizabeth.

[2] This is an appeal against the conviction and sentence to life imprisonment on the first charge of rape of a 12 year old child.

[3] The State relied on the evidence of four witnesses - the complainant, who at the time of the trial was 15 years old and a single witness to material elements of the offence; the complainant's aunt; the complainant's mother and the complainant's friend, Ms S.

[4] At the commencement of the trial the accused admitted the J88 report completed by Dr Moodley, the photo album taken of the crime scene, the DNA sample collection kit and that the appellant was the father of the child born to the complainant, who herself was a child of 12 years of age. A poignant fact that emanates from this case is that if the complainant did not fall pregnant at the age of

twelve years old, the rapes she experienced at such a tender age would have gone undetected and unreported.

[5] In July 2016, the 12 year old complainant, a Grade 6 learner, who was attending primary school, was playing outside with her friends. The appellant called her to buy cooldrink for him. She went to deliver the cooldrink to his home together with her friend, Ms S. She left the cooldrink in the lounge and was about to leave when the appellant asked her if she left the cooldrink in the lounge at her home. She then took the cooldrink to the kitchen. As she was coming back from the kitchen the appellant caught her and pulled her into the room and instructed her friend to leave. He then took off her shorts and panty and raped her. He did not use a condom while raping her. He threatened that he would kill her father if she told anyone about the rape. The appellant and the complainant's father knew each other and drank together. She saw Ms S when she left the house after the rape but said nothing to her. Ms S testified that she saw that the complainant was walking differently. The complainant did not want to talk. They went to sit with their friends again. In October 2016, the complainant was busy hanging clothes when he called her to go and buy him airtime. She went to buy airtime and picked Ms S up again before going to the appellant's house to give him the airtime. She went in and found the appellant topless. The appellant then pulled her by her hand towards the room and Ms S tried to pull her away from the appellant this time, to no avail. Ms S left and he ordered the complainant to go to the bedroom where he raped her. While he was raping her there was a knock on the door. The appellant went to open the door and the complainant jumped out through a window. She feared it was her mother looking for her and she was fearful the appellant would harm her father if her mother found out she was being raped by the appellant.

[6] In December 2016, the complainant did not get her period. This was noticed by her mother. Her mother had a pregnancy test done which confirmed that the complainant was pregnant. She was taken to the Mary Stopes Clinic to have an abortion but could not follow through with it as she was past the three-month gestation period. She refused to tell her mother how she felt pregnant. When they arrived back home from the Clinic, the complainant's mother called the complainant's paternal aunt and asked her to come home. Her aunt came to the house soon after

the telephone call and the complainant's parents told her that the complainant was pregnant and that she was refusing to name the father of the child. After her paternal aunt threatened to beat her she identified the appellant as the father and said she was afraid to mention his name and report the rapes as he threatened to kill her father if she did. Her reports of the rapes were corroborated by the evidence of her mother, her paternal aunt and her friend, Ms S. The evidence that the appellant was a drinking friend of the complainant's father; that he had seen her in school uniform and that he had a daughter the same age as the complainant was not contested by the appellant. The complainant was then taken to the police station and then to the Thuthuzela Care Centre situated at Dora Nginza Hospital for a medical examination. The complainant's medical records ("J88") recorded her age as a minor; that her last menstrual cycle was in August 2016; and that she was 20 weeks pregnant.

[7] The appellant's version is that the intercourse with the complainant was consensual and that he did not know that the complainant was only 12 years old. I find this version of the appellant to be false considering the evidence as a whole, in particular the evidence that the complainant had seen her in her school uniform.

[8] Mr Charles, appearing for the appellant, correctly conceded that he could not stand by his submission that the appellant did not know the age of the complainant after having considered the evidence as a whole in particular that: the appellant saw the complainant in her school uniform and the fact that he was a friend of her father's. Moreover, the appellant was a 38 year old male with a daughter the same age as the complainant. Mr Kgatwe, correctly submitted that it was common cause that the appellant saw the complainant in her school uniform; that the appellant was a friend of the complainant's father and the father of the child born to her.

[9] The trial court furthermore had specific regard to the delay in reporting the rape and found that it was not unreasonable. In the matter of *S v Connick and Another* 2007 (2) SACR 115 (SCA) where the rape happened 19 years before charges were laid refers. The complainant's memory was triggered when she met Connick at his sister's home 19 years later. After meeting him there she told her husband about the rape and reported it to the SAPS. The trial court found her explanation for the delay to be reasonable and furthermore relied on the rape of the

complainant being corroborated by the evidence of other witnesses. While there was a delay of 19 years in reporting the rape in *Connick supra*, the rape in this matter was reported a few months later. Furthermore, the evidence of the complainant in this matter is similarly corroborated by other evidence in this matter in particular the pregnancy of the complainant and the admission by the appellant that he is the father of the complainant's child.

[10] I am not convinced that the trial court's findings on credibility and on the facts are wrong and the conviction for the rape must stand.

[11] I now turn to deal with the appeal against the sentence of life imprisonment.

[12] This court, as a court of appeal, can only interfere with the sentence imposed by the court *a quo* if a demonstrable misdirection on the part of the learned magistrate is shown or where the sentence imposed is vitiated by irregularity or is disturbingly inappropriate (See *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12). Mr Charles did not point to any demonstrable misdirection on the part of the learned magistrate.

[13] Mr Kgatwe, representing the State, submitted that the sentence of life imprisonment is not shockingly inappropriate having regard to the following facts: the complainant was 12 years old at the time of the incident; the appellant raped the complainant more than once; the appellant impregnated the complainant and admitted to being the father of the child; and the appellant showed no remorse, maintaining that the intercourse was consensual and therefore refusing to acknowledge and take responsibility for his wrong doing. Having considered the factors of the *Zinn triad*, the trial court correctly found that there were no substantial and compelling circumstances to deviate from the sentence of life imprisonment.

[14] I would accordingly make the following Order:

14.1 The appeal against the conviction on the count of rape and against the sentence is dismissed.

A RAWJEE

ACTING JUDGE OF THE HIGH COURT

NORMAN J:

I agree. It is so ordered.

T V NORMAN

JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Adv Charles instructed by Legal Aid Centre, Grahamstown

For Respondent: Adv Kgatwe instructed by National Director of Public
Prosecutions, Grahamstown

Date Heard: 11 May 2022

Date Delivered: 31 May 2022