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

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: A17 /2020

LERATO RONALD RALILE

Appellant

and

THE STATE

Respondent

CORAM: MBHELE, ADJP, et NAIDOO, J et REINDERS, J

JUDGEMENT BY: MBHELE, ADJP

HEARD ON: 15 SEPTEMBER 2020

DELIVERED ON: 06 JANUARY 2021

- [1] The appellant was convicted by the Regional Magistrate, Bloemfontein, of raping the complainant more than once, whilst she was 9 years old, and sentenced to 10 years imprisonment. He appeals against conviction and sentence. The appellant's mother (accused 2) was charged alongside the appellant for failure to report to a police official knowledge that rape was committed against the complainant.
- [2] The offences are alleged to have happened during the year 2014. The background facts are as follows. The appellant is the complainant's cousin. The complainant and the appellant lived in the same house together with accused 2. She stayed with the appellant and his mother since she was a baby. Her mother's whereabouts are not known.
- [3] The complainant testified that one afternoon while she was playing outside the appellant called her into the house. The appellant instructed her to take off her clothes to which she obliged because she respected him as her brother. The appellant, further, instructed her to climb on top of a bed where after he climbed on top of her, inserted his penis in her vagina and started doing up and down movements. He thereafter instructed her to leave the room after telling her not to tell anyone about what happened.
- [4] Two days later the complainant was at home with the appellant and accused 2. Accused left the house to visit her friend at a nearby tavern while the complainant went outside to play. The appellant who had remained in the house called the complainant

into the house. He again instructed her to take her clothes off and lie on top of the bed. The appellant then climbed on top of the complainant, inserted his penis in her vagina and made up and down movements. She felt pain and tried to scream but the appellant put his hand across her mouth to block the sound from coming out. The appellant instructed her not to tell anyone about the incident and threatened to kill or assault her should she divulge it to anyone.

[5] When accused 2 came back home the complainant reported to her what happened while she was away. The appellant was not in the room when the complainant made the report to accused 2. The report was made while the complainant and accused were in the TV room and the appellant in the kitchen. Accused called the appellant and asked him if what the complainant told her was the truth but the appellant denied it. Accused 2 then took a wooden spoon and hit the appellant with it on his head. The appellant ran out and never came back home until the complainant went to sleep that evening. Accused then left the house to go to Palesa Khumalo who owns a tavern in their neighbourhood.

[6] When Accused 2 came back from the tavern she told the complainant not to sleep with the appellant in the same room that evening. The complainant was instructed to make a bed in the kitchen on the floor. The following day the complainant went to school where she was later fetched and taken to police station. She was with Palesa at the police station. She was then removed from accused 2 's house and taken to a place of safety.

- [7] Palesa, testified that on 18 May 2014 the appellant's mother came to her at Sekimo's house and reported that she found the appellant raping the complainant. This she said after she made a remark that she has always been telling Palesa that the complainant was naughty. When Palesa asked her what she planned to do with the information at her disposal she told her that she would go to the police and report the matter which she did not do. Palesa went to the complainant's school with an intention to discuss the complainant's academic progress with her teacher and to further report that she has heard news that the complainant was raped.
- [8] When she could not meet with the complainant 's teacher whom she was told was busy she decided to go to the police to report the matter. The complainant was then fetched from her school to the police station. She was asked to accompany her to the doctor for examination. She did not receive any report from the complainant about the incident nor did she meet with the complainant before the charges could be laid. She met the complainant for the first time at the police station after she had already reported the matter. She reported the matter to the police because she was concerned as a resident. During consultation with the doctor the complainant demonstrated with anatomic dolls how she was raped.
- [9] The complainant was examined by Dr Kotze in the presence of Palesa. She did not find visible injuries on the complainant's genitalia but she did not rule out sexual abuse. Upon enquiry she was informed by the complainant that her brother (O[....]) did

something bad to her. She demonstrated by putting a male doll on top of the female doll lying facing each other. She attributed absence of injuries in the complainant's genitalia to her young age. She explained that children at the complainant's age enjoy good supply of blood into their genitals which improves elasticity and makes it resilient to injuries.

- [10] The appellant testified and denied allegations against him. Accused 2 also denied knowledge of any rape incident committed by the appellant against the complainant. According to her the probable motive behind the charge against her and the appellant is that the relations between her and Palesa had soured and they were not on talking terms. She however admits that she went to complain to Palesa that the complainant was naughty and had tendencies of staying away from home until late at night.
- [11] In his notice of appeal, the appellant contended that the court *a quo* erred in finding that the state has proved its case beyond reasonable doubt despite material contradictions in the state's case and rejecting the evidence of the appellant.
- [12] The trial court evaluated the evidence and came to the conclusion that the State witnesses were truthful and rejected the version of the appellant as improbable. It is trite that factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. The acceptance by the trial court of oral evidence and conclusions thereon are presumed to be correct, absent misdirection. (See **S v Francis** 1991 (1) SACR 198 SCA at 204 e-d.) A court of appeal

may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong. (See **R v Dhlumayo & another** 1948 (2) SA 677 (A) at 705-706).

- [13] It is well established that, where a trial court makes findings on credibility of a witness, the court of appeal will take into account that the trial court had the advantage of seeing the witnesses give their oral evidence, which is not available to the court of appeal. The powers to evaluate and appraise evidence belong to a trial court and its conclusions cannot be interfered with simply because a court of appeal would have come to a different finding or conclusion. The trial court's advantage of seeing and hearing witnesses places it in a better position to assess the evidence than a court of appeal, and such assessment must take precedence unless there is clear and demonstrable misdirection. The Supreme Court of Appeal held as follows in **S v Pistorius 2014 (2) SACR 315 (SCA)** par 30:

'It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. **R v Dhlumayo and Another 1948 (2) SA 677 (A)** at 706; **S v Kebana 2010 (1) All SA 310 (SCA)** para 12.' As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings.'

- [14] It is trite that the State must prove its case beyond reasonable doubt. Ms. Kruger, on behalf of the appellant, submitted that the contradictions in the State's case were so glaring and material that they warranted a total rejection of the State's case. She

contended, further, that the complainant was a single witness whose evidence had to be approached with caution.

- [15] Contradictions must be material to warrant rejection of a witness' evidence. The court must after evaluating all evidence be satisfied that the truth has been told. In dealing with contradictions the following was said in **Mkohle 1990 (1) SACR 95 (A)**:

"Contradictions per se do not lead to the rejection of a witness' evidence, they may simply be indicative of an error".

- [16] In **State vs Oosthuizen 1982 (3) SA 571 (T)** from page 576 paragraph G to H it was held:

"Not every error made by a witness affects his credibility, in each case the trier of fact has to take into account such matters as the nature of the contradictions, their number and importance and their bearing on other parts of witness' s evidence".

- [17] Application of caution is necessary in assisting the court to decide whether the guilt of the accused has been established beyond reasonable doubt. It has been established that the application of caution must not be allowed to displace the exercise of common sense. In **S v Sauls and Others 1981 (3) SA172 (A)** the appellate division stipulates it clearly that:

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness...The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule ... may be a guide to a right decision but it does not mean 'that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well founded... It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

- [18] Although Dr. Kotze denied that the complainant told her explicitly that the appellant had sexual intercourse with her as testified by the complainant and Palesa, she did mention that the complainant told her that her brother (O[...]) did bad things to her and demonstrated the said things through two anatomical dolls, with a female doll lying on its back while the male one was on top and facing each other.

- [19] The complainant's version is supported by that of Palesa. Palesa and the complainant never met to discuss this matter until a charge was laid with the police. The complainant and Palesa's account of events is clear and it does not show that they colluded to falsely implicate the appellant and his mother.

- [20] I am unable to find any demonstrable or clear error on the part of the trial court to justify interference with its credibility findings. The trial court was correct in its assessment of evidence and credibility findings. I cannot find that the trial court erred in finding that the appellant and his co-accused's version is inherently improbable and fell to be rejected.

- [21] The sentencing powers are pre-eminently within the judicial discretion of the trial court; the court of appeal should be careful not to erode such discretion. The court sitting on appeal will interfere if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate. See **S v Rabie 1975 (4) SA 855 (A) AT 857 D-E** also **S v De Jager and Another 1965 (2) SA 616 (A)**
- [22] When sentencing, the court must consider the main objectives of punishment, being the prevention of crime, retribution, the deterrence of criminals, and the reformation of the offender. Simultaneously, the court must strike a balance between the crime, the offender and the interest of society.
- [23] In **S v Mudau 2013 JDR 0938 (SCA)** para 13. Madjiet JA, as he then was, remarked as follows:
- “I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualised, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity. . .”
- [24] The offence committed by the appellant is undoubtedly a serious one. The complainant grew up in front of the appellant and

considered him as her brother. The complainant trusted him and he, in turn, took advantage of her fragile state. The complainant was violated in the sanctity of her own home. A place she considered her sanctuary and was supposed to feel safe at.

[25] The fact that the Constitution regards a child's best interests as of paramount importance must be emphasized. It is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children unless unjustifiable. Whilst children have a right to inter alia, protection from maltreatment, neglect, abuse or degradation, there is a reciprocal duty to afford them such protection. Such a duty falls not only on law enforcement agencies but also on right thinking people and, ultimately the court, which is the upper guardian of all children. See **De Reuck v DPP WLD 2003 (1) SACR 448 (WLD) at 457 par 10**

[26] In **S v Abrahams 2002 (1) SACR 116 (SCA) Cameron JA** remarked as follows with regards to sexual violation of minor children in the domestic sphere.

“of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter's best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense.”

[27] It is clear from the above dicta that the rape of minor children must be viewed in a serious light, worse if committed by those entrusted with the care and safety of the child. Home is supposed

to be a place where children are cared for and protected. Sexual abuse in the domestic sphere is not the type that victims can easily escape from. It thrives on intimidation and blackmail. The victims have to live with their predator, see them every day and disguise their pain. It is apparent that the appellant would have continued with his criminal conduct had Palesa not blown the whistle on time.

- [28] Sexual violence against children evokes communities' indignation and often prompts them to resort to self-help to keep their children safe. The courts are the last hope for the tormented society.
- [29] The appellant was 16 at the time of the commission of the offence and 21 years old during sentencing. The court found that section 51 of the Act 105 of 1997 does not find application for the purpose of sentencing. He was a first offender, single, with no children and went to school up to grade 9. He was employed earning R450 per week. He was a minor during the commission of the offence.
- [30] It is so that sentence must be tailored to suit the offender, the crime and the circumstances surrounding the case. As stated *supra*, punishment must be proportionate to the offence. Although the appellant was a minor he brutally took away the innocence of a young child. The offence calls for a lengthy jail sentence.
- [31] When weighing up the mitigating factors against the aggravating circumstances, this matter as well as the interest of community, I am not persuaded that there is a just cause to interfere with the sentence imposed by the trial court. The appeal ought to fail.

ORDER

[32] The following order is made:

1. The appeal against conviction and sentence is dismissed;
2. The conviction and sentence are confirmed.

N.M. MBHELE, ADJP

I concur

S. NAIDOO, J

I concur

C. REINDERS, J

On behalf of the appellant:

Ms. S Kruger
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent:

Adv. Straus
Instructed by:
Director: Public Prosecution

BLOEMFONTEIN