



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 No.: A242/2018

In the appeal between:

PHEELLO JOHANNES JANTJIES

Appellant

and

THE STATE

Respondent

CORAM: MATHEBULA, J et CHESIWE, J

JUDGMENT BY: MATHEBULA, J

HEARD ON: 10 DECEMBER 2018

DELIVERED ON: 28 MARCH 2019

- [1] The appellant was convicted of rape and attempted rape. He was sentenced to life and eight years imprisonment respectively. He is now appealing against both convictions and sentences. I hasten to

add that on the conviction and sentence pertaining to the charge of attempted rape, there is a concession that it is in order. I intend not deal with it as I can find no misdirection on the part of the court *a quo* order or that the sentence imposed is shockingly inappropriate.

- [2] The facts are briefly as follows. A six year old P M testified that she was walking from school with T and O when they met with the appellant. The appellant commanded the two boys to undress her and thereafter he made her to lie on her back in the ditch. Thereafter the boys were instructed to hide behind the rock.
- [3] The accused threatened to kill her if she divulge to anyone what transpired. He proceeded to penetrate her with his penis. After he was done with her, he again threatened to kill her if she reported the matter to any other person.
- [4] Her version was corroborated by T who testified that he was with the complainant when they met the appellant. The appellant was well known to him as he had seen him many times before the day.
- [5] The appellant instructed the complainant to undress and go in one of the ditches. He (T) went to the other one. However, before doing so, the appellant had already undressed and was lying down with the complainant. He saw nothing further until the complainant emerged from the ditch.
- [6] Their journey home was a quiet one with the complainant not uttering a word. They did not tell their parents anything because

they were scared of the appellant. According to him incidents of this nature occurred several times to the complainant he later reported this matter to his mother.

- [7] The complainant's mother testified that she overheard T saying that the appellant had sexually assaulted the complainant. She probed the children on this aspect and they were all coy to tell the truth. It was T who told her what happened between the complainant and the appellant. This aspect was confirmed to her by the complainant.
- [8] The forensic nurse Amanda van Heerden testified that she examined the complainant on 12 July 2016. The complainant was anxious and the bruise on her neck was still visible. She concluded that based on the injuries she sustained, they were consistent with uncooperative non-consensual sexual intercourse. According to her, the complainant had been sexually assaulted prior to the examination.
- [9] The appellant elected to invoke his right to remain silent and did not testify.
- [10] It is trite law that a court of appeal may not depart from the findings of fact and credibility by the court *a quo* unless they are vitiated by irregularity or are patently wrong.¹ The presumption is that the court *a quo*'s conclusion on the facts is correct. Such

¹ S v Hadebe and others 1997 (2) SACR 641 (SCA) at 645 E - F

conclusions can be reversed by this court if we are convinced that the court *a quo* is wrong. However, the court of appeal has a duty to investigate the factual findings made by the court *a quo* in order to ascertain that they are correct. In the event that wrong findings have been made then interference is justified.²

- [11] The proper approach in evaluating evidence was considered in **S v Chabalala** and held as follows:-

“The correct approach is to weigh up all 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 reasonable doubt about the accused’s guilt.”³

- [12] I am satisfied that the respondent has proved its case beyond a reasonable doubt. The court was alive to the fact that the evidence of children should be approached with caution because of its inherent dangers. In addition that a person can be convicted on the evidence of a single witness if such evidence is satisfactory in material respects.

- [13] In this matter, the child witnesses corroborated each other by detailing in chronological order the involvement of the appellant in the sexual molestation of the complainant. In evaluating the evidence, the court *a quo* was correct that the evidence of the witnesses cannot be faulted. I agree.

² S v M 2006 (1) SACR 135 (SCA) at 152 A - C

³ 2003 (1) SACR 134 (SCA) at para 15

[14] In a criminal trial the accused person is not obliged to testify in rebuttal.⁴ However, there are consequences for an accused who when faced with formidable evidence against him elect not to testify. The legal position is that the accused will be at risk if does not produce evidence in rebuttal where the state has established a *prima facie* case.

[15] In this matter, the appellant did not produce any evidence in rebuttal. He elected to remain silent. This was to his detriment because the state had a *prima facie* case against him which required his rebuttal. This means that he forfeited the opportunity to put before the court *a quo* a version that only had to be reasonably possibly true. He did not. On this ground, I am convinced that the appeal ought to fail.

[16] The next instalment of the appeal to be considered relate to sentence. The court of appeal will interfere with sentence if there is an irregularity that results in a failure of justice.⁵ The appellant had committed an offense for which the Legislature has prescribed a minimum sentence of life imprisonment. The court can only deviate from imposing the aforementioned sentence if there are substantial and compelling circumstances. The court *a quo* was very much aware of its responsibilities in this regard and dealt with both aggravating and mitigating factors.

[17] The court concluded that there were no reasons justifying deviation from the prescribed sentence. The perpetration of rape against

⁴ S v Brown 1986 (2) SACR 49 (WC); S v Boesak 2001 (1) SA 912 (CC)

⁵ S v Bogaards 2013 SACR (1) at para 41

small children is a scourge that must be uprooted and eradicated in society. Perpetrators should be dealt with harshly with clear intention of sending a message to would be offenders that they will be shown little mercy by the courts.

[18] In this matter I could find no blemish that the court a quo exercised its discretion improperly and/or unreasonably.

[19] Accordingly I make the following order:-

19.1. The appeal against convictions and sentences is dismissed.

MATHEBULA, J

I concur.

CHESIWE, J

On behalf of the appellant:
Instructed by:

Adv. L Tshabalala
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent:
Instructed by:

Adv. D Pretorius
Director: Public Prosecutions
BLOEMFONTEIN