

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



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: A180/2016

In the matter between:

MOSES SIMON MASANABO

APPELLANT

and

THE STATE

RESPONDENT

CORAM:

NAIDOO, J *et* MOLITSOANE J

JUDGMENT BY:

NAIDOO J

HEARD ON:

11 MARCH 2019

DELIVERED ON:

21 MAY 2019

INTRODUCTION

[1] The appellant was convicted of contravening section 3, read with other relevant provisions of Act 32 of 2007 (the Sexual Offences Act) as well as the relevant provisions of the Criminal Procedure Act 51 of 1977 (the CPA) on one count of Rape (count 1) and one count of Sexual Assault (count 2) in the Regional Court, Heilbron. He pleaded not guilty to the charges, but on 16 January 2013, was convicted thereon and sentenced on 25 June 2013 to life imprisonment on count 1 and two years' imprisonment in respect of count 2. The appellant has an automatic right of appeal in respect of the sentence of life imprisonment and the court a quo granted leave to appeal in respect of count 2. Mr D Reyneke represented the appellant in this court and Mr Harrington represented the respondent, being the state.

BACKGROUND

[2] On 14 August 2010, ten year old R[....] G[....] M[....] (R[....]) and his 5 year old sister were asleep in their room in their home. Their mother, D[....] R[....] M[....] was away from the house, attending a funeral. Their mother's partner, or their stepfather as he has been referred to, was (ostensibly) asleep in the next room which he shared with their mother. The stepfather, Moses Simon Masanabo, is the appellant in this matter. In the early hours of 15 August 2010, the appellant allegedly went into the children's bedroom, and climbed into the bed with the children. He was naked. He began fondling the complainant's penis and forced the complainant to stroke his (the appellant's) penis.

Thereafter he turned the complainant over and penetrated him anally with his penis. The complainant thereafter went to the bathroom and the appellant left the room.

- [3] The next morning, or later that morning, the appellant gave the children some money and they went to their grandmother's house, where the complainant, who was crying, reported to her what had happened the night before and told her what the appellant had done. The children played at the grandmother's house and returned to their home in the afternoon. Later as the complainant was washing himself, his mother came into the room and noticed that he was hurt and asked him how he sustained those injuries. He then repeated to her what he had told his grandmother. Thereafter, they went to the police station, where a case was opened, and he was taken to the hospital to be medically examined.
- [4] The complainant's mother and grandmother also testified and confirmed that he told them what the appellant had done, namely that he had fondled the complainant's penis and pushed his penis into the anus of the complainant. The doctor who examined the complainant in the late evening of 15 August 2010 testified that the complainant was in a poor state of bodily hygiene, and it appeared that he did not clean himself properly. He also indicated that he found sores at the base of the complainant's penis and cracks around his anus. The doctor indicated that these could be due either to poor hygiene or to penetration, and he was unable to come to a conclusion. . The state then closed its case.
- [5] The appellant confirmed that the mother of the two minor children was not at home and was attending what appeared to be a night vigil and he was alone with the complainant and his sister that evening. He was aware that she would not be at home that

evening as she had earlier in the day informed him so. He fell asleep around 19h00 and did not see the complainant's mother leave. He woke up at approximately 1h00 on 15 August 2010, and when he did not see his wife, he went to the children's room and shook the complainant awake to ask if he knew where his mother was. The complainant sleepily said no, so the appellant went to either the lounge or diningroom and watched television until 2h00. He thereafter went back to sleep and awakened about 7h00 that morning. His wife was still not back, so he gave the two children money to buy bread. They left the house but did not buy the bread. They went to the grandmother's house. He denied raping or sexually assaulting the complainant and also denied that he was naked. He was arrested later that day.

- [6] As correctly pointed out by the court *a quo*, the state bears the onus to prove the guilt of an accused beyond reasonable doubt and that the accused person bears no onus to prove his innocence. In this matter the appellant assails the judgment of the trial court on a number of grounds the most important of these being that the court failed to undertake a proper analysis and evaluation of the evidence. The appellant also alleges that the court erred in finding that the state proved its case beyond reasonable doubt, especially as the complainant was a single witness, and as such, the court failed to apply the cautionary rule. The court also erred in failing to consider the improbabilities in the state's case.

In this respect the appellant relied on the fact that it was only towards the end of his evidence that the complainant indicated that the appellant had penetrated him anally. Similarly the complainant's mother indicated only under cross-examination that

the complainant had reported to her that he had been penetrated anally.

- [7] It is trite that an appeal court will not lightly interfere with the findings of the trial court especially as the latter was steeped in the atmosphere of the trial and had the benefit of observing witnesses. The trial court is in the best position to make findings as to such matters as credibility, demeanour and reliability. The court *a quo* in this matter specifically remarked that, in spite of his age, the complainant testified in a clear and logical fashion, and made a good impression on the court. An appeal court will only interfere if there is a misdirection on the part of the trial court in the application of the law or the facts. The trial court was very cogniscent of the doctor's testimony that given the state of the complainant's personal hygiene, he opined that there was a 50% possibility that the cracks observed around the anus of the complainant could have been caused by anal penetration.
- [8] The court then proceeded to examine the surrounding circumstances, much of which was common cause. The court concluded that it was very improbable that a ten year old child who enjoyed a good relationship with his stepfather who took care of the complainant and his family, would simply declare one morning that the stepfather had sexually abused him. He found that on the probabilities the complainant's version is the more probable one, given that the complainant arrived at his grandmother's house the following morning, crying, and narrated to her what had happened. This is also corroborated by the mother who found injuries around the complainant's anus, and that his penis was painful. The complainant then repeated to her what he had told his grandmother. In my view, a ten year old has neither the maturity, nor the level of life experience and knowledge of sexual matters to

have made up his detailed version. Although the court *a quo* did not specifically say so, it was apparent from the court's judgment that it rejected the appellant's version as false.

- [9] The case of **S v Singh 1975(1) SA 227 (N)** gives guidance on how to approach the evidence where the state and defence versions differ from each other where the court said:

".... it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses".

- [10] The court *a quo* dealt briefly with the evidence of the appellant, without going into much detail, but contrasted his version with that of the complainant and declared that the evidence of the complainant was more acceptable. In my view, the lack of a detailed examination of the appellant's version is not fatal, and does not amount to a misdirection on the part of the court. As bare as it may be in respect of details, it is apparent that the court considered both versions and correctly rejected that of the appellant. This is particularly so where the court found that the appellant was aware that his wife would be attending a funeral and would be away the whole night.

The court correctly rejected as false, his reason for waking the complainant, namely to ask where his mother was. I can find no fault with the conclusions of the trial court in respect of the conviction on count 1.

- [11] With regard to count 2, I am of the view that the actions of the appellant were part of one act leading to the rape of the complainant, and it amounts to a duplication of charges to have charged him separately with sexual assault. The act of causing the complainant to hold his penis was too close in time to be regarded as a separate act. In this respect, I am of the view that the court *a quo* misdirected itself in convicting the accused in respect of count 2, warranting the interference of this court
- [12] With regard to sentence, it seems that the record was reconstructed, as the portion of the record where the magistrate dealt with sentence was missing.

The court properly examined the personal circumstances of the appellant and weighed that against the seriousness of the offence and the interests of society. The court was unable to find any substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment in respect of count 1. The defence initially conceded that there was nothing substantial or compelling in the circumstances of the appellant, save that he is HIV positive. After the reconstruction of the record, the defence asked that the appellant's HIV status be regarded as substantial and compelling. In my view, this is an aggravating factor, as he sexually assaulted a child in the knowledge that he was HIV positive and was uncaring that the child could have been infected as a result of his actions.

[13] In the circumstances, the following order is made:

13.1 The appeal against the conviction and sentence in respect of count

1 is dismissed.

13.2 The conviction and sentence in respect of count 1 are confirmed.

13.3 The appeal succeeds in respect of count 2, and conviction and sentence in respect of count 2 are hereby set aside and replaced with the following finding:

“In respect of count 2, the accused is found not guilty”

S. NAIDOO, J

I agree

P MOLITSOANE J

On behalf of Appellant:

Adv. D Reyneke

Instructed by:

The Justice Centre

Bloemfontein

On behalf of Respondent:	Adv. Harrington
Instructed by:	The State