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

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

Case No. : A281/2018

In the matter between:-

THABO BINYANE

Appellant

and

THE STATE

Respondent

CORAM: MATHEBULA, J *et* MOLITSOANE, J

HEARD ON: 25 MARCH 2019

JUDGMENT BY: MOLITSOANE, J

DELIVERED ON: 20 JUNE 2019

- [1] The Appellant was arraigned in the Regional Court: Botshabelo on a charge of rape read with the provisions of s51 (1) of the Criminal Law Amendment Act 105 of 1997. He was convicted as charged and sentenced to life imprisonment. He has an automatic right of appeal and this appeal is against both his conviction and sentence.
- [2] The evidence of the state is briefly as follows: On the 21st May 2015 the complainant, then eight years of age was playing outside in her parental yard together with her other friends. The appellant then called her and sent her to his home to look for a wallet. When she got in his shack, which was demarcated with a curtain he told her to undress her pants and underwear. He put her on the bed and inserted his penis into her vagina and thus raped her. The children who were playing outside noticing that the complainant was taking long alerted her aunt one M[....] Y[....]. The latter went to the house of the appellant and called both the appellant and the complainant. The appellant came from behind a curtain in his house busy pulling the zip of his fly. He was followed by the complainant who was crying. M[....] left with the complainant and alerted the neighbours about what she had just witnessed. The police were summoned and the appellant was subsequently arrested.
- [3] The appellant deny the allegations against him and asserts that he is being falsely implicated by M[....]. He further alleges that he was in a love relationship with M[....] and according to him M[....] cheated him with a taxi driver. According to him on the day of this incident he was drunk. He arrived at his home and found K[....]and T[....] playing in his yard. He switched his TV on so as to enable the said children to watch it while he went to sleep. He was awoken

from his sleep by M[...] who accused him of raping the complainant. As indicated he denied any wrongdoing.

[4] The following are the grounds of appeal on the conviction:

1. The court a quo erred in finding that the complainant was a credible witness;
2. The Court erred in drawing a negative inference of the appellant's version and not making a credibility finding in favour of his testimony;
3. The Court erred in finding that the State had proved its case beyond a reasonable doubt;

[5] The evidence of the state is based on the evidence of a single witness. Apart from being a single witness to the act of rape the complainant was a child aged eight years at the time. This means that the court had to be more cautious in approaching her evidence.

[6] Section 208 of the Criminal Procedure Act 51 of 1977 provides that a conviction may follow on the evidence of a single competent witness. It is settled that the evidence of a single witness must be approached with caution. In *S v Stevens*¹ the court said:

"In terms of s208 of the Criminal Procedure Act, an accused can be convicted of any offence on the single evidence of a competent witness. It is, however, a well-established judicial practice that the evidence of a single witness should be approached with caution, his or her merits as a witness being weighed against factors which militate against his or her credibility."

¹ 2005(1) All SA 1 (SCA) at par [15].

- [7] Apart from the complainant being a single witness, she is also a child. State also led the evidence of another child O[...] who was nine years of age at the material time. The court should thus approach the evidence of both children with the necessary caution. In **Woji v Santam Insurance Co Ltd**² the court said the following with regard to the evidence of children:

“Trustworthiness....depends on factors such as the child’s power of observation, his power of recollection and his power of narration on the specific matter to be testified....His capacity of observation will depend on whether he appears ‘intelligent enough to observe’. Whether he had the capacity of recollection will depend again on whether he has sufficient years of discretion ‘to remember what occurs’ while the capacity of narration or communication raises the question whether the child has capacity to understand the questions put, and to frame and express intelligent answers.”

- [8] The complainant testified in a nutshell that she was playing outside in her parental yard when the appellant, who is their neighbour called her and asked her to go and fetch his wallet at his home. This evidence is corroborated by O[...] who testified that prior to the complainant being sent to fetch the wallet the appellant sent her to go and buy a box of matches and home-made beer for him. O[...] further testified that the appellant also told her to take the things he sent her to buy to his home. Upon arrival the appellant gave her money. It is her testimony that thereafter he asked her to undress but she refused and ran away. Of crucial importance she testified that the appellant thereafter called the complainant to his house. From her testimony it is clear that the complainant went to the appellant’s house. She (O[....]) and M[....] then went to inform

² 1981(1) SA 1021(A) 1028B-D.

the complainant's aunt(M[....]) that the complainant went to the appellant's house.

[9] It is understandable why O[....] went to inform the aunt of the complainant that the complainant went to the appellant's house. At that stage the appellant had already offered her money and asked her to undress. Young as she was she testified that she was scared that the accused was going to do what the witness said were 'nasty things' to her. For this reason she must have feared that the appellant would in all likelihood do 'nasty things' to the complainant or ask her to undress hence she went to call her aunt.

[10] The evidence of the complainant is further corroborated by the testimony of her aunt who testified that after she was alerted to the whereabouts of the complainant she went to the house of the accused. She called both the accused and the complainant. The accused came out of the bedroom pulling the zip of the fly of his trousers. This also corroborates the testimony of the complainant that when the appellant left the bedroom he was pulling his zip. He was followed by the complainant. The complainant was crying. The aunt then called the neighbours who together with the said aunt confronted the accused about the alleged rape of the child. Both the aunt and Ms N[....], the neighbour, corroborate each other in material respect that the appellant was armed with a weapon although the aunt said that appellant had a knife while Ms N[....] said he had what she described as a sable. All the four state witnesses called by the state place the appellant at the scene of this incident, namely, his house.

[11] Further corroboration in the version of the complainant comes by way of medical evidence handed in by consent in the form of the

so-called J88. The doctor who examined the complainant observed injuries to the private parts of the complainant. He observed abrasions and redness on the labia minora, paraurethral folds and fossa navicularis. The hymen of the complainant had fresh tears at five and seven o'clock positions. The doctor concluded that there were signs of forceful intercourse. That the complainant was raped cannot be disputed.

[12] In **S v Gentle**³ the court said the following about corroboration:

"It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant and which renders the evidence of the accused less probable, on the issue in dispute. If the evidence of the complainant differs in significant detail from the evidence of other State witnesses, the Court must critically examine the differences with a view to establishing whether the Court must critically examine the differences with a view to establishing whether the complainant's evidence is reliable."

[13] The overall testimony of the complainant was consistent and in my view credible and reliable. She did not contradict herself in anyway. It is so that some criticism can be levelled against her testimony when same is mirrored against the testimony of O[....]. O[....] testified that K[....] and T[....] were present and playing under the tree when the appellant called the complainant. The complainant denied their presence and further denied knowing them. In my view the contradictions in this case are not material.

[14] When an appeal is centred on the issue of corroboration, the appeal court would not lightly interfere with the factual findings of the trial court unless they are manifestly wrong or are based on the wrong premise. It has to be borne in mind that it is the trial court

³ 2005(1) SACR 42(SCA) @ 430j-430c.

which was steeped in the atmosphere of a trial. The trial court saw the witnesses and observed their demeanour. The trial court was in the vantage position to believe or disbelieve the witnesses. The court in **S v Francis**⁴ said:

“Bearing in mind the advantage which a trial court has of seeing, hearing and appraising witnesses, it is only in exceptional cases that this court will be entitled to interfere with a trial court’s evaluation of oral testimony.”

In my view the trial court cannot be faulted in the evaluation of the oral testimony in this case. Save to make a general statement that the trial court erred in finding that the evidence of the complainant was not credible, no particular parts of the evidence could be highlighted to make the said assertions.

- [15] On the other hand I am in agreement with the learned Regional Magistrate that the version of the appellant was false and stood to be rejected. In essence his defence boiled down to a bare denial. It is clear to me that the identity of the appellant was not in dispute. He is well known to all the witnesses in this case. He is of the view that these charges are of the making by M[...] who he alleges was her girlfriend. I am unable to comprehend why M[...] would involve an eight year as well as a nine year old children in her elaborate ‘scheme’ of fabrication. What is further puzzling is the fact that the neighbours also went to confront the appellant immediately after this incident. For M[...] to have succeeded in the alleged fabrication she would have needed not only the complainant but also O[...], Ms N[...], her live in lover and the doctor to have been complicit in the scheme. The doctor found evidence of genital

⁴ 1991(SACR 198(A) at 2014D.

injuries and forceful intercourse. This rules out any notion of fabrication. I find that this fabrication story is a lie. The appellant's version is in my view not reasonably possibly true and was correctly rejected by the trial court.

[16] It is an established principle of our law that the sentencing discretion lies pre-eminently with the sentencing court. A court exercising appellate jurisdiction will only interfere with the sentencing discretion of the trial court if it is tainted by a material misdirection or the sentence imposed is so disproportionate to the crime, the personal circumstances of the accused and the interest of society. Where a sentence does not seem to be shockingly inappropriate, a court of appeal is also entitled to interfere and to consider the sentence afresh if there has been a material misdirection in the exercise of the discretion. See **S v Jiminez**⁵.

[17] The grounds on which it is contended that the sentence is inappropriate are briefly as follows:

1. That the sentence is shockingly inappropriate and induces a sense of shock;
2. The severity of the offence was over emphasised at the cost of the personal circumstances of the appellant;
3. The court erred in finding that there was no compelling and substantial circumstances present to deviate from minimum sentence.

[18] It was submitted on behalf of the Appellant that the Court *a quo* erred in finding that no substantial and compelling circumstances

⁵ 2003(1) SACR 507(SCA) at 512 par [7].

existed warranting the Court to deviate from imposing the prescribed sentence. This court is obliged to deviate from imposing a minimum sentence of life imprisonment if it is satisfied that substantial and compelling circumstances exist which justifies the imposition of a lesser sentence.

[19] In assessing whether there are compelling and substantial circumstances justifying the imposition of a lesser sentence the court is guided by the approach as laid down in **S v Malgas**⁶ that , “if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.”

[20] With regard to the personal circumstances of the appellant the following come to the fore in mitigation of sentence. The appellant is an unmarried man of 27 years of age. He has no children. He was not formally employed at the time of this incident and he did odd jobs. He is a first offender and he spent a year and three months awaiting trial. It is further contended in the heads of argument that the complainant did not sustain any serious injuries and there no evidence of lasting emotional trauma suffered. In his address in the court *a quo*, Counsel for the appellant conceded that there were no substantial and compelling circumstances that existed in this case in favour of the appellant.

⁶ 2001(1) SACR 469 SCA at 482e.

[21] The appellant is a first offender. I hasten to add that this fact alone cannot constitute a compelling and substantial circumstance. The court in *Shubane v The State*⁷ said the following with regard to first offenders:

“[10] A first offender is therefore already given the benefit of a lesser sentence by the Act itself. The fact that the appellants have no previous convictions is most certainly a positive mitigating factor in their favour, but it can hardly be a compelling or substantial circumstance on its own.”

[22] Prior to his sentencing the accused had spent a year and three months in custody awaiting trial. The period in detention prior to sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified and whether it is proportionate to the crimes committed. See *DPP v Gcwala*.⁸

[23] In *S v Chapman*⁹ the court said that rape is ‘a humiliating degrading and brutal invasion of the privacy, the dignity and the person of the victim’.

[24] A victim impact report was not submitted during the trial. It can, however, not be argued otherwise that cases of child rape have taken unprecedented proportions. The victim in this case was a mere eight year old. The appellant was a neighbour of the complainant. To say that this rape was not one of the worst kind ignores the psychological impact this ordeal may have on the child. Section 51(3)(a)(aA) of Act 105 of 1997 specifically precludes the

⁷ (073/14)[2014] ZASCA 148 (delivered on 28 September 2014).

⁸ (295/13) [2014] ZASCA 44 (delivered on 31 March 2014).

⁹ 1997(2) SACR 3 (SCA).

court from taking into account the apparent lack of physical injuries as substantial and compelling. Taking into account the aggravating circumstances and weighing same against the mitigating circumstances I am of the view that there are no substantial circumstances warranting this court from deviating from the prescribed sentence. I accordingly make the following order:

[25] **ORDER:**

1. The appeal against the conviction and sentence is dismissed.

P.E. MOLITSOANE, J

I agree.

M.A. MATHEBULA, J

On behalf of the Appellant: Mr ML Tshabalala
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the Respondent: Adv. R Hoffman
Instructed by:
Director of Public Prosecutions
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