



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.: A77/2019

In the appeal between:

T M

Appellant

and

THE STATE

Respondent

CORAM: REINDERS, J et VOGES, AJ

JUDGMENT BY: VOGES, AJ

HEARD ON: 26 AUGUST 2019

DELIVERED ON: 02 SEPTEMBER 2019

- [1] The Appellant was convicted on 13 May 2015 in the Regional Court, Bloemfontein of contravening the provisions of Section 3 of Act 32 of 2007 and sentenced to life imprisonment on the same day.
- [2] The Appellant appeals against both the conviction and sentence.
- [3] The appellant was charged with the rape of the five year old daughter of his brother. The State called the child, her teacher and the doctor who examined the victim the day after the alleged rape.

The appellant testified in his own defence.

- [4] In short, the complainant testified that the Appellant fetched her and her younger brother from the crèche on 21 November 2012. It was only the three of them present at her grandmother's house. After the Appellant had given them food to eat and the little brother was playing outside the Appellant pulled her to the bedroom. He closed the door, put Vaseline on his penis and made her lie down on the bed where he raped her.

She reported to her grandmother that she was raped and the grandmother called the police. The police did, however, not show up.

She went to school the next day, wearing the same clothes. Her teacher then noticed blood stains on her and took her to the doctor.

- [5] Queen Malutabaleng Phala, a teacher at Retswela Penny Day Care, testified that the accused, who is well known to her, fetched the two children from school on 21 November 2012 at 14h00. By then he was under the influence of liquor. He was also there at 11h00. The next morning she saw bloodstains on the pink tights that the complainant was wearing. The complainant told the teachers that she was raped by R (the Appellant). The police was eventually called and the complainant taken for a medical examination.

During the evidence of this witness it transpired that there had previously been allegations that the complainant was sexually molested by P, a minor brother of hers.

Since the incident, the complainant is staying with this witness.

- [6] Dr Maria Elizabeth Schultz testified that she examined the complainant on 22 November 2012. She completed a J88 medical report. Her main findings were: Very irritated, swollen, almost bleeding urethral orifice; swollen, bruised para-urethral folds; bruising of the labia minora; increased friability and bleeding of the posterior fourchette, as well as fresh tears and scarring. She also noted a bloody, watery discharge in the vagina. She was convinced that the complainant was raped.

She was informed that this child was also previously raped by her underage brother and she noted the scarring.

- [7] The Appellant denied that he fetched the children from school or that he raped the complainant. He testified that he was at his workplace at the old age home from 7h30 until 16h00 that day.

He had previously heard that the complainant was raped by P.

- [8] The complainant was 5 years old at the time of the commission of the offence and 8 years when she testified. The court a quo considered her evidence meticulously, especially taking into account the cautionary approach applicable to single and child witnesses. His reasoning and evaluation of the evidence cannot be faulted.
- [9] Ms Phala was found to be a credible and reliable witness whose evidence supplemented and corroborated the evidence of the complainant. She immediately suspected that P was the culprit again, but the complainant was adamant that it was her uncle, the Appellant, who raped her this time.
- [10] On the evidence there is no indication that the complainant was falsely implicating the Appellant or that she was “covering” for P. Previously she was quite prepared to tell the teacher when P raped her (p. 60).
- [11] Even though the Appellant made a favourable impression as witness, the court a quo did not accept his version as reasonably possibly true in light of the overwhelming evidence against him.
- [12] The trial court is in a better position to judge on the credibility and reliability of witnesses. It is trite law that a court of appeal will assume that the trial court’s findings are correct and will accept these findings, unless it is convinced that these are wrong. See ***R v Dhlumayo and another 1948 (2) SA 677 (AD) at 705 -6***
- [12] There is nothing in the Appellant’s heads of argument that convince me that the court a quo was wrong in its findings.

AD SENTENCE

- [13] The Appellant was convicted of a very serious, repulsive crime that no doubt warrants a heavy sentence.
- [14] The court a quo correctly took into account as aggravating circumstances that the victim was a vulnerable child, that the Appellant was “in control” of the child and that the offence was planned. Furthermore the interests of society, the prevalence of this type of offence and the need to send out a clear message to persons of like mind was taken into account. All of these factors are relevant and should be reflected in the sentence.
- [15] The minimum sentence prescribed by Section 51 (1) of Act 105 of 1997 on conviction of an offence referred to in Part 1 of Schedule 2 is imprisonment for life. It must be imposed, unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.
- [16] Pursuant to the guidelines in ***S v Malgas 2001 (1) SACR 469 (SCA)*** and mindful of the Supreme Court of Appeal’s view that “specified sentences are

not to be departed from lightly and for flimsy reasons” the court a quo considered itself bound to impose the minimum sentence, after having found that no substantial and compelling circumstances exist.

In **S v Moswathupa 2012 (1) SACR 259 (SCA)** it was said: “Where sexually abusive adults reprehensibly satisfy their carnal desires with helplessly young children they have to be deterrantly punished by imposing on them sentences that would reflect not only the strong disapproval of the court but also the natural indignation of society”

The trial court was also of the opinion that sentences should be consistent and that he “want to send out the very same message to all offenders who has raped young children”.

This reasoning would be in line with the sentencing aim of deterrence, but it must also be borne in mind that sentences must be individualized.

- [18] In **S v Shongwe 1999 (2) SACR 220 (O)** Cilliè J concurred with the view that “... dit wat as die gewone versagtende omstandighede beskryf kan word duidelik volgens die bedoeling van die Wetgewer nie kan kwalifiseer as wesenlike en dwingende omstandighede soos bedoel in die voormelde wetgewing nie”, but found that “Die voorkoming van ‘n skokkende onreg by vonnisoplegging is myns insiens wel ‘n wesenlike en dwingende omstandigheid wat die oplegging van ‘n mindere vonnis regverdig”
- [19] In considering the imposition of the prescribed minimum sentence it was said in **S v Mahomotsa 2002 (2) SACR 435 (SCA) at 444a – b**: “Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this court observed in **S v Abrahams 2002 (1) SACR 116 (SCA)** ‘some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust’ “

A higher degree of violence or brutality increases the moral blameworthiness of the offender.

The complainant was not assaulted or seriously injured. There is no evidence about the psychological effect of this ordeal on the complainant, but I am convinced that she did not get through it unscathed. She was removed from the unfortunate conditions at her grandmother’s house and has been living with ms Phala since the incident

The trial court did not give credit to the Appellant for the fact that he did not use excessive violence towards the complainant.

- [20] The Appellant in this case is a 45 year old first offender and the father of two minor children. He was in fixed employment and living with the complainant and her grandmother. By the time he was sentenced he has spent 30 months in custody awaiting finalization of the trial.

It was argued on behalf of the Appellant that the court a quo erred by not properly taking into consideration the period spent in custody awaiting the finalization of this matter as a compelling and substantial circumstance.

In **S v Ngobo 2018 (1) SACR 479 (SCA)** it was held that a pre-conviction period of imprisonment was not, on its own, a substantial and compelling circumstance: it was merely a factor in determining whether the sentence imposed was disproportionate or unjust.

- [22] Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Taking into account the circumstances of the offence, the interests of society and the personal circumstances of the Appellant I am of the opinion that life imprisonment differ to such an extent from the sentence that would be regarded as appropriate had it not been for the prescribed minimum sentence that it would lead to an injustice to the accused.

- [23] In the absence of a material misdirection no appellate interference is justified. **S v Pieters 1987 (3) SA 717 (AD) at 728 B – C.**

Cumulatively taking into consideration what was said *supra*, in paragraphs [16], [19] and [20] I am persuaded that the regional magistrate misdirected himself in not finding compelling and substantial circumstances. The above circumstances should have been regarded as such.

Having found that, we are accordingly at liberty to consider the question of sentencing afresh.

- [24] There is no doubt that the offence warrants a long term of imprisonment. It is the only sentence that would do justice to the offence and the interests of society.

- [25] The following order is made:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is upheld. The sentence of the court a quo is set aside and replaced with a sentence of 20 years imprisonment.

The sentence is ante dated to 13 May 2015.

C. REINDERS, J

I concur.

M. VOGES, AJ

On behalf of the appellant:
Instructed by:

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Bloemfontein Justice Centre
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On behalf of the respondent:
Instructed by:

Adv. S Mthethwa
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