



**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

Appeal No.: A87/2019

In the appeal between:

MOYENE PETER TSHABALALA

Appellant

and

THE STATE

Respondent

CORAM:

REINDERS, J *et* VOGES, AJ

JUDGEMENT:

REINDERS, J

HEARD ON:

26 AUGUST 2019

DELIVERED ON:

19 SEPTEMBER 2019

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- [1] The appellant, who was legally represented, appeared before the Regional Court, Frankfort on a charge of contravening the provisions of sec 3 (rape) of the Criminal Law (Sexual

Offences and Related matters) Amendment Act 32 of 2007 (hereafter “the Sexual Offences Act”).

- [2] It was alleged by the State that on or about 14 July 2017 the appellant unlawfully and intentionally committed an act of sexual penetration with a ten year old girl by penetrating her vagina with his penis. Appellant pleaded not guilty but was convicted on 19 July 2018 and sentenced to the imprisonment for life on 6 September 2018. He feels aggrieved by both the conviction and the sentence and exercises his automatic right of appeal against same before us.
- [3] Ms Kruger, appearing for the appellant, submitted in her heads of argument that the trial court misdirected itself in finding that the State has proven its case beyond a reasonable doubt and that the accused should have been acquitted. Before us no further arguments were advanced. In the event that the conviction is to be confirmed, she submitted that the court a quo erred in not deviating from the prescribed minimum sentence of life imprisonment.
- [4] Mr Mthethwa on behalf of the State supported both the conviction and the sentence on the papers and before us. He contended that the trial court did not misdirect itself in either convicting the appellant as charged or in imposing the minimum sentence of life imprisonment in the circumstances of the instant matter.

AD CONVICTION:

[5] To prove its case the state called the complainant and her mother, Ms M[...]. The crux of their versions, as accepted by the magistrate, entailed the following:

[5.1] The complainant testified through an intermediary. On the night in question, her mother had gone to a funeral, leaving her and her seven year old brother with her father. They watched television until about 20:40 when her brother fell asleep. Her father told her that he would show her how babies were made, and in her parents' bedroom appellant threw her on the bed. He undressed her pants and underwear, pulled down the zip of his trousers and inserted his penis into her vagina, whilst making movements on top of her. She was lying on her back. She complained to him three times that it was painful (she used the word "sore"), and after the third time he withdrew his penis and ordered her to dress herself. Upon her mother's return from the funeral the following morning she made a report to her mother. After deposing to a statement at the police station, she attended a gynaecological examination.

[5.2] Ms M[...] testified that upon her return from the funeral the next morning on the 15th, the complainant reported to her that the appellant did "*stoute dinge*" to her. Hereupon she took the complainant to the police station where complainant relayed what happened whilst crying.

[6] It is common cause that, although the appellant was not her biological father, the relationship between them was that of a father and daughter. The appellant denied ever having committed an act of rape on his daughter. He testified that the mother of the complainant on the night in question was not at home, hence he prepared food for the children. He instructed them to go to bed, where after he followed suit and went to sleep at 21h00. The following day he received a call informing him to visit the police station, where he was arrested for the rape of his minor daughter.

[7] It is trite that factual findings of the trial court and its acceptance of oral evidence are presumed to be correct unless and until they are demonstrably or, on adequate grounds, shown to be wrong.

See: *S v Francis and Others* 1991(1) SACR 198 (A) at 198J-199 A.

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

[8] It is clear from the record that the magistrate was alive to the fact that he had to apply the necessary caution to the evidence of the complainant, she being a single witness and 10 years of age. He concluded that she was a good witness and accepted her evidence. He found corroboration for the complainant's version in report on the medico-legal examination (the "J88") as well as in her first report made to

her mother. In my view the learned magistrate's conclusion in this regard cannot be faulted in any way.

[9] The J88 was accepted into evidence as Exhibit "B". The medical doctor in his gynaecological examination of the complainant made the following clinical findings:

- Increased friability/redness on the Fossa Navicularis
- bruising on the hymen

He concluded that his findings are "consistent with attempted forceful vaginal penetration".

[10] In reaching the conclusion that the appellant is guilty as charged, to wit having committed an act of sexual penetration by inserting his penis into the vagina of the complainant, the learned magistrate remarked as follows:

"Nou daar is nie getuienis voor die hof dat sy wel geopenetreer is nie... Maar volgens die definisie van verkragting is dit baie duidelik dat sou sy privaatdeel slegs haar privaatdeel aangeraak het kom dit neer op penetrasie..."

[11] I do not agree with the magistrate that the mere touching of genitals will suffice for a conviction on rape.

[12] Rape is defined in Sec 3 of the Sexual Offences Act as the crime in terms whereof a person unlawfully and intentionally

commits an act of **sexual penetration** with another (the complainant) without the consent of the complainant.

See: **Sec 3 of the Sexual Offences Act, 32 of 2007.**

Sexual penetration is defined in sec 1 of the aforesaid Act to include **“any act which causes penetration to any extent whatsoever by –**

- (a) **the genital organs of one person into** or beyond **the genital organs**, anus or mouth **of another person**;
- (b)....
- (c)...”

Genital organs as defined in sec 1 “includes the whole or part of the male and female genital organs”

[13] In the context of rape in terms of the common law, the Supreme Court of Appeal in *S v MM* 2012 (2) SACR 18 at para [21] accepted for purposes of that judgment that “the slightest penetration is sufficient, and that this includes any degree of penetration, however minor, into the labia...”

In my view sec 3 of the Sexual Offences Act is in line with *S v MM supra* that even the slightest penetration of the sexual organ of a complainant would suffice for a conviction on rape, as the said section does not specify the extent of penetration.

[14] Having due regard to the above authorities there should therefore at least be some form of penetration for a conviction on rape. The complainant both in her evidence in chief and in cross examination on various occasions testified that the

appellant inserted his penis **into** her vagina. The magistrate accepted her evidence. On the J88 bruising of the hymen is noted (para [19] above). This lends credence to the complainant's evidence. I am accordingly convinced that the magistrate should therefore have concluded that penetration was in fact proved on the evidence accepted by him. So seen I am of the view that the conviction was in order and it stands to be confirmed.

AD SENTENCE:

[15] The next enquiry is whether or not the sentence imposed is just, regard being had to the cumulative impact of mitigating and aggravating factors inclusive of the interests of society. It is trite that the powers of a court of appeal to interfere with the sentence imposed, are limited insofar as it can only interfere where the sentence is disproportionate, harsh or the sentencing court committed a material misdirection or did not exercise its discretion properly or at all.

See: *S v Pieters* 1987(3) SA 717 (A)

See also: *S v Makondo* 2002 (1) All SA 431 (A).

[16] The aforementioned principles applicable to an appeal in respect of sentence, was restated in *S v Hewitt* 2017(1) SACR 309 (SCA):

“[8] It is a trite principle of our law that the imposition of sentence is the prerogative of the trial court.¹ An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. In other words, it is not enough to conclude that its own choice of penalty would have been *an* appropriate penalty. Something more is required; it must conclude that its own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not.² Thus, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it.³ So, interference is justified only where there exists a ‘striking’ or ‘startling’ or ‘disturbing’ disparity between the trial court’s sentence and that which the appellate court would have imposed. And in such instances the trial court’s discretion is regarded as having been unreasonably exercised.⁴”

[17] It is evident from the record that the learned magistrate in handing down sentence addressed the triad consisting of the crime, the criminal and the interest of society.

[18] The court *a quo* had regard to the appellant’s personal circumstances. These were: his age of 32 years; he was in a relationship with Ms M[...]; he is a father to 3 children staying with their mother and he contributed to their expenses; his highest scholastic education level is grade 6; he was

¹ *S v Pieters* 1987 (3) SA 717 (A) at 727F-H; *S v Sadler* 2000 (1) SACR 331 (SCA) at para 8; *S v Swart* 2000 (2) SACR 566 (SCA) para 21. See also, *S v L* 1998 (1) SACR 463 (SCA) at 468f; *S v Blank* 1995 (1) SACR 62 (A) at 65h-i.

² *Sadler*, para10.

³ *S v Pillay* 1977 (4) SA 531 (A) at 535E-F.

⁴ *S v Snyders* 1982 (2) SA 694 (A) at 697D; *S v N* 1988 (3) SA 450 (A) at 465I-J; *S v Shikunga* 465I-466A; *S v Shikunga & another* 1997 (2) SACR 470 (NmS) at 486c-f. See also *S v M* 1976 (3) SA 644 (A) at 649F-650A; *S v Pieters* 1987 (3) SA 717 (A) at 733E-G; *S v Petkar* 1988 (3) SA 571 (A) at 574D; 1997 (2) SACR 470 (NmSC) at 486d. See also *S v Abt* 1975 (3) SA 214 (A); *S v Birkenfield* 2000 (1) SACR 325 (SCA) para 8; *S v M* 1976 (3) SA 644 (A) at 649F-650A; *S v Pieters* fn 3 at 733E-G.

employed as farmer and had an income; he was in custody awaiting trial for 14 months and he was a first offender.

[19] The interest of the victim was comprehensively dealt with by the magistrate with reference to the Victim Impact Report before him. He alluded to the emotional and psychological trauma suffered by the complainant as a result of the crime as evidenced from the Report compiled by Mr Mafada. The court *a quo* stressed the remarks of the complainant's teacher who indicated, amongst others, the detrimental effect on complainant's school results, sudden aggression and withdrawal from her peers. According to complainant's mother she is afraid of dark and being alone, distrusts male persons and is aggressive towards her brothers. The court *a quo* was of the view that it was one of the worst cases of negative behavioural changes after the rape that he has dealt with. The lasting impact of the ordeal would, according to the psychological assessment, be impacting on her for the rest of her life. He considered the aforementioned, the tender age of the complainant of 10 years and the fact that the appellant was in a trust relationship with both the complainant and her mother, as aggravating circumstances.

[20] The seriousness of the crime of rape was stressed by the court *a quo* with specific reference to *S v Chapman* 1997 (3) SA 341 (SCA). Further reference was made to *Chapman* *supra* regarding the interest of the community in being protected from criminals and the courts' duty to send out a clear message of no tolerance to rapists.

[21] The regional magistrate in handing down sentence balanced all of the aforementioned factors. In following the guidelines in

S v Malgas 2001 (1) SACR 469 (SCA) he did not find any substantial and compelling circumstances in respect of the rape charge and invoked the prescribed minimum sentence of life imprisonment as envisaged Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 read with Part II of Schedule 2.

[22] It was submitted by Ms Kruger on instruction that we, sitting as a court on appeal, should consider that the rape *in casu* was not the most serious cases of rapes, and accordingly a deviation from imprisonment for life is justified. We were referred to *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at 436 b-d where it was held that “Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. It is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment.”

[23] From a reading of the record the magistrate referred to physical injuries inflicted on the complainant, supposedly the bruises and redness to the genitalia of the complainant as indicated on the J88. From the evidence it is indeed evident that the rape was not brutal and did not involve any violence. However, the magistrate considered the psychological injuries and trauma suffered by the complainant (as indicated in para [19] above) to be so severe that “...haar lewe verwoes is”. Accordingly he held the view that the rape was indeed serious. From the proven evidence it is clear that complainant had been profoundly affected emotionally and psychologically by the rape and that the effect will be long lasting.

[24] In unreported judgement of *S v S* (CC 42/2018) [2018] ZAECHGHC 68 (16 August 2018) Plasket J dealt with the rape of a child of 8 years by her father. The child sustained minor physical injuries that healed. A psychological assessment report on the impact that the crime had on the victim, confirmed that the psychological trauma and its consequences will endure for the long-term and were extremely serious. The learned judge in handing down a sentence of imprisonment for life, stated the following at para [10]:

“I also take into account the seriousness of the offence of which the accused has been convicted, which I have discussed above, and the severe psychological impact that the accused’s conduct has had and will continue to have on the life of his daughter. These factors negate any mitigatory effect that the accused’s personal circumstances may otherwise have had...” (own emphasis)

[23] I have not been convinced by appellant that the court *a quo* erred in finding as he did. I therefore come to the conclusion that the appeal against appellant’s sentence should fail.

[24] I accordingly make the following order:

The appeal is dismissed.

C. REINDERS, J

I concur.

M. VOGES, AJ

On behalf of the appellant: Adv. S. Kruger
Instructed by:
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On behalf of the respondent: Adv. S. Mthethwa
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