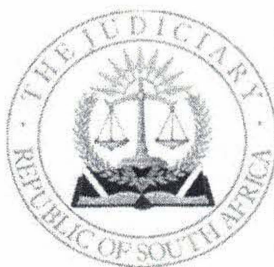


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG HIGH COURT DIVISION, PRETORIA

Appeal Case No.: A371/2016

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

2/3/2018

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In the matter between:

SIPHO PETROS MABENA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

CHESIWE AJ:

- [1] The appellant was convicted on a charge of rape of a seven year old girl, the complainant. The appellant pleaded not guilty. He was however found guilty and sentenced to 20 years imprisonment.

- [2] Leave to appeal against conviction and sentence was refused on 14 March 2012 by the trial court.
- [3] The appellant subsequently petitioned the Judge President of this Honourable Division on 25 February 2016. The petition was successful and now the appellant appeals to this Court against both conviction and sentence.
- [4] The complainant testified via an intermediary although incoherent according to the record, she said that she was visiting her friend Mpumi on the day of the incident and they were jumping on Mpumi's mother's bed, the appellant heard them and came in the bedroom, Mpumi ran away. She said the appellant grabbed her, undressed her and inserted his penis into her. The complainant testified that the appellant after "hurting" her wiped himself and gave her a R5,00 and told her to go home and not to tell anyone. The complainant testified that the appellant put polish on his face after hurting her. On her way out of the house she saw the parents of the appellant and told them what happened, but they did not respond or react except to ask her "*Where is Sipho*" (page 54 line 15). When she got home she first told her mother that she was hurt by a stick. But later on more questioning she confirmed that she was hurt by Sipho (the appellant).
- [5] Ms Koos-Monyakane on behalf of the appellant, in her Heads of Argument and in oral submission said the complainant (minor child) told lies and contradicted herself. She mentioned that the J88 is not clear on the injuries sustained by the complainant. The complainant first said she was injured by a

stick and after being pressured she said it was the appellant. She submitted that the trial court convicted the appellant on insufficient evidence and that the child is a single witness. She argued that the complainant was unable to identify the appellant and rather gave vague description of the appellant. The appellant's younger sister was neither helpful as a witness, even though she testified that the appellant and complainant were together in the house.

- [6] Counsel on behalf of the respondent, submitted in oral argument that the complainant spoke about the stick injury as she was afraid of the appellant. Counsel submitted that the J88 is clear on the injuries and that the complainant's hymen was swollen; there was a deep vaginal tear at 6 o'clock with an offensive yellowish discharge, and thus fits in with the complainant's version of vaginal penetration. She said if it was a stick injury the medical officer examining the complainant would have seen that the injuries sustained by the complainant are due to a stick injury.
- [7] When evaluating the evidence of the State at the trial court, though as submitted by Counsel for the appellant that there was discrepancies and contradictions in the State's case, the complainant and the state witness are both minors but the complainant was able to give a clear and formalistic account of the incident although not in perfect logic. The complainant and the witness (appellant's sister) place the appellant on the scene and in the house with the complainant. The appellant's version is also that he was in the house watching TV. He places himself on the scene. The Prosecutor on

questioning Mpumi about the appellant's where about she answered as follows: (page 66 line 17 – 25 of the records).

"Was Sipho there that day?"

"Yes"

"Where was Sipho?"

"In the bedroom."

"So he was also in the house"

"Yes"

"How long was Letswalo in the house?"

"For a short period of time"

- [8] The Appellant's defence was a bare denial, but under cross-examination, appellant confirmed that he knew the complainant as she used to come to their house after school with the younger sister. The appellant had different versions that on the day of the incident he was not home, and then he was in his room watching television. He said the complainant must have been coached to identify him and he is therefore falsely implicated, whereas he testified that he does not have any problems with the family of the complainant. On being questioned by the Prosecutor in respect of him knowing the complainant he said: (Line 12 – 13 page 70 of the record).

"You say you only saw the complainant in the street?"

"Yes, I normally saw her on the street. At times she will come back home after school with my younger sister, she will come to my home and they would drink water and afterwards left."

"So you do not see her only in the street, you also see her at your house."

"Yes."

AD CONVICTION

- [9] Counsel for the appellant submitted that there is no sufficient evidence that the appellant raped the complainant, that the complainant's evidence is full of discrepancies and contradictions. She indicated that the child might have been coached to implicate the appellant. She submitted that the complainant was unable to properly identify the appellant and the medical doctor who examined the child and completed the J88 was not called to testify at the trial court. Nor was there any DNA testing to check for the appellant's semen or testing of the offensive vaginal discharge that was coming from the complainant.
- [10] Counsel for the respondent submitted that the complainant was not coached and that her evidence was not fabricated. She submitted that the trial court came to the correct decision to convict the appellant and that it is highly improbable that the appellant was falsely incriminated.
- [11] The complainant despite her young age, was truthful and a reliable witness. She was cross-examined at length though the intermediary had to constantly repeat the questions put to the complainant. The appellant could not refute the complainant's version except through a bare denial. There is no evidence that the complainant met another person who could have had sexual intercourse with her. The complainant was in the appellant's company. He gave her a R5, 00 and complainant went home. The appellant sister, Mpumi, confirmed that the appellant was in the house with the complainant. The complainant's mother also testified that she noticed blood flowing from the

complainants private part and that she experienced pains. The J88 confirmed the injuries as sustained by the complainant.

- [12] The appellant disputed that the complainant knew him before the incident page 49 lines 20 to 25 of record shows as follows:

“Where does Sipho Stay?”

“He stays at Mabena’s place.”

“Do you know him from before the incident?”

“Yes I know him before.”

“Okay will you be able to show us who this Sipho is.”

“Yes”

A demonstration was conducted in court with six people including the appellant and was put together in court; the complainant was requested to identify the appellant touching him. The complainant pointed out the appellant in court. (Page 50 lines 5 to 25 of the record).

- [13] It is trite that evidence on identification must be approached with caution. The dangers of an incorrect identification are well-known. The pointing out of a wrong person by witnesses who act in good faith has led to notorious cases of injustice. The evidence of identifying the accused because of the ever present possibility of a honest mistake being made by witnesses, evidence of identification has to be treated with caution. In the *S v Mthetwa*¹, Holmes JA stated that:

“Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest; reliability of his observation must also be

¹ *S v Mthetwa* 1972 (3) SA 766 (A).

tested. This depends on various factors: such as lighting; visibility; and eyesight; the proximity of the witness; his opportunity for observation; both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities²."

[14] The complainant throughout her testimony answered the questions consistently and frank. She explained in detail what happened in the room up to the point where the appellant wiped himself after the rape and put on black polish on his face, bearing in mind that the complaint was only seven years old at the time of the offence. In *S v Oosthuizen*³, the court said: "There is no reason in logic why the mere fact of contradiction, or of several contradictions, necessarily leads to the rejection of the whole evidence of a witness.

[15] In *R v Dhlumayo and Another* 1948 (2) SA 677 the majority, per Greenberg JA and Davis AJA (Schreiner dissenting) said: "The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness and being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing their demeanour, but also their appearances and whole personality. This should not be overlooked."

² *S v Mthetwa* above at 768 A-E. See also *S v Khumalo en Andere* 1991 (4) SA 310 (A) at 328E – G. and *S v Mlati* 1984(4) SA 629 (A) at 632F – 633C.

³ 1982 (3) SA 571 (TPD) at 576 A – B).

[16] The trial court with the evidence before it was satisfied in that the State proved the appellant's identify beyond reasonable doubt. And correctly so, the trial court came to the inescapable conclusion that the appellant was the person who raped the complainant and correctly convicted the appellant. From the judgment of the trial court that the learned Magistrate was acutely aware of the conflicts and discrepancies in the evidence, having regard to the fact that the complainant and the one witness Mpumi are children and both were seven years old at the time of the offence. Ultimately the evidence must be assessed as a whole.⁴ . It follows that there is no room for interference with the conviction.

AD SENTENCE

[17] Counsel for the appellant acknowledged that the Court considered youthfulness as a mitigating factor and thus deviated from imposing life sentence as per the Prescribed Minimum Sentence Act. However, she is of the view that the 20 years sentence imposed is still too harsh, because the trial court has correctly indicated that the appellant can be rehabilitated. The appellant is a first offender and he spent time in custody awaiting trial. Counsel further submitted that the appellant's name has been added to the Sexual Offender's Register and this is an added punishment.

⁴ Mosephu and Others v R (1980 – 1984) LAC 57 at 59F-H.

[18] Counsel for respondent, submitted that the 20 years sentence imposed on the appellant is appropriate. She said the trial court took into consideration the aggravating factors: The seriousness of the offence, the complainant was seven years and defenceless, the appellant pulled and grabbed the complainant and that the offence was planned. She also conceded that the court found youthfulness and the possibility of rehabilitation to be substantial and compelling circumstances therefore the trial court deviated from the Prescribed Minimum Sentence of life imprisonment, and imposed 20 years imprisonment sentence.

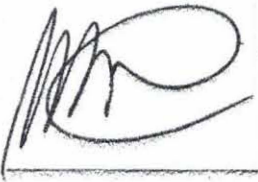
[19] The crime which the appellant was convicted of falls within the provisions of the Criminal Law Amendment Act 105 of 1997 as amended (the Act). In terms of Section 51 (1) read with part 1 of Schedule ii, where a person is convicted of an offence of rape and the victim is a person under the age of 16 years the sentence of life imprisonment must be imposed, unless there are substantial and compelling circumstances which will justify the imposition of a lesser sentence.

[20] In determining whether in a particular case substantial and compelling circumstances exist a court has to follow the guidelines as set out in **State v Malgas**,⁵ and consider the well know traditional triad of factors relevant to sentence, the crime, the criminal and the needs of the society.

⁵ 2001(1) SACR 489 (SCA) at 482C

- [21] The complainant was seven years at the time of the offence, that in itself is very serious to have a young child being exposed to such a heinous crime. It is for these types of offences the legislation prescribed a minimum sentence of life for raping of children under the age of 16 years. Rape of a child violates the child's dignity, though the record in this instance does not show the impact of the crime on the complainant.
- [22] It is trite that the appeal court may interfere with the sentence imposed by the trial court if it is so disproportionate to the crime committed that it is unjust or where the trial court in sentencing the offender failed to exercise its discretion properly or exercised it unreasonably.
- [23] In my view the trial court did accord due weight to the personal circumstances of the appellant that he was a first offender, there are good prospects of rehabilitation and that the appellant spent time in custody, and therefore deviated from imposing life sentence to the appellant.
- [24] The trial court did not misdirect itself and it exercised its judicial discretion properly. This Court will therefore not temper with the imposed sentence of 20 years imprisonment. There is nothing that persuades me to impose a sentence different from that imposed by the trial court.
- [25] The sentence imposed is just and appropriate to this particular offence and therefore there is no justification to temper with it.
- [26] Consequently the following order is made:
1. The appeal on conviction and sentence is dismissed.

2. The sentence imposed by the trial court is confirmed.



S CHESIWE

Acting Judge of the Gauteng High Court, Pretoria

I agree



N P MNGQIBISA-THUSI

Judge of the Gauteng High Court, Pretoria

Appearances

For Appellant: Adv Koos-Monyakane

Instructed by: Justice Centre, Pretoria

For Respondent: Adv MJ Van Vuuren

Instructed by: Director of Public Prosecutions, Pretoria