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

Appeal number: A160/2017

In the matter between:

DANIE KLUE

Appellant

and

THE STATE

Respondent

CORAM:

MBHELE, J *et* CHESIWE, AJ

HEARD ON:

04 DECEMBER 2017

JUDGMENT BY:

CHESIWE, AJ

DELIVERED ON:

09 MARCH 2018

[1] The appellant was convicted in Regional Court in Bloemfontein on one count of contravening the provisions of Section 5(1) read with sections 156(1), 57,

58, 59, 60 and 61 of the Criminal Law Sexual Offences and Related Matters amendment Act 32/2007, Sexual Assault, and two counts of contravening the provisions of Section 3 read with 1, 56(1), 57, 58, 59, 60 and 61 of the Criminal Law (Sexual Offences and related matters) amendment Act 32/2007 and with Section 92(2); 94 and 256 of Act 51/1977, Rape. The complainant was a 12 year old girl. The appellant was sentenced on count 1 to 5 (five) years imprisonment, count 2 - life imprisonment in terms of Section 51 (1) of Act 105 of 1977, and count - 3 life imprisonment in terms of Section 51 (1) of Act 105 of 1977.

- [2] The state's version as accepted by the trial court was to the effect that during 2008 the appellant, complainant's stepfather, while they were staying at Trompsburg started telling her how babies are made . He told her how male and female sexual organs are used to make a baby. He went further to explain how sperms enter a woman's body in a process of making a baby. The appellant would sometimes touch the complainant's breasts to test how far developed they were. The appellant's family moved to Bloemfontein where they stayed at Caravan Park during 2008. During this period the complainant shared a room with her sibling sister adjacent to the caravan that was used as the main dwelling by the family. The appellant and complainant's mother were sleeping in the caravan. Sometime during 2008 and 2009 the appellant would come into her bedroom and started touching her. During one of these encounters the appellant inserted his finger in the complainant's vagina and made her touch his penis. Around 2009, although she could not remember the date, the appellant after watching some DVD's, got into her blankets. He lowered her pyjama pants and penetrated her with his penis. It was painful when the appellant penetrated her in that manner. The complainant testified through an intermediary.
- [3] The appellant appeals to this court against the conviction and sentence after special leave was granted by the Supreme Court of Appeal. In respect of count 2 and count 3 the appellant has an automatic right of appeal.
- [3] The basis for the appeal is that the trial court did not comply with the provisions of section 162 read with section 164 of the Criminal Procedure Act 51 of 1977 pertaining to the evidence of the complainant as a child witness. According to the appellant complainant was simply sworn in before her

capacity to understand the nature and importance of the oath was established, and that there was no enquiry and no finding by the trial court before admonishing the complainant. The appellant contended that the complainant was a single witness and the trial court failed to apply the cautionary rule.

- [4] Mr. Pretorius, counsel for the appellant, in oral argument and in the Heads of Argument submitted that the complainant was a single witness and that the complainant's evidence must have been approached with caution and that there are unusual features in the evidence of the complainant that required application of the cautionary rule. In his view the complainant failed to answer many questions and some of the answers she gave were not befitting a 13 year old.
- [5] Mr. Pretorius submitted that the trial court erred in not finding that there were substantial and compelling circumstances. He contended that the trial court failed to take into consideration that the appellant was sick and that he was a first offender. He submitted that the trial court could have imposed a lesser sentence than life imprisonment.
- [6] Mr. Simpson, on behalf of the respondent argued, that the State at the trial court proved its case beyond reasonable doubt. He contended further that in the absence of any misdirection by the trial court, the findings of a trial court are presumed to be correct. With regard to the issue of character of evidence of the complainant, Mr. Simpson submitted that the trial court conducted an enquiry and clearly admonished the complainant to tell the truth. He submitted that the trial court did not commit any irregularity or misdirection during conviction and sentence, and there is no basis for an appeal against conviction and sentence.
- [7] Section 164 (1) of the Criminal Procedure Act 51 of 1977 provides that:
"Any person who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation; Provided that such person shall, in lieu of the oath affirmation, be admonished by the presiding judge or judicial officer to speak the truth, the whole truth and nothing but the truth."

[8] In **Director of Public Prosecution, Transvaal v Minister of Justice and Constitutional Development, and Others** 2009 (4) SA 222 9 CC) para 165 the court said:

"The practice followed in the courts is for the judicial officer to question the child in order to determine whether the child understands what it means to speak the truth. As pointed out above, some of these questions are very theoretical and seek to determine the child's understanding of the abstract concepts of truth and falsehood. The questioning may at times be very confusing and even terrifying for a child. The result is that the judicial officer may be left with the impression that the child does not understand what it means to speak the truth and then disqualify the child from giving evidence. Yet with skilful questioning, that child may be able to convey in his or her own child language, to the presiding officer that he or she understands what it means to speak the truth. What the section requires is not the knowledge of abstract concepts of truth and falsehood. What the proviso requires is that the child will speak the truth. As the High Court observed, the child may not know the intellectual concepts of truth or falsehood, but will understand what it means to be required to relate what happened and nothing else."

At paragraph 166 the Constitutional Court set out the rationale for the procedure required by section 164:

"The reason for evidence to be given under oath or affirmation or for a person to be admonished to speak the truth is to ensure that the evidence is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a pre-condition for admonishing a child to tell the truth. The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused's rights to a fair trial were such evidence to be admitted. To my mind, it does not amount to a violation of sections 28 (2) to exclude the evidence of such a child. The risk of a conviction based on unreliable evidence is too great to permit a child who does not understand what it means to speak the truth to testify. This would indeed have serious consequences for administration of justice."

- [9] The questioning of the complainant by the presiding officer in terms of section 164 proceeded as follows:
(page 24 to 26 of the record)

"COURT: Do you know where you are right now

GETUIE: Ja

COURT: Where are you? GETUIE: In die hof.

COURT: And you know why you are here?

GETUIE: Ja.

COURT: Do you attend school

GETUIE: Ja.

COURT: Where?

GETUIE: [...].

COURT: Where is it?

GETUIE: In Bloemfontein.

COURT: In which Province:

GETUIE: Suid - Afrika.

COURT: In which Grade are you there?

GETUIE: Graad 7.

COURT: Who is your friend at school?

GETUIE: M F

COURT: Is she here today?

GETUIE: Nee.

COURT: If M were to tell your friends at school tomorrow that she was here
at court with you today, would she be telling the truth?

GETUIE: Nee.

COURT: Why do you say so?

GETUIE: Want sy lieg dan vir die ander kinders.

COURT: Is it okay to lie?

GETUIE: **Nee.**

COURT: Will you be happy with her if she lies about you?

GETUIE: **Nee.**

COURT: So you know the difference between truth and lies.

GETUIE: Ja.

COURT: which between the two have you come to tell us today?

GETUIE: Die waarheid.

COURT: Okay, I am admonishing you to tell only the truth and nothing else but the truth herein, do you understand?

GETUIE: Ja."

- [10] In my view, the court a quo correctly applied section 164 of the CPA and warned the witness to speak the truth. I am not persuaded by the appellant's argument that the complainant was unable to distinguish between wrong and right and the enquiry held by the presiding officer was insufficient.
- [11] The issue relating to single witness is well known and having regard to Section 208 of Act 51 of 1977, an accused may be convicted of any offence on the single evidence of any competent witness. The question whether the complainant is a competent single witness and whether her evidence should be accepted. Of course the trial court took into consideration certain factors that may be important; that is the child's age; she was a credible and reliable witness. The cautionary rule applied in sexual cases has been dealt with comprehensively. In **R v Mokoena 1932 OPD 79** at 80, the rule was put in perspective in several judgements and there is no doubt that the exercise of caution should not be allowed to displace common sense. See **S v Artman and Another 1968 (3) SA 339 (A)** at 341. The trial court found that the evidence of the complainant had to be approached with caution and made a finding that the complainant as a single witness was credible. This finding cannot be faulted.
- [12] The complainant's evidence was logical and clear. She described in detail how the appellant used to touch her breasts and how he used to get in her bed. The complainant testified how the appellant used to show her his private part and that the appellant would forcefully grab her hand, put it on his penis so

that she could touch it. The appellant explained what sex is and how kids are made. She gave her testimony with consistency under tremendous pressure.

- [13] The court is an intimidating place for most witnesses and doubtless even more for child witnesses. In the face of such scrutiny and questioned and cross-examined; I am convinced that had she indeed not been telling the truth, this would have been patent to the court by virtue of her demeanour. In court the content of her evidence also speaks volumes. She was straight forward, a simple story she was called upon to tell the court and she was consistent even though she could not remember dates here and there, but her testimony cannot be faulted.
- [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 she was able to differentiate that the touching of her breast, the putting in of the fingers, touching of penis and rape happened on different days, bearing in mind that the complainant was only 12 years old at the time of the offence. In **S v Oosthuizen** 1982 (3) SA 571 (TPD) at 576 A - 8), 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."
- [16] As far as the complainant herself is concerned it is clear to me that the learned Magistrate did, in fact, satisfy herself as to this witness's ability to give a full, proper and truthful account of the relevant incidents as they happened. This is noted in the line of questions that were put through the medium of intermediary to the complainant. Therefore the content of the complainant's evidence bears out the correctness of the learned magistrate's ruling that the complainant was a competent witness.
- [17] Mr Pretorius challenged the conviction on the basis of the state's failure to

present sufficient DNA evidence, and that the complainant had no injuries to her private parts, her hymen was intact. He submitted that the evidence of Sister Mokoena, the Forensic nurse confirmed that there was *"no visible injuries noted and this does not exclude sexual assault."*¹¹ (Page 153 of the record). Mr Pretorius submitted that the evidence of Dr. Wagner shows that during medical examination on the complainant she laughed and this creates the suspicion regarding her version of the truth. He concludes that this corroborative medical evidence of the two state witnesses simply concludes that the complainant was not raped as alleged.

- [18] The complainant's case was corroborated and bolstered by the state witness, Veronica Venter, who was the first person the complainant, told about the sexual assault and the rape. She told the court that the complainant informed her about the appellant touching her body all over. The complainant on her part during her testimony was not fumbling or hesitant, she was able to give evidence in a logic and clear manner and testified in court as to the different times and places the incidents occurred.
- [19] In my view the complainant was a truthful and reliable witness. The appellant could not refute her version except through his bare denial. The appellant's version was brief and his evidence was so unconvincing that it could be safely rejected as not being reasonably or possibly true. He averred, for instance that he only assisted the complainant with homework she had from school. This homework was about sex education and he used a CD that had information on male and female reproductive parts to show the complainant how both sex organs function.
- [20] It is apparent 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 was only 12 years at the time of the offences. Ultimately the evidence must be assessed as a whole. (See **Mosephu an Others v R 1980-1984** LAC 57 at 59F-H) It follows that there is no room for interference with the conviction on all the counts.

AD SENTENCE

- [21] As I pointed out the fact that the complainant was 12 years and was sexually assaulted and raped by her stepfather, this brought the application of the

Criminal Law Amendment Act into operation. The authoritative case in this application is **S v Malgas**¹ In line with this decision the sentencing court should not depart from the prescribed minimum sentence simply because of flimsy reasons”². On the other hand the prescribed minimum sentence should not be "shocking", "startling" or "disturbing inappropriate”³.

- [22] It is trite that the notion "compelling and substantial circumstances" differs from one case to another⁴, as evidenced from the decision of **S v Malgas**⁵When a trial court is faced with a case in which a minimum sentence is prescribed, the sentencing court must still have regard to all the traditional factors taken into account when considering sentence⁶.
- [23] The crime which the appellant was convicted of falls within the purview 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.
- [24] 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**,⁷ and consider the well know traditional triad of factors relevant to sentence, the crime, the criminal and the needs of the society.
- [25] The complainant was 12 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. In **S v SMM** 2013 (2) SACR 292 (SCA), the court stated that:

¹ *S v Malgas* 2001 (1) SACR -1-69 (SCA).

² *Ibid* at 481j-482c. See also *S v Price mid Another* 2003 (2) SACR 551 (SCA).

³ *S v GN* 2010 (1) SACR 93 (T) al 95j - 96a.

⁴ *Mofokeng v S* [2015] JOL 34851 (FB). Sec also *S v Abrahams* 2002 (1) SACR 116 (SCA).

⁵ *S v Malgas* above

⁶ *S v Abrahams above and S v Nkomo* 2007 (2) SACR 198 (SCA).

"Rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space, the very act itself. even absent of any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement..."⁸

- [26] The invasive and humiliating nature of rape, the discrimination inherent therein and the unfortunate prevalence thereof in society demands protection against this kind of conduct, especially if the complainant is a minor child, this makes it the worst kind of brutality against any human being⁹ In **F v Minister of Safety and Security** 2012 (1) SA 536 (CC), the Constitutional Court stated that: "It is deeply sad that a few of our women and girls dare to venture into public spaces alone, especially when it is dark and deserted. If official statistics are anything to go by, incidents of sexual violence against women occur with an alarming regularity."¹⁰
- [27] Mr. Simpson on behalf of the respondent argued that the trial court did not misdirect itself and that the appeal court should not tamper with the sentence, as the sentence is appropriate for the crime committed.
- [28] 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.
- [29] The trial court evaluated the evidence and came to the conclusion that the state witnesses were truthful and rejected the version of the appellant as improbable. It is trite that factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. The acceptance by trial court of oral evidence and conclusion thereon are presumed to be correct, absent misdirection . (See **S v Francis** 1991 (1) SACR 198 SCA at 204 e-d.) A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong. (See **R v Dhlumayo & another** 1948 (2) SA 677 (A} at 705-706 }.

⁷ 2001(1) SACR 489 (SCA) at 482C

⁸ S v *SMM* 2013 (2) SACR 292 (SCA) para [17] and S v *Uithaler* 2015 (1) SACR 174 (WCC) para [10]- [12]

⁹ S v *Mabaso* 2014 (1) SACR 299(KZP) para [87]

- [30] In my view the trial court did accord due weight to the personal circumstances of the appellant. The appellant did not present to the trial court exceptional substantial and compelling circumstances for the trial court to deviate from the prescribed sentence, therefore it imposed life sentence to the appellant. The legislature has deliberately left it to the courts to decide whether circumstances of any particular case call for a departure from the prescribed sentence¹¹. I am of the view that taking into consideration the principles set out in *Malgas*¹², the sentence imposed for the offence committed is reasonable and is not harsh and inappropriate nor did the trial court misdirect itself in any manner.
- [31] This Court will therefore not tamper with the imposed sentence by the trial court. There is nothing that persuades me to impose a sentence different from that imposed by the trial court. It is trite that a court of appeal should not replace the sentence imposed by the trial court with its own, unless it is justified to do so¹³. As indicated above, I see no reason to interfere and replace the sentence imposed.
- [32] The sentence imposed is just and appropriate in the circumstances of this case therefore there is no justification to tamper with it.
- [33] Consequently the following order is made:
1. The appeal on conviction and sentence is dismissed.
 2. The conviction and sentence are confirmed.

S. CHESIWE, AJ

I concur

M. MBHELE, J

¹⁰ *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) para [56]

¹¹ *S v Dodo* 2001(3) SA 382 (CC) para [11]. See also *S v Malgas*. 2001 (2) SA 1222 (SCA).

¹² *S v Malgas* above.

¹³ *S v Obisi* 2005 (2) SACR 350 (W) para [7]

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