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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 number: A278/2017

In the matter between:

FRANS LEHLOHONOLO MOHAPI

Appellant

and

THE STATE

Respondent

CORAM: MHLAMBI, J *et* MURRAY, AJ

HEARD ON: 25 JUNE 2018

DELIVERED ON: 28 JUNE 2018

MHLAMBI, J

[1] The appellant was convicted on a charge of rape and sentenced to eighteen (18) years imprisonment. Appellant's leave to appeal against both conviction and sentenced was refused by the magistrate on 11 November 2016 and such leave to appeal against both conviction and sentence was granted on petition by Mathebula,J and Van Schalkwyk, AJ on 05 September 2017.

[2] The main grounds of appeal are as follows:

"5.5 The magistrate misdirected herself in finding that there was no DNA evidence implicating the appellant or linking the appellant to the commission of the crime, yet found that the appellant was excluded. The fact that no or insufficient male DNA could be detected was consistent with the version of the appellant that he denied raping the complainant.

5.6 The magistrate misdirected herself by finding that there were no contradictions in the complainant's evidence thereby disregarding the contradictions in her evidence that though she had testified that she had a bruise on her right eye yet the doctor, on the J88 medical form, noted that there were no external injuries.

5.7 The magistrate misdirected herself by not taking into consideration the contradictions between the complainant's and Elisa Koloti's evidence regarding the injuries the complainant reported.

5.8 Even though it was suggested to the complainant that she falsely implicated the appellant because she was angry that he did not give her money, the appellant was consistent even under cross-examination that he did not know the reason why the complainant falsely implicated him."

- [3] The accused pleaded not guilty and his defence boiled down to a bare denial. In brief, the complainant's testimony was to the effect that the accused is her step-father and as at 13 November 2013 they lived together under one roof. On that day at about half past six (18h30) in the evening, he was drunk and he raped her. He had closed the door of the house and locked the kitchen door whereafter he pushed her into the bedroom; told her to be quiet, undressed himself and had sexual intercourse with her. He promised her money but she said that she did not want his money. She described the act of sexual intercourse and told the court that he took his private part and inserted it into hers. She described his pelvic movements or that he moved up and down on top of her. She managed to get away from him. She was very frightened and cried. She put on her clothes, told him that she needed to use the bathroom and left to a certain lady's house she called grandmother Makoloti, the second state witness. As she was running to her house she noticed that water was leaking from her private parts.
- [4] She testified that prior to the sexual intercourse, her step-father assaulted her and that on previous occasions the accused had attempted to rape her. Her mother had reprimanded him and it seemed that the mother was aware of this problem. The mother did not testify in the case. Mrs E Koloti confirmed that the complainant did arrive at her place on that day in question. She was crying and informed her that her step-father had raped her. An ambulance and the police were contacted whereafter she was taken to the police. The medical doctor confirmed her findings

and conclusions that there was penetration on the basis of the swelling on the hymen based on her examination of the complainant on 1 December 2013 at 13h00.

- [5] The first ground of appeal is of no consequence. The full remarks of the magistrate on page 52, lines 5-10 of the transcribed record), are as follows:

“There is no DNA evidence implicating the accused or linking the accused to the commission of this crime, but he was not excluded. It was because of the fact that there was insufficient male DNA or none found hence DNA testing could not be done.”

What is evident on the record, is that no DNA evidence was presented by the state nor semen taken for analysis.

- [6] There was one contradiction in the evidence of the complainant when she, under cross-examination, said that she had told Makoloti of the assault. E Koloti, in her brief testimony, denied that the complainant told her of the assault on her and stated that she did not notice any marks on her. However, she confirmed that the complainant was crying when she arrived at her place and told her that the accused had raped her.

- [7] The complainant’s testimony (lines 11-16 on page 12 of the record) in respect of her injuries was as follows:

“Did you sustain any visible injuries? --- No, I only had bruises.

Is it now on your face? --- On my eye.

Court(indistinct) pointing at her right eye.

Prosecutor: That is correct so your worship. ... Yes,[it is confirmed that it on the right eye]”.

During cross-examination, page 17, lines 19 to 21 of the record, read as follows:

“You told us that you had a bruise on your right eye.

Was it like a blue eye? --- No it was like the fingers of his hand which was traced on my face”.

Page 20, lines 5 to 14 of the record, read as follows:

“Ms Terblanche: when you were at Bongani did you tell the doctor that your step father assaulted you? --- I was made to lie there on the bed and then after a while they said to me that the police are here to take you statement.

Was the bruise then still visible on you eye? --- Yes but no too visible”

- [8] Taking into account the following extract from the record on page 31, it make nonsense of the last ground of appeal mentioned above. The said paragraph reads as follows:

“What was D.’s attitude after you told her that you are not going to give her money and when she left the tavern; did you see the attitude that she had or couldn’t you say?--- According to me she was fine when she left there”.

- [9] In the light of the above, I am of the view that the grounds cited in support of the appeal are insufficient to uphold it. The conviction should therefore stand.

- [10] Ad Sentence

The accused was 34 years of age, a first offender and did not have children of his own. He passed grade 12 at school and was employed and earned an income of R 2 500.00 per month. He spent nine months awaiting trial and abused alcohol. The court found that, as a step-father, the accused abused his position and

showed no respect for the victim, being the minor child who was left distressed and traumatized after the event. Even though the court was of the opinion that life imprisonment was an appropriate sentence, the court decided that the accused could be considered as a candidate capable of rehabilitation and that his personal circumstances could be considered as factors that the court should take into consideration for imposing a sentence lesser than life imprisonment. Both counsel for the state and the appellant submitted that it is tried law that in an appeal against sentence, the court of appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the court of appeal should be careful not to erode that decision. A sentence should only be altered in instances where an irregularity took place during sentencing or the sentence imposed could be described as disturbingly or shockingly inappropriate. Counsel for the appellant conceded that the magistrate correctly and appropriately took the appellant's personal circumstances into consideration and properly found that the appellant was a candidate capable of rehabilitation and therefore deviated from the minimum sentence of life imprisonment. However, counsel still insisted that the magistrate should have imposed a lesser sentence than the one she did. In the light of the above, there is no basis upon which this court can interfere with the imposed sentence. The sentence should be upheld.

[11] The following order is therefore made:

Order:

The appeal against both conviction and sentence is dismissed.

MHLAMBI, J

I concur

MURRAY, A J

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