



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

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| 1. Reportable:
YES/NO |
| 2. Of Interest to other Judges:
YES/NO |
| 3. Circulate to Magistrates:
YES/NO |

Case no:A248/2013

In the matter between:

DIKETSO PETRUS TSAOANE

1st Appellant

JAN FUSI FORTUIN

2nd Appellant

and

THE STATE

Respondent

CORAM: LOUBSER, J et OPPERMAN, J

HEARD ON: 05 NOVEMBER 2018

JUDGMENT BY: LOUBSER, J

DELIVERED ON: 22 NOVEMBER 2018

[I] **INTRODUCTION:**

[1] This is an appeal by the two Appellants against their conviction in the Bloemfontein Regional Court on a charge of Rape and their sentence of 20 years imprisonment each. The complainant is a male child, who was only 5 years old at the time of the commission of the crime. The first and second Appellants were respectively 21 years and 18 years old at the time. They were accused of the act of sexual intercourse with the child in that they penetrated his anus with their penises after forcing him physically to lie on his stomach in a certain shack.

[2] In her judgment, the Magistrate alluded to certain unsatisfactory elements in the State case, but she found them not to be of such a nature as to vitiate the truthfulness of the State version in its totality. On the other hand, the version of the Appellants boiled down to a bare denial of the allegations against them. It was found by the court *a quo* that they did not fare well when they testified in their defence.

[II] **THE EVIDENCE AND FACTS:**

- [3] A perusal of the record of evidence in the trial court shows that the complainant and the two Appellants lived in the same street and that they knew each other well. The complainant testified that, on the day of the incident, he was walking past the shack of one Patrick when he was called by the two Appellants. They took him into the shack where they undressed him and pressed him onto a bed where the second Applicant penetrated him anally. After he finished, the first Appellant followed suit. When they were both finished, they let the complainant go, threatening that they would kill him if he were to tell his mother what happened.
- [4] A friend of the complainant, aged about 6 years on the day in question, testified that he saw the two Appellants calling the complainant when he was walking past the shack. When he later heard the complainant cry inside the shack, he went closer and peeped through a hole in the zinc wall of the shack. He saw the two Appellants pressing the complainant onto a bed in the shack. He ran away when the mother of the first Appellant emerged from a house and chased him away. The mother of this witness testified that he related this version to her and others that same evening.

- [5] The mother of the complainant also testified in the court *a quo*. When the complainant arrived home, he complained about discomfort in the area of his anus, and when she checked, she found bruises there and blood coming from his buttocks. He did not tell her anything although she became “harsh” towards him. She then took him to her sister who was already asleep in her bed. The sister told the court in evidence that she was woken up by the complainant’s mother who told her that the complainant was raped. She took him with her under the blankets and asked him who had raped him, and he said it was the two Appellants. They then went to the first Appellant’s parental home, where these allegations were denied by the first Appellant. The same happened when they visited the parental home of the second Appellants thereafter. The second Appellants denied everything. Thereafter the two Appellants and their parents met at her parental home, where the Appellants once again denied the allegations when the complainant pointed them out. From there they proceeded to the police station to report the incident.
- [6] In addition, the complainant was taken to the National Hospital for a medical examination of his anal area, and the forensic examiner who performed the examination, recorded her findings on a form J

88, which was handed in by consent during the trial proceedings. The examination showed multiple abrasions of that area with redness, and it is recorded that the injuries were consistent with the version offered by the complainant.

- [7] Lastly, it needs to be mentioned that, throughout the proceedings, much was made by the defence of an allegation by the Appellants that the complainant had initially, and at the meeting of all the parents and the Appellants referred to earlier herein, told them that it was one Simphiwe and one Bambi who had actually assaulted him sexually. All the state witnesses who attended the said meeting, denied this allegation vehemently. The complainant himself said “yes” when he was asked by the court whether he initially said it was Simphiwe and Bambi, but immediately thereafter he told the court that he “eventually” said that it were the two Appellants. In her judgment, the Magistrate found that the complainant indeed mentioned two others initially and not the Appellants, but it was due to the fact that he was facing the very two people at that moment who had threatened to kill him if he were to tell the truth. She found the complainant to be an averagely intelligent child who constantly maintained in his testimony that it was the two Appellants who had raped him.

[8] Mr. Tshabalala, appearing for the Appellants before us, chose not to address the Court on the merits of the conviction. He merely referred the Court to his Heads of Argument, in which he argued that it was not proven beyond a reasonable doubt that it were the two Appellants who had raped the complainant.

[9] In her judgment on sentence, the Magistrate found substantial and compelling circumstances in respect of both the Appellants, and therefore she deviated from the prescribed minimum sentence in cases of the rape of a child under the age of 16 years. As mentioned earlier, she sentenced them to 20 years imprisonment each. She found that their age, the fact that they are first offenders and the fact that they have spent more than two years in custody awaiting trial, amount to substantial and compelling circumstances.

[III] **DETERMINATION**

[10] It is clear from the record of proceedings in the court below that the complainant was indeed anally penetrated on the day in question.

The only question was whether it was the Appellants who had raped him. The Magistrate was satisfied, on the totality of the evidence, that they were the guilty ones. I have studied the record carefully to establish whether the Magistrate had perhaps overlooked something when she came to that conclusion, and I could find no such indication. The two others initially mentioned by the complainant at the meeting of parents, were children of about his own age, and it is highly improbable, therefore, that they could have been the ones. Moreover, there is a reasonable explanation why the complainant had mentioned their names at the meeting, since the Appellants were also present, and they were the ones who had threatened to kill him. As a child of tender age, he had every reason to be scared of them. In my view, the Magistrate was quite correct in holding that in his evidence, the child has maintained throughout that it was the two Appellants who had raped him, and nobody else. The Magistrate was correct in finding the Appellants guilty.

- [11] I find support for this view in the following statement by the highest Court of Appeal in the case of **S v FRANCIS 1991(1) SACR 198 (A)** at p.204 c-e:

“This Court’s power to interfere on appeal with the finding of the trial court are limited.....bearing in mind the advantage which a trial court has seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with the trial court’s evaluation of oral testimony”.

It was also stated in **S v SAULS AND OTHERS 1981(3) SA 172 (A) at 180 E-G** that the exercise of caution in the case of a single witness must not be allowed to displace the exercise of common sense.

[12] As for the sentence imposed by the Magistrate, it has already become trite law that a court of appeal will only interfere with a sentence where there was a misdirection on the part of the Magistrate, which is of such a nature, degree or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all, or exercised it improperly or unreasonably. Here the Magistrate has deviated from the prescribed minimum sentence of life imprisonment for the reasons already mentioned. In deciding whether the sentence of 20 years imprisonment each is not tainted by any misdirection, I am mindful of what the Court of

Appeal has stated in S v D 1995(1) SACR 259 (A) at 259g and further:

“The majority of the Court held that the Appellant’s conduct was sufficiently reprehensible to fall within the category of offences calling for a sentence which would reflect the Court’s strong disapproval and act as a deterrent to others minded to satisfy their carnal desires with helpless children”.

This statement is fully apposite to the present case, and therefore I can find no reason why we should interfere with the trial court’s sentence.

[13] The following order is therefore made:

1. The appeal against the conviction and sentence of both Appellants is dismissed.

P. J. LOUBSER, J

I concur:

M.L OPPERMAN, J

On behalf of the Appellant:

Mr. L.M Tshabalala
Bloemfontein Justice Centre
Bloemfontein

On behalf of Respondents:

Adv. L.M Lencoe
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Bloemfontein