



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 No: A213/2018

In the matter between:

HERMAANS MOTSHWARE LESHORO

Appellant

and

THE STATE

Respondent

CORAM:

LOUBSER, J et OPPERMAN, J

HEARD ON:

5 NOVEMBER 2018

JUDGMENT BY:

LOUBSER, J

DELIVERED ON:

22 NOVEMBER 2018

[I] **INTRODUCTION:**

- [1] The Appellant in this appeal before us is a 51 year old man who is not married, and he has no children. He was convicted on 24 April 2018 in the Welkom Regional Court, sitting at Odendaalsrus, on a charge of rape and sentenced to life imprisonment. The complainant in the matter is a young girl who was seven years old when the incident allegedly occurred on 28 February 2015. The Appellant now comes into higher contention against both his conviction and sentence. It was submitted before us that the trial Magistrate had erred in finding that the complainant was a credible witness, and had also erred in finding that there were no compelling and substantial circumstances justifying a deviation from the prescribed minimum sentence for a rape of this kind.

[II] **THE EVIDENCE:**

- [2] The record of proceedings in the trial court shows that the complainant was the first witness called by the State to testify. She was 11 years old at the time of her testimony, and in Grade 6. She testified that on the day of the incident, she was visiting a relative

of hers. The Appellant was living in a shack next door to the relative. While she was inside the house of the relative, the Appellant called her from where he was sitting outside the house. He instructed her to go buy him liquor. When she returned from the liquor store, the Appellant told her to take it to his shack. As she was on her way to the shack with the liquor, the Appellant suddenly ran towards her, picked her up and lifted her onto his shoulders. He then ran with her into the shack, undressed her, placed her on a bed and then had forced sexual intercourse with her by penetrating her vagina with his penis. According to the complainant, there was nobody else in the shack at the time.

- [3] While the Appellant was raping her, she heard her grandmother calling for her, and she replied by saying that the Appellant had shut her inside the shack. She then managed to get dressed quickly, and the Appellant opened the door for her. He told her that he would stab her with a knife if she were to tell her grandmother what he had done. As she went outside, she saw her grandmother standing at the gate of the relative's yard, and she ran to her and told her that the Appellant had raped her.

[4] The grandmother of the complainant also testified. She told the court that on the day in question, she was also visiting the relative referred to above. At a certain juncture she was informed that the complainant had been sent to a store or a shop, and then she called the name of the complainant somewhat later. As she was calling, she saw the complainant emerging from the shack of the Appellant. The witness was then standing at the gate of the relative. As they proceeded on their way home, the grandmother wanted to know from the complainant why she was in the shack, but the complainant first said she was too scared to tell. Later she told the grandmother that the Appellant had raped her, and she handed the grandmother a R10 note saying that Appellant had given it to her when he warned that he would kill her if she were to tell anybody about what happened.

[5] Later that same evening, the matter was reported to the police, and the next morning the complainant was taken for medical examination. A Form J88 was handed in at the trial by the forensic nurse who performed the examination. She found a bloodstained mucus discharge coming from the private parts, as well as bruises and swelling in that area, amongst others. She concluded that her

findings were consistent with penile penetration of the vagina. The defence chose not to cross-examine this witness, and her evidence therefore stood undisputed.

- [6] The Appellant also testified in the proceedings, and his defence consisted of a bare denial. He testified that he and others were drinking on that day at the house where the complainant and her grandmother came to visit. Early that evening he went to his shack to sleep. He denied that he had sent the complainant to buy him liquor, and he denied having raped her. He told the court that when he went to sleep, he was alone. He would have been aware if someone was raping the complainant on his bed, because he was not fast asleep,

[III] **FINDING OF THE MAGISTRATE:**

- [7] In his judgment, the Magistrate stated that he was impressed with the manner in which the complainant gave her evidence in court. He found that, despite her tender age, she was able to give a coherent account of what had happened to her on that day. The

Magistrate mentioned that he was mindful of the discrepancies between the evidence of the complainant and that of her grandmother, but he found, that in his view, such discrepancies were not material if regard is had to the fact that the incident occurred almost three years before the witnesses were called to testify. One of the discrepancies referred to by the Magistrate, existed in the evidence of the complainant that she had told her grandmother at the gate that she was raped, while the grandmother testified that this was only told by the complainant when they were already on their way home. The Magistrate also indicated that he had observed the complainant and her grandmother closely when they testified, and that there was no reason for them to falsely implicate the Appellant in the commission of the crime.

[IV] **DETERMINATION:**

[8] In considering the evidence in the trial court and the findings of the Magistrate, I am mindful of 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 findings 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”.

I have carefully studied the record of proceedings to find whether the Magistrate had perhaps misdirected himself by coming to the conclusion that the evidence of the State had to be accepted as proof beyond reasonable doubt, but I could find no traces of such misdirections. I am also satisfied that he was alert to the pitfalls of evaluating the evidence of a single witness who is at the same time a child witness.

- [9] As for the sentence imposed, we are guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court, and should only be altered if it is shown on appeal that such discretion has not been judicially and properly exercised.

(S v RABIE 1975(4) SA 855 (A) at 857 D-F). In the present case, the seriousness of the offence by far outweighs the very few mitigating factors counting in favour of the Appellant, of which one is the fact that the Appellant is a first offender. In my view, the Magistrate was therefore correct in finding that there were no compelling and substantial circumstances present which would justify a departure from the prescribed minimum sentence of life imprisonment in the present circumstances.

[10] The following order is therefore made:

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

P.J. LOUBSER, J

I concur:

M.L. OPPERMAN, J

On behalf of the Appellant:

Mr. P.L. van der Merwe
Bloemfontein Justice Centre
Bloemfontein

On behalf of Respondents:

Adv. L.M Lencoe
Office of the DPP
Bloemfontein