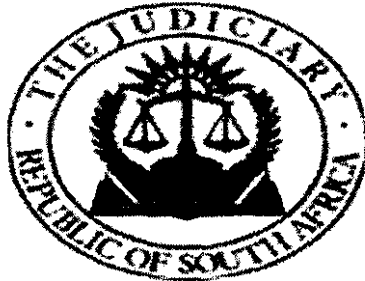


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A238/2016

DATE OF APPEAL: 6 FEBRUARY 2017

Delivered: 8/2/2017

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between

LUCKY MDUDUZI NDUBANE

Appellant

Versus

THE STATE

Respondent

JUDGMENT

MADIMA. AJ

[1] The appeal before us relates to both conviction and sentence. The appellant, duly represented by a lawyer was, on 23 May 2013 tried in the Nelspruit Regional Court on one count of rape. The victim is an underage [...], who I shall, for her protection, call her O, then 12 years of age. The appellant pleaded not guilty, but was convicted and on 30 May 2013, sentenced to life imprisonment. He is before us in terms of s10 of the Judicial Amendment Act 42 of 2013.

[2] I deal briefly with the background to this matter. The complainant, her grandmother, (maternal) her grandfather (maternal), her uncle Sam, [...] Lucky Mduduzi (the appellant) and younger brother M, all live in the grandparent's house in Mangweni, Mpumalanga Province.

[3] O testified, via an intermediary that one fateful day in November 2011 she arrived home from school, changed from her school uniform into casual clothing, went to the kitchen and prepared a meal. She then sat before the television and had her meal. There was no one else at home. Her grandmother had gone to one Ngobeni's place.

[4] The appellant arrived, closed the door and then dragged (O used the word "pulled") her from the dining room to his bedroom. Inside the bedroom he undressed her. He undressed as well. He made her lie on the bed and then inserted his penis inside her vagina. O tried to scream and the appellant closed her mouth. O did not tell anyone about the incident because the appellant threatened her that if she told her grandparents, she would never see them again.

[5] The second incident involving the appellant and O, occurred, according to her evidence, when her grandparents had gone to collect their pension at a pension collection point. She and the appellant were home. So was her younger brother M. The appellant gave M some money and sent him on some errand. As soon as M left, the appellant dragged O into Uncle Sam's bedroom whereupon he undressed her and himself and then proceeded to have sexual intercourse with her. This time around she reported the assault after noticing "white water" coming from her breast.

[6] Grandmother refused O a call to her mother. She told her that she would tell O's mother on her next visit to Mangweni. O's mother visited in the first week of December and was then told what the appellant did to O. Mother accompanied daughter to the hospital where she was examined and then reported the matter to the police. The examination revealed that O's hymen was not intact and she also had a cleft and scar in her vagina.

[7] The grandmother in her evidence corroborated O's evidence in so far as it related to the report O made to her. O's evidence was steadfast despite insignificant lapses of memory here and there.

[8] The appellant in his evidence denied the allegations against him. He stated that O falsely accuses him of rape because he had on one occasion hit her after she had walked in on him having sex with his girlfriend in his room. That was the sum total of the appellant's evidence in rebuttal of the evidence against him.

[9] The appellant also raised a technical point regarding the oath taken by O before she testified. It is claimed in this regard that the Court *a quo* did not establish with O whether she understood what an oath was. The appellant submitted further that O's evidence was thus supposed to have been treated with caution, not only because she was a minor, but also that she was a single witness.

[10] An examination of the record [on pages 56 to 57] disabuses the appellant's assertions regarding the Court's treatment of the oath administered to O. The following is instructive.

Court: How old is she?

Witness: I am 14 years of age

Court: Does she understand what it means to take the oath?

Witness: Yes

Court: What does it mean?

Witness: That I am going to tell the truth.

Court: I am going to test her if she indeed understands what it means. I am going to ask

her a few questions to determine if she know (sic) what it means to take the oath, does she understand that? How old is she now, 14?

Witness: Yes

Court: When was she born?

Witness: [...] 1999.

Court: In what grade is she in school now?

Witness: Grade 8.

Court: What would you say if I say to you that you are 16 years do I tell the truth or am I lying to you?

Witness: That will be lies.

Court: If I say today is Friday will I be lying or telling the truth?

Witness: That will be lies.

Court: Who taught you what is the difference between truths and lies?

Witness: It is my mother.

Court: And who else?

Witness: My granny

Court: And at school?

Witness: I was also told so at school

Court: And pre--schooling, Were you also taught in pre-schooling what is the difference is between lies and truth?

Witness: Yes they did

Court: Does she understand that all we want is for you to tell the truth and nothing but the truth that happened on that day, that specific day. That means the time from 2011, November what happened during that time ... Yes?

Do you agree that she understands the oath?

Prosecutor: Yes the state agrees, Your Worship.

Court: Mr Malumane, do you agree?

Mr Malumane: Yes, I do agree, Your Worship.

Court: She must swear that everything she testifies will be the truth, nothing but the truth, she must say so help me God

Witness: I do swear, Your Worship.

[11] It is clear from the record that the Court was alive to the fact that O is a minor and thus went out of its way to ensure that O understood what taking an oath entailed.

There is nothing to criticise the Court in that regard. Importantly both the prosecution and the defence were satisfied that O understood what taking an oath meant. I therefore find the submission with little merit and not worthy of further attention.

[12] I now deal with the merits of the appellant's version in his defence. The appellant's version that was put to O by the appellant's lawyer during cross examination was that the appellant denies raping O. She insisted that he did. The further version was that the appellant denies that he pulled O into a room and took off her Skirt and panty and inserted his penis in her vagina. O insisted he did. Another of the version put to O was a denial that the appellant threatened to kill O. She again insisted that he did.

[13] In his evidence in chief the appellant testified that he did not rape O. He knows nothing about the incidents of rape that O testified about. He did not threaten her with a knife as he does not carry one at all. Asked why would O make false claims against him, the appellant responded that O saw him having sex with his girlfriend and reported him to their grandmother.

[14] It was only during cross examination that the appellant stated that he had beaten O after she reported him to their grandmother about the incident in his bedroom with his girlfriend. He testified that was when the hatred between them developed.

[15] In her evidence the grandmother testified that she knows nothing about the rape but was informed by O about it some two weeks after the incident allegedly happened. Grandmother's evidence was that O told her that the appellant pulled her into the bedroom and wanted her to lie (sic) but she managed to push him away.

[16] During cross examination grandmother stated that she did confront the appellant about the allegations. She did not call the mother of the child because she works at a school and is busy. Importantly grandmother said that she did not take the matter seriously because "... we know all of them to be kids of the same family."

[17] When asked if she was aware of the incident in the bedroom between the appellant and his girlfriend, grandmother stated that she did, and knows the appellant's girlfriend. She reprimanded the appellant's girlfriend. Grandmother denied that O was ever

punished or hit by anyone for reporting the incident to her.

[18] I deal here with the appellant's evidence that is of concern to me. He states only during his evidence in chief that the reason O falsely accused him of rape was because he had beaten her up after she had reported him to their grandmother for having sex with his girlfriend in his bedroom. This is an important issue regarding motive .Which was never raised by the appellant's lawyer during the cross examination of O. It is raised for the first time in the appellant's evidence in chief. No one knows how O would have responded.

[19] The grandmother was cross-examined on the incident. She testified that she knew of the episode in the bedroom between the appellant and his girlfriend. She however disputed the evidence by the appellant that O was punished or hit by anyone for reporting him to her.

[20] This makes the appellant's evidence in this regard not believable. This I find to be an afterthought on his part. This then makes me wonder why the appellant would lie about the reason for the rape accusation. This is such an important point that he was supposed to have put upfront when O was on the stand. He never did. The further question is why the appellant never called his girlfriend to corroborate his version regarding the beating he meted out to O.

[21] A further issue of concern to me is the fact that the appellant after being notified by the grandmother that O's mother had arrived, ran away and never came back home. When O's mother arrived at home with the police, the appellant took off. The question is why would the appellant run away from his aunt? Are the guilty afraid? Another of my concern is that the appellant in denying the rape allegation also claimed that no one ever confronted him about O's claim. This was contradicted by the grandmother who testified that she did. Again why would the appellant deny the confrontation? Is he hiding something?

[22] Of some significance is the fact that the Nurse called by the Court to explain the J88 report stated that O's hymen was not intact. The Nurse added that there is a tear. The cleft noted is a healed scar of a tear caused to the hymen during penetration. She

explained that the hymen could have been ruptured by penetration with a penis or any other object, but the fact remains that the uncontested clinical findings described in the J88 serve as clear corroboration of O's evidence that her vagina had been penetrated. Despite recent developments in our law that the cautionary rule in sexual cases is based on outdated and irrational considerations - see *S v Jackson 1998(1) SACR 470 SCA and Za'ffert + Paizes The South African Law of Evidence, 2nd edition p969- 972*, courts still find it necessary, and convenient, in seeking corroboration for the evidence of a single witness in a sexual case. See for example *S v Van der Ross 2002(2) SACR 362 CPD*.

In this case, despite the strong evidence of O, and the questionable evidence of the Appellant, as described, I see no harm in recognizing the corroboration found in the J88 as an added factor serving to support the case of the state.

[23] It is trite that the state must prove its case against an accused beyond reasonable doubt. The evidence adduced must not be looked at in isolation by the trial court. All evidence must be examined in its totality, by failing to do so the court may fail to see the wood for the trees. It may well be that O's testimony was at times contradictory with relation to the times she was sexually assaulted by the appellant. She however was steadfast in her evidence of the sexual assault.

[24] The evidence of O and that of her mother was truthful and honest. O's evidence was corroborated by that of her mother. The obverse is not true with regard to the evidence of the appellant. I find his evidence regarding the alleged reason behind the chasm between himself and O incredible and unlikely. This because he did not beat her up as he claimed. The evidence by the grandmother was not entirely helpful to the Court and especially to the appellant. She wished to protect the appellant at the expense of her much younger granddaughter. She insinuated that all belonged to the same family. That was the main reason she did not immediately call O's mother and tell her what she had just heard from O regarding the allegations of the sexual assault.

[25] Much has also been made about the fact that O was the sole witness regarding the rape. Our courts have dealt with the issue regarding the evidence of a single witness for decades. In *S v Sauls and Others 1981 (3) SA 172 (A) at 180 E-G* it was held that

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial judge will weigh his evidence, will consider its merits and demerits and, having done so will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule may be a guide to a right decision but it does not mean that the appeal must succeed if any criticism, however slender, of the witnesses' evidence was well founded. It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense."

[26] I have little to criticise the court *a quo* in finding the appellant guilty for the rape of O. The appellant's version of events is fraught with improbabilities and inexplicable doings such as lying about hitting O for walking in on him and his girlfriend as well as running away from home when he heard that his aunt was home on a visit. He knew that O would tell her mother about what happened. The appellant's version I find not reasonably possibly true. *S v Mbuli 2003 (1) SACR 97 (SCA)*. I have further not found the findings of the court *a quo* patently wrong or vitiated by irregularity. I thus am not in a position to justify interfering with the Court's findings.

Sentence

[27] I now turn to sentence. Is life in prison an appropriate sentence in this instance? I am mindful of the principle that punishment is a matter for the discretion of the trial court. This court ought not erode that discretion unless justified.

[28] Rape is a serious offence. The rape of an underage and defenceless child is in itself an aggravating factor. The rape of an underage relative who looked up to the perpetrator for protection, love and comfort is beyond devastation for the victim.

[29] I am further mindful of the fact that this court can only alter the trial court's sentence if, for example, there was an irregularity that occurred during the trial, or if the trial court misdirected itself in the imposition of the sentence, or the sentence imposed by the trial court is disturbingly or shockingly inappropriate. *S v De Jager and Another 1965 (2) SA*

616 (A), *S V Rabie* 1975 (4) SA 855 (A) and *S V Petkar* **1988** (3) SA 571.

[30] Even in the event this court were the court of first instance and it were minded to impose a lesser sentence, this in itself is not sufficient to interfere if this court is not convinced that the trial court could not have reasonably passed that sentence. *S v Ncheche* 2005 (2) SACR 386 (W).

[31] I have already stated above that rape is a serious crime. *In s v Chapman* 1997 (2) SACR 3 (SCA) at 5b-c, the crime was described thus: " Rape is a very serious offence, constituting as it does a humiliating degrading and brutal invasion of the privacy, the dignity and the person of the victim. the rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensive civilisation. Women In this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives." In *Ncheche* supra it was described as "...an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and Inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable... A woman's body is sacrosanct and anyone who violates it does so at his peril and our legislature, and the community at large, correctly expects our courts to punish rapists very severely."

[32] O was twelve years old at the time she was raped by her [...], the appellant. She testified that prior to the rape she was not scared of him. She referred to him as her brother. Indeed in certain African cultures, one's mother's siblings' children are referred to as one's siblings, that is, brothers and sisters. The same applies to one's fathers' siblings' children. It is not easy to describe the pain, the humiliation and shame O feels after being violated by her brother. To add salt to the wound, the appellant showed little or no remorse. He was smiling during the proceedings and when confronted about that, he stated that it was his nature.

[33] Because O was twelve at the time of the rape, the offence falls squarely within the

purview of s51 of the Criminal Law Amendment Act 105 of 1997. This section prescribes a minimum sentence of life imprisonment unless substantial and compelling circumstances exist. Our courts are emphatic on the imposition of a minimum sentence in this regard. In *S v Matyityi 2011 (1) SACR 40 (SCA) at para 23* the court held that "Despite certain limited successes there has been no real let up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, 'it is still no longer business as usual'. And yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentence prescribed by the legislature for the flimsiest of reasons - reasons, as here, that do not survive scrutiny. As Malgas makes plain courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."

[34] In mitigation of sentence the appellant submitted a pre-sentence report which listed the appellant's personal circumstances as (a) born on 7 July 1985, then 28 years of age, (b) unmarried with a girlfriend, (c) both parents deceased, (d) raised by his grandmother, also deceased, (e) raised by his other grandmother who testified in his defence, (f) he has no children, (g) left school in Standard 8 and (h) he was a first offender.

[35] A sentencing court must take into account all of the personal circumstances of the accused and blend that with elements of mercy. *S v Khumalo 1973 (3) SA 697*. I agree. However for mercy to be shown on the appellant, he needed to show remorse. I have not seen any indication in the record that the appellant is sorry for what he has done and that he had asked O for her forgiveness. He could easily have done the necessary

mea *culpa* soon after being found guilty and then testified to that effect in mitigation of sentence.

[36] It is no surprise that the court *a quo* found that the crime that the appellant committed is of a serious nature. Rape always is. There is no indication in the record that the court in sentencing the appellant did not take into consideration the appellant's personal circumstances, such as his young age and other relevant criteria. Is age a factor to be taken into account when determining a sentence?.

[37] This court does not take lightly the offence of rape. It is a very serious invasion of personal space. The law should look dimly at anyone who rapes another. O must have been very scared when she realised that her brother sought to force himself on her. O shall for the rest of her life carry with her the burden of the assault by her brother.

[38] The courts have on numerous occasions held that the imposition of a sentence on accused persons is always in the discretion of the trial court. A court of appeal may only interfere if it finds that the sentence has not been judicially and properly exercised. See *S v Rabie supra*; *S v Salzwedel and Others 1999 (2) SACR 586 (SCA)*.

[39] Does the life sentence imposed on the appellant by the trial court induce a sense of shock? The appellant submitted that there were several other cases of rape worse than his, where a life sentence was drastically reduced. The court held in *S v Khumalo 1989 (3) CPD at 31* that "The public interest is not necessarily served by the imposition of very long sentences of imprisonment. As far as deterrence is concerned, there is no reason to believe that the deterrence effect of prison sentence is always proportionate to its length."

[40] It was submitted further that in *S v MN 2011 (1) SACR 286 (ECG)* a sentence of life for the rape of a girl of 10 years was reduced on appeal to 15 years. The mitigating factors were that there was no serious physical injury other than that produced by the act of rape. There was no evidence of emotional trauma. The perpetrator, a man of 47 years could still be rehabilitated.

[41] In *S v MM 2011 (1) SACR 510 (GNP)* a life sentence for the rape of his 12 years

old stepdaughter in the family home was reduced to 12 years on appeal. In *S v JS 2011 (1) SACR 510 (GNP)* the appellant was sentenced to life imprisonment for the rape of a 4 year old girl the court stated that this was not the category of the worst rapes. There also was no evidence of what psychological effects there will be as this was not canvassed at the trial. In *S v JV 2011 (1) SACR 510 (GNP)* a father was convicted of two counts of the rape of his own daughters. The court again held that after taking into account all of the relevant factors it could not be said that this was one of the most serious cases of rape. The father's two sentences of life imprisonment were set aside and replaced with two sentences of 15 years' imprisonment which were ordered to run concurrently.

[42] There is no doubt that each case must be evaluated according to its own merits. The appellant in this case has shown no remorse. He has not apologized for his actions. He has not demonstrated any substantial and compelling circumstances that would merit a deviation from the prescribed minimum sentence. I hold the view that even in the absence of the prescribed minimum sentence the appellant is a textbook example of someone deserving of a long period of incarceration.

[43] It is for the above reasons that I find that there was no misdirection by the court *a quo* regarding sentence.

1. I accordingly make the following order.

1.1 The appeal against conviction and sentence is refused.

TS MADIMA: AJ

PRINSLOO, J

I Concur

So it is ordered

On behalf of the Appellant: MB Moloi
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On behalf of the Respondent: Adv S Scheepers
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Dates of Hearing: 6 February 2017
Date of Judgment: 8 February 2017