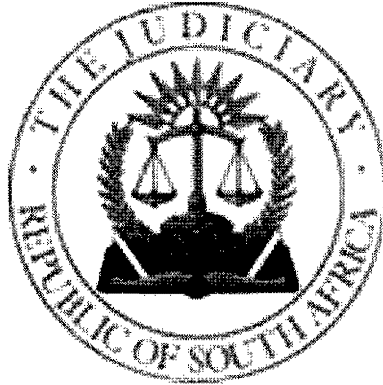


REPUBLIC OF SOUTH AFRICA



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

CASE NO.: A872/2015

17/2/2017

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

KENNETH KHOZA

APPELLANT

AND

THE STATE

RESPONDENT

JUDGMENT

THOBANE AJ,

[1] The appellant was arraigned for trial in the Regional Court sitting at Pretoria on two counts of rape. The allegations against him were that on 25 February 2013 he sexually penetrated the victim's private parts, the victim being a girl 12 years old, using his finger, (count 1) and also using his penis (count 2). The provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 were applicable to the charges and were explained to the appellant at the commencement of the trial.

[2] The appellant enjoyed legal representation at the trial. He pleaded not guilty to both counts but was found guilty on one, (sexual penetration with his penis) and acquitted of the other count. He was thereafter sentenced to life imprisonment.

[3] This appeal, brought automatically in terms of section 10 of the Judicial Amendment Act 43 of 2013, is directed at both conviction and sentence.

[4] Conviction of the appellant follows events that took place on 25 February 2013. F. T., the victim's grandmother, testified that on that day the victim came to her after school in tears. The victim informed her that the appellant, who was her step-father, while preparing for school that morning and while K. (the half-brother) was asleep, called her to the kitchen, undressed her and raped her. He thereafter gave her R10-00 and warned her not to tell anyone otherwise she would be killed. Ms T. informed the victim's mother and the matter was reported to the police. The victim was taken to Mamelodi Day Hospital for medical examination. She, Ms T., conceded that she did not enjoy a good relationship with the appellant.

[5] Cuhuni Thantsha, the arresting officer, testified that he was on duty together with his colleague and that they approached the appellant's place of residence in the process of investigating the matter. They were not in their police uniform and were travelling in an unmarked police vehicle. As soon as the appellant saw them he ran away, tripped and fell. He was arrested and transported to the police station. During cross examination it was put to him that on the day of the appellant's arrest he, appellant, did not know that they were police officers that was why he had a fight with them.

[6] The mother of the victim, C. T. confirmed that she was in a relationship with appellant and that the victim was raised by the appellant. On the day of the incident she

left early for work, as she usually did. Before she left she prepared one of her children for school. Later she received a call informing her about the incident. She came home and they eventually went to the clinic for the child's examination.

[7] The victim testified through an intermediary that on the day of the incident at about 5:45 in the morning she was at her home with her two half siblings as well as the appellant. The appellant instructed one of her siblings to go to the bedroom and was left with her in the kitchen. He thereafter instructed her to undress or else he would beat her up. He then placed a towel on the floor of the kitchen and inserted his penis into her vagina. When she started to scream he covered her mouth with his hand. When he was done, the vehicle that transports them to school came. She was thereafter given lunch money together with her sibling. On returning from school she went to her grandmother's place and related the events of earlier that morning to her. They later went to the police and to the clinic.

[8] During cross examination she was asked about the statement she made to the police. She however stated that it was not read back to her. It was further put to her that she was never sexually assaulted. If she had been, so the postulation went, then neighbors and her two siblings would have been able to hear her scream. She stood by her statement that she had been raped.

[9] The J88 Medico-Legal Report completed by Dr. Ken Mimbulu was admitted into evidence in terms of section 212 (4) of the Criminal Procedure Act 51 of 1977.

[10] Appellant testified in his own defense. He testified that on the day of the incident he was awoken by his youngest son who asked for pocket money for school. He later left the common home and only returned when it was time for the children to return from school. On returning home he heard that the police were looking for him. Later while standing outside next to the gate, police emerged and there was a scuffle with them. He threw a can of beer away which injured one of the policemen. He was then arrested. He denied sexually assaulting the child and stated that he suspected his mother-in-law (Ms T.) of having influenced the child to falsely implicate him because they were not on good terms.

[11] Rosina Ledwaba, the police officer who took down the statement of the victim, confirmed that she recorded in the statement what she was told. She also confirmed that what was related to her is that the appellant after closing the gate and the kitchen door, placed the victim on the table and pushed his finger inside her vagina. He left momentarily to the bedroom and on his return, while the child was still on the table, he inserted his penis into her vagina and raped her. She confirmed further that she read the statement back to the; victim after reducing it to writing.

[12] The magistrate was of the view, after the defense had closed its case, that the evidence of the doctor, whose J88 Medico-Legal Report was entered into evidence in terms of section 212(4), was a necessary witness and that he should be called to give evidence. None of the parties objected. Dr. Mimbulu testified that he had been practicing for 15 years as a medical practitioner, seven of which were spent examining rape victims. He confirmed that some of the victim's injuries were as noted in the J88 Medico-Legal Report, swelling of the clitoris and bruises and swelling on various areas of the vagina. He stated that this was consistent with penetration by a finger as borne out by the bruising possibly from the perpetrator's fingernails. He confirmed that the injuries were abnormal for a female who was not sexually active. He concluded that the injuries did not exclude sexual assault.

[13] The appellant appeals against the conviction on the following grounds;

- that the court a *quo* failed to treat the evidence of the complainant, who was both a minor and a single witness, with the necessary caution;
- that the magistrate failed to accord due weight to numerous contradictions which are material;
- that the magistrate failed to put sufficient weight to the evidence of the Doctor who testified that the injuries could have been caused by insertion of a finger into the victim's vagina as opposed to insertion of a penis.

It is thus contended that the court a *quo* failed to properly evaluate the evidence placed before it and that the contradictions are such that the appellant ought to have been found not guilty.

[14] It is a trite principle of our law that the guilt of the accused must be proved beyond

a reasonable doubt. The onus to do so rests on the State. In the matter of **S v T 2005 (2) SACR 318 (E)**, at paragraph 37, Plasket J said the following;

'The State is required, when it tries a person for allegedly committing an offence, to prove the guilt of the accused beyond a reasonable doubt. This high standard of proof - universally required in civilized systems of criminal justice - is a core component of the fundamental right that every person enjoys under the Constitution, and under the common law prior to 1994, to a fair trial. It is not part of a charter for criminals and neither is it a mere technicality. When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse - convictions based on suspicion or speculation - is the hallmark of tyrannical systems of law. South Africans have bitter experience of such a system and where it leads to.'

[15] Sitting as the court of appeal we are called upon to be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court (see **R v Dhlumayo and another 1948 (2) SA 677 (A)**). We can only do so where the trial court materially misdirected itself insofar as its factual and credibility findings are concerned. In **S v Francis 1991 (1) SACR 198 (A) at 198j - 199(9)** the approach of an appeal court to findings of fact by a trial court was summarized as follows

"The powers of a Court of appeal to interfere with the findings of fact of a trial Court are limited. In the absence of any misdirection the trial Court's conclusion including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony".

[16] Lastly, the court's approach when evaluating evidence of a single witness who is also a minor was articulated in **S v Dyira 2010 (1) SACR 78 (E)**:

"In our law it is possible for an accused person to be convicted on the single evidence of a competent witness (section 208 of the **Criminal Procedure Act No 51 of 1977**). The requirement in such a case is, as always, proof of guilt beyond reasonable doubt, and to assist the courts in determining whether the onus is discharged they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution (**Rex v Mokoena, 1956 (3) SA 81 (AD) 85, 86**). This means that the courts must be alive to the danger of relying on the evidence of only one witness because it cannot be checked against other evidence. Similarly, the courts have developed a cautionary rule which is to be applied to the evidence of small children (**R v Manda, 1951 (3) SA 158 (AD) at 162E to 163E**). The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity (**Viveiros. v S [2000] 2 All SA 86 (SCA) para 2**). Here, more than one cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness"

[17] Counsel for the appellant Mr Kgagara, argued that the court a quo did not treat the evidence of the victim, who was both a minor and a single witness with "sufficient" caution. During engagement he stated that although there was caution, it was in his view just not sufficient. The magistrate's judgment however does not support counsel's contention. The magistrate was alive to the fact that he ought to approach the minor's evidence with caution. Hence he opined, in his judgment, that the victim was able to open up and tell her grandmother about the incident because she felt comfortable round her (Record page 157 line 6-7). In light of this, it can not be said that there was no caution in the court a quo's approach to evidence evaluation.

[18] It was further argued before us, that the magistrate failed to accord sufficient weight to the contradictions by the victim. These contradictions can be summarized as follows:

18.1 Contradictions contained in the victim's written statement to the police and her evidence in court with regard to how much money she was given by the appellant after the rape incident.

18.2 Contradicting accounts of whether the rape occurred on the floor or on the table in the kitchen.

18.3 Lastly, whether the victim was sexually penetrated by both a finger and a penis, by the appellant.

The evidence of the appellant before the court *a quo* was to the effect that he did not see the victim on the morning of the incident and therefore did not give her money. The only person he gave money to was his other child. The question that inadvertently arises is whether the contradiction is material. The victim's grandmother testified that she was told by her that after she was sexually assaulted by appellant he gave her R10-00. No issue was taken with her testimony in this regard. When the victim's mother testified it was put to her that the version of the appellant was to the effect that the victim (my emphasis), was given R10-00 by the appellant to share with her younger sibling. The following was put to her during cross examination,

Mr Sibebe: ".....

.....

Ja. I am saying this, because my client says on 25 February 2013, he gave your daughter R10-00 for them to share with the younger one, K.....

.....

.....

and then my instructions are saying that they were given R5, sorry R10 for them to share, R5 and R5." (Record page 33 line 19-24).

[19] When the victim testified, she stated that she was given R20-00 and her sibling R10-00. When it was put to her that the version of the appellant was to the effect that she was given R10-00 on the day, she disputed it, insisting that it was R20-00. When the police officer who took down the statement was called to testify, she made reference to the statement and indicated that according to it, the victim was given R10-00. The magistrate alive to the contradiction, referred in his judgment to the decision of **S v Oosthuizen 1982 (4) SA ALLSA 245 (T)**. The thrust of his reference to case law

being that mere contradictions do not necessarily lead to rejection of evidence. One of the most critical issues being whether the truth has been told. I find the following remarks in the case of **S v Mafaladiso en Andere 2003 (1) SACR 583 (A)** 593e - 594h apposite in this matter when evaluating the evidence in situations where there are contradictions:-

"The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings."

In light of the above, I am of the view that whether the complainant was given R20-00 or R10-00, was not material to the issues that the court *a quo* was to adjudicate upon. I am further of the view that when one considers the entire evidence, the truth has been told. The finding by the trial court, that the contradictions do not vitiate the State case (Record page 157 line 24), was a correct finding.

[20] Counsel for the appellant further argued that the Doctor's evidence as to what could have caused the vaginal injuries of the victim, was not given due weight. The Doctor's evidence, so it was argued, was to the effect that the vaginal injuries could not have been caused by penile penetration but by finger penetration. The judgment of the magistrate shows that he did not approach the evidence in piecemeal fashion but accounted for all the evidence including the evidence of the appellant which included allegations of a conspiracy against him. Such conspiracy was, correctly in my view, found to be improbable as it would have involved collusion of the victim's grandmother, the police and the Doctor. On the other hand the magistrate found corroboration of the victim's evidence in the testimony of the Doctor. He found that when evidence is viewed in its entirety, the version of the appellant stood to be rejected as false. Although not specifically referred to in his judgment, the contention by the appellant that there was fabrication of the allegations against him so as to falsely implicate him in view of payments that were due from the Road Accident Fund, or because the victim's grandmother hated him, is not borne out by recorded evidence. The approach by the court *a quo* was in line with what was said in ***S v Van Der Meyden 1999 (1) SACR 447***, by Nugent J, as he then was;

"In whatever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."

[21] The basic approach in every appeal against sentence was set out in ***S v Rabie 1975 (4) SA 855 (A)*** at 857D-F to be the following:

"the court hearing the appeal -

(a) should be guided by the principle that punishment is 'pre- eminently a

matter for the discretion of the trial court', and
*(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly' exercised. The test under (b) is whether the sentence is vitiated by any irregularity or misdirection or is disturbingly inappropriate" (see also **S v Giannoulis 1975 (4) SA 869 (A)**, **S v Barnard 2004 (1) SACR 191 (SCA)** at 194C-D, **S v Mayisela 2013 (2) SACR 129 (GNP)** at[13].)*

[22] The court in **S v Malgas 2001 (1) SACR 469 (SCA)** at 478E-H said the appeal court can only interfere with the sentence imposed by the trial court where it is vitiated by a material misdirection or where the disparity between the sentence of the trial court and the sentence that the appellate court would have imposed had it been the trial court, is so marked that it be described as '*shocking*', '*startling*' or '*disturbingly*' inappropriate (see also **Madiba v S (2015) JOL 33686 (SCA)**).

[23] The appellants' personal circumstances were placed before the sentencing court as follows:

- That he was 38 years of age at the time of the rape;
- That he has previous convictions which relate theft and two of which relate to drugs or dependence inducing substance;
- That he was not married but was in a stable relationship;
- He has two minor children;
- He attended formal schooling upon grade 9;
- That he suffers from HIV;
- That he is self employed.

[24] A pre-sentence report was procured and tendered into evidence. The Probation Officer notes in the report that the appellant does not admit the incident and does not exhibit any remorse. It is further noted that the appellant was brought up by his stepfather and that he never knew his father. His childhood was punctuated by poverty and financial strain. As a teenager he became rebellious and mixed with wrong friends. He ended up using alcohol and dagga. He also started committing crime. At the time of

his arrest he had been cohabiting with the victim's mother for 13 years. Two children were born of this relationship. He was a good father to his children. It is further recorded that he has joined the ZCC church, made peace about his situation and is now closer to God. In evaluating the circumstances of the appellant, the Probation Officer stated that the rape was an isolated event and that the appellant was not predisposed to being attracted to children and therefore was unlikely to reoffend.

[25] In the victim impact report the Probation Officer states that the victim experienced pain as a result of the rape. The rape has further caused the victim to feel unloved and has been exhibiting signs of short temperedness. Her mother reported that she makes demands which when not met are followed by threats that the victim will kill herself. The incident has also impacted severely on her mother and grandmother too. Following the rape, the behavior of the victim has changed significantly to a point where her mother feels like the victim no longer feels the need to confide in her. She is also not responding positively when attempts are made to reach out to her. The Probation Officer noted that during the interview the victim was crying continuously. She concludes that the rape has impacted the victim significantly.

[26] The magistrate, in the end, found that there were no substantial and 'compelling circumstances present and concluded that there was no reason to depart from the minimum sentence of life imprisonment. This finding by the magistrate can be assailed for there were, in my view, substantial and compelling circumstances, namely;

- The appellant was a first offender. Although the magistrate correctly found that on a sexual assault case the appellant was a first offender (Record page 170 line 15-16), he failed to give due weight to this factor,
- The appellant spent 26 months (2 years and 2 months) awaiting trial. The magistrate makes a passing reference to time spent (Record page 171 line3-5). He however does not account for such a time. He therefore simply paid lip service to it. The failure to account for the 26 months served while awaiting trial, which period is substantial, is in my view a misdirection. An injustice is perpetuated when time served is not brought in to bear. (See **S v Vilakazi 2009 (1) SACR 525 (SCA)**).
- The appellant was said to be HIV positive. It is usually an aggravating factor

whenever a perpetrator knowing his HIV status, sexually assaults another person. In this instance it should count in favor of the appellant that the victim, somehow, was not infected with the virus (Record page 171 line 21),

- In the pre-sentence report, the Probation Officer correctly points out that this incident of rape was an isolated one and that the appellant is not a person predisposed to committing sexual assault. It follows therefore that he is capable for being rehabilitated,
- The magistrate correctly found that the appellant was not "an inherently evil person (page 172 line 5-7). He further went to say that such a finding counts in favor of the appellant. From the sentence imposed however the magistrate seems not to have given the benefit of such a finding to the appellant,
- Lastly, rape is a serious crime that leaves lasting scars on its victims.

That however is not to say each crime committed is not to be individualized. On the facts of this case while the victim did sustain injuries on her private parts and as per the victim impact report exhibits signs of trauma emanating from her ordeal, the rape itself was not accompanied by extreme violence.

[27] In light of the above, I am accordingly of the view that the court *a quo* erred in not finding that there are substantial and compelling circumstances present in this case that warrant a deviation from imposing life imprisonment as a sentence. This misdirection by the court *a quo* places this Court at liberty to consider the sentence afresh.

[28] I therefore propose the following order;

1. The appeal against conviction is dismissed;
2. The appeal against sentence succeeds;
 - 2.1 The sentence of life imprisonment imposed by the court *a quo* is set aside and is replaced by the following:
"Eighteen (18) years imprisonment";
3. The sentence in paragraph 2.1. *supra*, is ante dated to 20 August 2015.

T THOBANE
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

D MOLEFE

JUDGE OF THE HIGH COURT

APPEARANCES

Heard: 30 January 2017

Delivered: 17 February 2017

Counsel for Appellant: Mr. M. B. Kgagara

Counsel for Defendant: Ms. J.P. van der Westhuysen