

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

15/3/2017

CASE NO: A894/2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

DLOZI DAVID NKADIMENG

Appellant

and

THE STATE

Respondent

JUDGMENT

MANAMELA, AJ

Introduction

1. The Regional Court for the Regional Division of Gauteng, Benoni (the Trial Court) convicted the appellant on 27 May 2015 on a charge of rape.¹ The appellant was sentenced by the Trial Court to life imprisonment.² He launched this appeal against both conviction and sentence in the

¹ See the judgment of the Trial Court at indexed pp 112-124 of record; the charge sheet (i.e. exhibits "A" and "B").

² See indexed pp 129-136. The Trial Court also ordered the appellant's name to be entered and recorded in the national register for sexual offenders in terms of section 50(l)(a) of the Criminal Law Amendment

exercise of his automatic right to appeal.

2. The appellant was accused of raping [...] (who was under the age of 16 years at all material times), between 04 February 2013 and 13 February 2013 at or near Etwatwa, Benoni. Section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act)³ and its accompanying schedule 2 was found to be applicable to the charge and conviction, hence the sentence of life imprisonment.⁴

3. The appellant pleaded not guilty to the charge and was legally represented throughout the proceedings before the Trial Court. As part of his plea explanation, he among others, admitted in terms of section 220 of the Criminal Procedure Act 51 of 1977 to have had sexual intercourse with the complainant. However, the appellant qualified his admission by stating that on the particular day he was "tricked" or seduced by the complainant, whilst drunk and sleepy, into having sexual intercourse with her.

4. The complainant died from natural causes on 27 October 2014,⁵ before commencement of the proceedings before the Trial Court. However, by the time of her death, she had already deposed to an affidavit or sworn statement by the police when she laid criminal charges against the appellant. The affidavit was ruled admissible by the Trial Court in terms of section 3(l)(c) of the Law of Evidence Amendment Act 45 1988⁶ without demur by the appellant.

Act (Sexual and Related Matters) Act 32 of 2007 and to be declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000.

³ Section 51(1) of the Criminal Law Amendment Act 105 of 1997 provides as follows in the material part: "(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life. Part I of Schedule 2 reads as follows in the material part: "Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007- (a) when committed- i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice; (ii) ... ; (iii) ... ; (b) where the victim-(i) is a person under the age of 16 years".

⁴ See indexed p 135 of record; annexure "A" to the charge sheet (i.e. exhibit "A").

⁵ See report by medical practitioner (i.e. J88) on indexed pp 138-141; death certificate on indexed p 147 of the record.

⁶ Section 3(l)(c) of the Law of Evidence Amendment Act 45 1988 reads as follows in the material part: "(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless- (a) ...; (b) ... ; or (c) the court, having regard to- (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.". See pp

5. Further, the following documents were handed in as exhibits before the Trial Court by agreement between the parties: the report by medical practitioner (colloquially referred to as the J88 Form); statement by forensic analyst and reporting officer of the Forensic Science Laboratory of the South African Police Service in terms of section 212 of the Criminal Procedure Act confirming that the appellant fathered the complainant's unborn foetus; complainant's abridged birth certificate stating her birth as on 30 November 1997.⁷

6. The appeal came before us on 14 November 2016. After hearing oral submissions by Mr Adv. F. Van As, on behalf of the appellant, and Adv. M.J. Makgwatha, on behalf of the respondent, we reserved this judgment. We called upon counsel to file heads of argument by 18 November 2016 on the limited issue of whether a conviction on a charge of rape of a minor constitute rape as contemplated by provisions of the Minimum Sentences Act. We are grateful to counsel for the heads of argument received. I will deal with this issue at the appropriate stage later in this judgment. Next I deal with the grounds of appeal.

Grounds of appeal

7. It is argued, on behalf of the appellant, in terms of both written and oral argument that the Trial Court erred in finding that the State or the respondent had proved its case beyond reasonable doubt and consequently convicting the appellant. The following are, among others, the reasons or grounds advanced by the appellant in support of this contention:

7.1. by accepting inadmissible hearsay evidence during the trial;

7.2. by failing to apply the cautionary rule relating to single witnesses and accepting the complainant's testimony from her sworn statement, and versions of other witnesses on behalf of the State despite various contradictions and inconsistencies, and

7.3. by finding that the State had proved the case against the appellant beyond reasonable doubt.

9-10 of the record.

⁷ See indexed pp 138-150 of record.

8. Regarding sentencing the following is submitted as grounds to challenge the life imprisonment sentence imposed by the Trial Court:

8.1. the sentence of life imprisonment is shockingly harsh and inappropriate under the given circumstances of this matter;

8.2. the Trial Court erred in not finding that substantial and compelling circumstances existed for deviation from the prescribed minimum sentence;

8.3. the Trial Court misconstrued remarks⁸ by the appellant whilst in the dock regarding feeling responsible for the death of the complainant in its sentencing of the appellant;⁹

8.4. there is no evidence that excessive violence was involved in the incidences and the complainant also suffered no injuries. Although it is conceded that any form of rape is a serious violation of another person, it is submitted that the life imprisonment sentence imposed is the ultimate sentence possible and therefore inappropriate.

8.5. the Trial Court overemphasised the interests of the community and public demand for stringent sentences;

8.6. the appellant can be rehabilitated, but excessively long period of incarceration would deny the appellant the opportunity to rehabilitate.

9. Evidently, the appellant's grounds appear expansive, but most of them constitutes the appellant's dissatisfaction with the actual reasons for judgment, rather than the substantive order made by the Trial Court, which is not conventional practice.¹⁰ In the sum, it is submitted that the Trial Court ought to have rejected the evidence tendered by the State and discharged the appellant. In the alternative, it is submitted that, in the event of conviction of the appellant, the Trial Court ought to have found existence of substantial and compelling circumstances justifying

⁸ The appellant said, among others, the following at the Trial Court in his evidence-in-chief: "As we speak she is no more in this world and it seems as if it is my doing for her to be no more. I greatly apologise. I am left with no words to say." See indexed p 86 of the record.

⁹ See indexed pp 123-124 of the record.

¹⁰ See *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) at par 39, which cited, with approval, the decision in *Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355.

deviation from the ultimate sentence of life imprisonment. Therefore, according to the appellant this Court is entitled to interfere with the findings of the Trial Court.

The State's or the Respondent's Case

10. I deem it prudent to follow the sequence in which evidence was given at the Trial Court and commence with the respondent's case. Obviously, this being an appeal, the appellant bears the onus to satisfy this Court that the Trial Court erred in the respects indicated above. Nothing, in my view, would turn on the sequence of consideration of the submissions for purposes of this appeal.

11. The State obviously supports the findings of the Trial Court. Its main contention is that, the appellant admitted having sex with the complainant who was under the age of 16 years and therefore this led to the impugned conviction and sentence of the Trial Court. It is submitted that the appellant's assertion that he was drunk and seduced is just a desperate attempt to explain how he fathered a foetus with his underage [...]. It is also submitted in the alternative that the appellant ought to be at least convicted of statutory rape as contemplated in section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.¹¹

12. As indicated above, the State significantly relied on a sworn statement deposed to by the complainant. The contents of this statement [read out to the Trial Court by a member of the police who took the statement¹²] are briefly along the following lines. During the night of Monday, 04 February 2013, the appellant called the complainant on the phone about three times from within the house, but the complainant ignored him. The appellant then went and got the complainant from where she was sleeping into the kitchen. He raped her and closed her mouth. That was the first incident. The second incident took place on Tuesday, 05 February 2013. During the second incident, the complainant was again asleep and the appellant woke her up and told her to follow him into the shack adjacent to room or house where she was sleeping. He instructed her to undress and lie on his jacket, and raped her. According to the complainant's

¹¹ Section 15(1) reads as follows in the material part: "(1) A person ("A") who commits an act of sexual penetration with a child ("B") who is 12 years of age or older but under the age of 16 years is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child, unless A, at the time of the alleged commission of such an act, was- (a) 12 years of age or older but under the age of 16 years; or (b) either 16 or 17 years of age and the age difference between A and B was not more than two years."

¹² See pp 11-23 of the record.

statement there were four more rape incidents between 06 February 2013 and 13 February 2013. The appellant threatened her not to tell anyone about the rapes. However, she told her friends; sister (who discussed or reported the issue to other relatives); the school authorities and the police. There was an argument at the hearing of this appeal by counsel for the appellant about the sequence of these reports and significance thereof. I will revert to this later.

13. Apart from the complainant's statement, the State called a number of witnesses to testify before the Trial Court, including a young girl named M.. She testified through an intermediary due to her age. She referred to the appellant as her uncle and the complainant as her aunt. She confirmed essentially one incident of rape, which according to her testimony took place in the dining room or kitchen and at the complainant's home. She explained to the Trial Court that the reason why she didn't tell her mother about her uncle's behaviour was because she was afraid of her uncle. The uncle had previously beaten her up and also beaten up her [i.e. M.'s] mother. M. conceded that she did not know what happened in the kitchen.

14. The State also called Miss L M, a friend of the complainant to testify.¹³ According to this witness, the complainant reported the rape incident to her and thereafter the school authorities were alerted. Counsel for the State actually submitted that the complainant reported the incident to M first before the others, but as indicated above the sequence of the reports is strongly contended. I will deal with this issue below.

15. Regarding the fact that the appellant's assertion that he was seduced into committing the rape, counsel for the respondent submitted that there is no complaint for seduction. Counsel further submits that this version of the testimony is highly improbable for consensual rape. I will deal with this and other submissions on behalf of the State below.

Appellant's or Accused's case

16. As already indicated above, the appellant denied the rape incident as stated in the complainant's statement. But, the appellant admitted one sexual encounter with the complainant at his place.

¹³ See line 23 on page 15 of the record.

17. He denied the rape incidents alleged in the complainant's statement and other witnesses on behalf of the State. The State's case is that, these incidents occurred at the complainant's home. The appellant actually denied having visited the complainant's place during the time the incidents are alleged to have taken place or for the length of the period as alleged.

18. When the appellant was asked why the complainant and other witnesses would implicate him in the commission of rape, he told the Trial Court that it was due to the fact that he had reported the complainant for missing school. He said he went to the complainant's school to enquire about the complainant attendance of or absence from school.

19. When asked by the Trial Court whether or not he knew the age of the complainant, the appellant told the Trial Court that he could not dispute the fact that she was 16 years old.¹⁴ The following were his responses on questions by the Trial Court in this regard:

"QUESTIONS BY THE COURT: How old was M. [i.e. the complainant]? --- I don't know her age very well Your Worship.

But can you estimate? --- I would not be in a position to.

If somebody says she was below 16 years, would that be the truth?

I will not dispute that."¹⁵

20. As with the State's case, I will deal with these submissions further and other submissions on behalf of the appellant below.

Analysis of the submissions

21. Further from what is stated as the respective parties' cases above, next I discuss submissions made for purposes of this appeal on behalf of the parties under subparagraphs adopted from the grounds of appeal.

¹⁴ See p 103 of the record.

Acceptance of inadmissible hearsay evidence during the trial?

22. Counsel for the appellant complained about the Trial Court's ruling in terms of section 3(1)(c) of the Law of Evidence Amendment Act. His focus was pinned on these Trial Court's words in the ruling: "the evidence of those witnesses shall be admitted because the author of that kind of evidence is now deceased and it is impossible for the state to call that [sic] witnesses".¹⁶ Counsel mentioned that reference to witnesses, being in plural, as opposed to just witness was problematic.¹⁷ According to him the Trial Court appeared to have accepted as admissible evidence of all witnesses where there was hearsay in the case. But, I don't agree with this wholesale interpretation or treatment of the judgment of the Trial Court. It is not borne by the facts and it may well be that the problem arose from transcription of the record. There is also nothing of substance pointed out by counsel to support his contention in this regard. Be that as it may nothing really turns on this.

Failure to apply the cautionary rules?

23. As a general attack on the complainant's statement, it is submitted on behalf of the appellant that the Trial Court should have applied extra caution when evaluating the evidence emanating from the complainant's statement. Two issues are raised in this regard. First, is that there may have been language problems or challenges between the police witness, who took the statement and the complainant. Much is made of the fact that the police witness said that although she understood the complainant's language (i.e. Zulu), she wasn't fluent in the Zulu Language. Second, is that there is no testimony that the statement was read back to the complainant at the time it was taken down by the police. But, there were no objections in both regards these challenges at the Trial Court. We raised this issue and, to his credit, appellant's counsel appeared to appreciate this shortcoming in the appellant's challenge. However, my assessment didn't reveal any evidence to suggest that the contents of the statements were affected by language differences or other problems. This issue, in my view, merit to further attention.

24. It is also submitted that the Trial Court convicted the appellant on evidence of a single

¹⁵ *Ibid.*

¹⁶ See lines 9-11 on p 10 of the record.

¹⁷ The Trial Court's ruling is stated as follows: "The evidence of those witnesses shall be admitted because the author of that kind of evidence is now deceased and it is impossible for the state to call that witness." See lines 9-11 on p 10 of the record.

witness, being the complainant.¹⁸ The Trial Court is said not to have approached the matter with the necessary caution. The following often-quoted passage from *R v Molwena*¹⁹ is a useful authority to begin discussion of this issue with:

"the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by s 284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in very material respect."

25. The Trial Court accepted as credible and reliable the contents the complainant's statement. The Trial Court appears to have been always alive to the fact that due to the death of the complainant before the proceedings commenced, the appellant did not have an opportunity to cross-examine her. But, other witnesses, particularly her friend M, who relayed what the complainant's report before the Trial Court, represented an opportunity for the appellant to test their evidence. Further, the evidence of young child M confirmed a single incident of rape. M's testimony was outside of the complainant's statement.

26. Another type of cautionary rule said to not have been applied by the Trial Court is regarding the testimony of the minor child, M.²⁰ Appellant's counsel submitted that the Trial Court should have applied some caution as it is done with children, as it is possible that M may have been influenced by discussions she had with others before she testified before Trial Court. But nothing specific was brought to the attention of the Court in this regard. The Appeal Court (as it was then known) offered this useful guide albeit in a civil case regarding the evidence of a minor in the decision of *Woji v Santam Insurance Co Ltd*.²¹

"The question which the trial court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness... depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified."

¹⁸ See section 208 of the Criminal Procedure Act 51 of 1977 which provides: "An accused may be convicted of any offence on the single evidence of any competent witness." See *R v Mokoena* 1932 OPD 79 at 80.

¹⁹ 1932 OPD 79 at 80.

²⁰ See section 170A of the Criminal Procedure Act.

²¹ 1981 (1) SA 1020 (A) at 1028A-E.

27. M testified through an intermediary due to her age. Borrowing from the principles laid down in the decision of *Woji*, I am testified from a review of her evidence that she was trustworthy. Her testimony reveal powerful observation, recollection and narration. M told the Trial Court what she observed and was honest enough to admit that she did not see what happened in the kitchen after the appellant took the complainant there from where they were sleeping. This, in my view, is a hallmark of trustworthiness and honesty. Therefore, in my view, M's evidence was correctly found admissible by the Trial Court.

28. I am therefore satisfied with the way the Trial Court dealt with the testimonies of the complainant (borne by the statement) and of M, the minor child. Nothing from the record indicates that the Trial Court erred in accepting their testimonies under the circumstances. Therefore, I do not agree that the Trial Court failed to apply the necessary caution.

Contradictions and inconsistencies between the State's witnesses and complainant?

29. In this regard, it is submitted on behalf of the appellant that there were contradictions and inconsistencies in the State's case.

30. The main (in my view) contradiction, it is submitted, was the stage or time in the sequence of events when the complainant told her sister about the rapes. According to the appellant, the complainant's statement say the report to the sister was made before the report to the school and the police, but according to the complainant's sister the report was made after the appellant had been arrested. But, counsel was alerted by this Court to the fact that the first report was made to the complainant's friend M, who testified before the Trial Court. From her testimony, it is clear that the school authorities were alerted and then the police.²² Therefore, whatever shortcomings that may exist in the testimony of the complaint's sister doesn't really avail the appellant.

Proof of the charges and conviction

31. The appellant's main view is that the State's case did not justifying the conclusion of the Trial Court that there was proof beyond reasonable doubt. Apart from what is stated above, there are

²² See pp 16 to 17 and p 27 of the record.

other contentions that I will briefly discuss next.

32. The appellant queried the timing of the alleged rapes, particularly the dates on which they are said to have taken place. It is queried that the complainant was already one month and a few weeks pregnant, when she was taken to hospital around the same time when the appellant was arrested. It is submitted that this goes to the credibility of the complainant for not mentioning any prior sexual intercourse from which she will have been impregnated by the appellant in her statement. The State's response is that even though the charge-sheet refers to incidents in February 2013, the complainant statement indicates that the complainant was raped "from since last year".²³ I agree. There is no merit in this argument.

33. Also the appellant disputes the fact that the complainant screamed during the rapes, as no evidence confirmed that the other occupants of the house heard this. Even the witness M did not report hearing any screaming and it actually appears that the complainant was a willing participant in the incident witnessed by M. It is submitted, rather curiously so, I must add, that the appellant disputes the absence of consent, when the appellant actually disputed sexual intercourse with the complainant as charged. These submissions are to be made to simply be rejected.

34. Further, counsel for the respondent submitted that M's testimony accords with the *modus operandi* of the appellant with respect to the other incidents. Therefore, this strongly suggests or confirms the commission of the other rape incidents. According to counsel it does not matter whether the gist of what was said before the Trial Court had covered the rape incident for which the appellant was impregnated.

35. Overall, it is also submitted on behalf of the appellant that the Trial Court heard two conflicting versions and should not have dismissed the appellant's version as false. The Trial Court ought not to have reached a conclusion beyond reasonable doubt after assessing the probabilities of the two versions, apart from considering the credibility and reliability of the witnesses.²⁴ But, I find nothing meriting interference with the conclusions of the Trial Court regarding the conviction and I have no reasonable doubt in this regard.

²³ See p 17 of the record.

Complainant's age and statutory rape

36. As indicated above, after oral submissions, this Court requested counsel to furnish written heads of argument as to whether or not statutory rape is to be considered similar to rape. In other words, whether statutory rape carries life imprisonment as rape, particularly in terms of the Minimum Sentences Act. Although as I have indicated above that we are grateful to counsel for the heads, I must immediately mention that this may, regrettably, have been an unnecessary exercise. This will become clear below.

37. Regarding the age of the appellant, Counsel for the appellant submitted that the appellant did not have intention to commit statutory rape as the record clearly shows that he did not know the exact age of the complainant. According to counsel this should have had an impact on the sentence imposed by the Trial Court. It is submitted that at most the appellant should have been convicted of statutory rape, due to the appellant's admission of one incident of consensual rape. But, even this is denied as the State failed to prove that the appellant had the necessary intention to commit statutory rape. The complainant was the appellant's [...] over whom he was very protective and even went to her school to make sure she was not being truant. In my view, the Trial Court was correct in accepting as proven the age of the complainant, including from the admitted certificates.

38. As indicated above, there is no need to entertain the differences between statutory rape and rape in this regard. Part 1 of Schedule 2 of the Minimum Sentences Act,²⁵ read together with section 51 of the same legislation prescribes a sentence of life imprisonment for conviction of rape of a person under the age of 16 years²⁶ in the absence of substantial and compelling circumstances. Once the Trial Court has accepted that the complainant was less than 16 years old at the time of her death and therefore including when the rapes were committed, life imprisonment starts to feature. I do not find anything the Trial Court could have done differently in this regard.

Sentence of life imprisonment and substantial and compelling circumstances

²⁴ *S v Damgazela* 2010 JDR 0577 SCA at par 12.

²⁵ See footnote 3 above for a reading of section 51 of the Criminal Law Amendment Act 105 of 1997 and its Part I of Schedule 2.

39. It was also submitted on behalf of appellant that the life imprisonment sentence imposed on the appellant is shockingly harsh even though there was no indication of serious violence meted out against the complainant. Further, it is submitted that the complainant did not have any prior convictions; the Trial Court overemphasised the interests of the community and public demand for stringent sentences; the appellant can be rehabilitated, but excessively long period of incarceration would deny the appellant the opportunity to rehabilitate.

40. On the other hand, counsel for the respondent or the State submitted that life imprisonment is not shockingly harsh and inappropriate, particularly when considering that the appellant is related to the complainant; the complainant was younger than the appellant; and the complainant was in a vulnerable position to the appellant and the appellant abused a position of trust, as should have been the one taking care of the children.

41. Considering the factors of this matter it is submitted that the Trial Court ought to have deviated from imposition of the prescribed life imprisonment due to existence of compelling and substantial circumstances. I do not view this conclusion or submission to be borne by the facts. In my view, there were no compelling and substantial circumstances to deviate from the prescribed sentence.

Conclusion

42. Therefore, I could not find any misdirection by the Trial Court regarding conviction of the appellant on a charge of rape with a person under the age of 16 years. With the application of the Minimum Sentences Act, the Trial Court found no substantial and compelling circumstances and imposed the prescribed life imprisonment sentence. Therefore, the appeal ought to fail.

Order

43. I therefore propose that the following be ordered:

- a.) The appeal against conviction and sentence is dismissed.

²⁶ See indexed p 135 of record; annexure "A" to the charge sheet (i.e. exhibit "A").

b.) The conviction and sentence of the Trial Court are confirmed.

K. La M. Manamela
Acting Judge of the High Court

A.A.LOUW
Judge of the High Court

I agree and it is so ordered

DATE OF HEARING	:	14 NOVEMBER 2016
DATE OF FURTHER HEADS OF ARGUMENT:		18 NOVEMBER 2016
DATE OF JUDGMENT	:	15 MARCH 2017

Appearances:

For the Appellant

Adv. F. Van As
Justice Centre, Pretoria

For the Respondent

Adv. M.J. Makgwatha
Director of Public Prosecutions
Gauteng Division, Pretoria