

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

DATE: 24/3/17

CASE NO: A 933/2015

In the matter between:

MAK. MOSES CELE

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

MALI J

INTRODUCTION

[1] On 22 July 2015 the appellant was arraigned and convicted in the Regional court of Klerksdorp on one count of rape of a 10 year old girl. The appellant was sentenced to life imprisonment. He is appealing against conviction and sentence. The appellant was duly represented and pleaded not guilty.

AD CONVICTION

[2] It is trite that the court of appeal will only reject the trial court's assessment of evidence if is convinced that the assessment is wrong. Even if the court is in doubt, the trial court's judgment must remain in place; see **S v Dhlumayo** [\[1\]](#).

[3] The trial court convicted the appellant on the basis of the evidence of the complainant, her aunt N. Z. as well as the evidence of Dr Tennebaum.

[4] It is common cause that the appellant [...] with the appellant and her mother. Her mother was the appellant's [...]. At the time of the incident her mother found both of them inside the house. The complainant was lying on her stomach on the bed and the appellant was standing next to the window. It is also common cause that the complainant was raped.

[5] The issue in dispute is whether the appellant had raped the complainant. According to the appellant the trial court misdirected itself in convicting him on the evidence of a child witness who could have been influenced.

[6] The evidence of the complainant was that she was playing at her aunt's place when the appellant arrived and asked her to go and buy rice and boerewors from the shop. On her way back from the shop she met the appellant outside and handed him the items she sent her to buy. The appellant told her to go home where they all stayed and got inside the house.

[7] The complainant further testified that the appellant took her to the bedroom and put her on top of the bed. He instructed her to lay on her stomach and then undressed her of her jeans and underwear just above the knee level. He then smeared her on the buttocks with vaseline. The appellant took off his maroon underwear. On complainant's version the appellant did "*snaaks*" things to her and thereafter wiped himself with his T-shirt.

[8] During the trial proceedings the complainant made a demonstration with dolls. She touched the penis of the doll and stated that the appellant used something like the doll's penis to hurt her buttocks. After he finished he told her not to tell her mother, but she told him that she was going to tell her mother. Suddenly her mother appeared and found her still laying on her stomach with her panty and jeans at knee level. She enquired from both of

them as to what was happening. The complainant spontaneously informed her mother that the appellant did bad things to her.

[9] N. Z.'s ("Z."), the complainant's mother, testified that on the day in question she came back from work and passed by her sister's place to look for the complainant and she was told that the complainant left with the appellant. When she got home she pushed the door open and found the complainant in bed laying on her stomach crying. Her jeans and panty were at her knees. The appellant was standing next to the window and pulling up her trousers. Z. asked what was happening, the complainant told her that the appellant was doing "*snaaks*" things to her. It was admitted by the court that the Afrikaans word "*snaaks*" meant filthy or bad things.

[10] Z. further testified that the complainant told her that the appellant warned her not to tell her about what happened. Z. opened complainant's legs and examined her. She found that the complainant had sperm. At the time the appellant was kneeling down pleading with her to not lay charges against him. Z. further stated that she left with the complainant to the police station. The appellant followed them and got arrested right there at the police station.

[11] The appellant did not dispute that Z. found him inside the house with the complainant. His defence is a bare denial, as he stated that he was packing up clothes from the basket whilst the complainant was asleep. He noticed Z. opening the complainant's thighs and inserting her finger on complainant's vagina. According to the appellant the injuries sustained by the complainant could have been caused by Z.'s finger. The appellant did not call any witness.

[12] During the hearing of the appeal there was no oral submissions on behalf of the appellant. The counsel stood by the heads of argument. In the appellant's heads it was submitted that the doctor who examined the appellant found injuries on the vagina and not on

the anus. Although Dr Tennenbaum testified that he did not record any injuries from the anus, he manage to explain that the anus opening from the vagina opening of a child is around two centimetres apart. Dr Tennenbaum further stated that the injuries sustained by the complainant were very extensive they could not have been caused by a finger. It is apparent that the complainant was raped.

[13] The court found the complainant, being a single witness, to be a satisfactory witness. At page 102 at line 16-19 of the record the following is stated

"As a single witness, I am satisfied that the complainant did not contradict herself in any material aspect. She gave the Court a graphic account as, as (sic) to what happened when K. met her at S.' place".

[14] The learned Magistrate correctly found that the fact that the appellant was found in a compromising position led to the inference that under the circumstances it is the appellant who raped the complainant, being the only inference that can be drawn.

[15] The trial court also accepted Z.'s evidence and found it reliable. Taking into account that Z. is the complainant's mother who found the appellant in a compromising position did not lie and try to exaggerate things. She had all the opportunity to say she found the appellant in the act.

[16] This court is satisfied that the learned magistrate, even though he dealt with a single witness evaluated the evidence properly and objectively as a whole against all probabilities, adequately placed the necessary caution on the evidence arrived at a just and fair conclusion on its reliability. The state proved the appellant's guilt beyond reasonable doubt.

AD SENTENCE

[17] In considering an appropriate sentence on appeal the court must exercise caution not

to erode the discretionary powers of the trial court. (See **S v Pillay**[2]). It is trite that the power of an appeal court to interfere with sentence is limited.

[18] It was submitted on behalf of the appellant that the learned magistrate erred in not following the principles laid down in **S v Malgas**[3]. The trial court erred in over-emphasising the seriousness of the offence whilst the personal circumstances of the appellant were not taken into account.

[19] In this case a minor child was raped by a 24 year old male at the time of the rape. Life sentence is an ordained minimum sentence in cases of this nature, unless there are substantial and compelling circumstances. There was nothing placed before the learned magistrate to persuade him to deviate from the minimum sentence. In fact the trial court considered everything that was placed before it. For example at page 116 paragraph 19-21:

"I have noted your personal circumstances as put forwards by your attorney. You are single, you have no children and you are 25 years old."

[20] At page 117 of the record line 6 -20 the it is stated:

"She also referred to me to the, the case of state vs Malgas, which is the first, one of the cases which tried to define how really the Court should approach the concept of substantial and compelling circumstances."

As we know that the Act, the legislator simple said unless the Court finds that there are substantial and compelling circumstances, but it was not explained what really should be regarded as such."

However in the very same case Judge Marais emphasise that not every fact what he refer, he used the word flimsy reason should be regarded. He went to say further specifically, the mere fact that a person is a first offender, does not

necessarily mean that should be, that alone should be regarded as constituting substantial and compelling circumstances."

[21] At page 118 paragraphs 14-25 it is stated:

"I may also refer to state vs Thabete, being this (indistinct) judgment on sentence I will not give the full citation, but that case is well known. That the Court there state that it is an aggravated factor if this type of offence is committed within the family.

It is evidence which was tendered before this Court that yourself, the aunt of the accused, of the complainant to whom she referred to as the mother, the three of you were staying together in that rented room. The defence Attorney rightly considered that this child trusted you, the mother of the child, the aunt of the child trusted you, but you misplaced that trust."

[22] At page 119 paragraphs 5-25 it is stated:

"Supreme Court of appeal there found that in the light of the age of the complainant, even if the accused were relatively young, those were not substantial and compelling circumstances to entitle the Court to deviate from the prescribed sentence.

Furthermore with regard to your plea that you have been in custody for a period of fourteen months, there again I wish to refer to the decision of the Supreme Court of Appeal. As I have said it is (indistinct) judgment and sentence, by the state vs Radebe, R-a-d-e b-e.

Where the Court said that the fact that a person was in custody for quite a number of times before the matter is finalized, is not automatic that really should be regarded as a factor, constituting compelling and substantial circumstances. Each case must

be taken on its own, because at times the delays are systematic, like in this case.

The state and defence cannot be, just be blamed for any delay why it took fourteen months for the matter to be finalized"

[23] Having regard to the above this court therefore does not find it necessary to interfere with the sentence of life imprisonment.

[24] In the result it is ordered, that

24.1 The appeal against conviction and sentence is dismissed.

N.P. MALI

JUDGE OF THE HIGH COURT

I agree and it is ordered

N.V. KHUMALO

JUDGE OF THE HIGH COURT

Attorneys for the Appellants: Advocate Moeng

Instructed by: PRETORIA JUSTICE CENTRE

Counsel for the Respondent: Advocate Mashuga

Instructed by: Director of Public Prosecutions

Date of Hearing: 6 December 2016

Date of Judgment: 24 March 2017

[\[1\]](#) 1948 (2) SA 677 (A)

[\[2\]](#) 1977 (4) SA 531 (A) at 535 E-F

[\[3\]](#) (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001)