

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal number: A190/2015

In the matter between:

FANELE MPHAHLU

Applicant

And

THE STATE

Respondent

CORAM: JORDAAN, J *et* MBHELE, J

HEARD ON: 01 FEBRUARY 2016

JUDGMENT BY: MBHELE, J

DELIVERED ON: 11 FEBRUARY 2016

- [1] This is an Appeal against conviction and sentence. The appellant was convicted of rape of a 13 year old girl by a Regional Court sitting in Bloemfontein on 23 October 2014 and sentenced to life imprisonment on 24 April 2015. The appellant has an automatic right to appeal.

- [2] He feels aggrieved by both conviction and sentence and now approaches this court on appeal against the same.
- [3] On convicting the appellant, the trial court rejected the appellant's version as not reasonably possibly true. The court below, further, accepted that the appellant was correctly identified as the person who raped the complainant. The trial court, furthermore, accepted the medical evidence that confirmed that the complainant had genital injuries consistent with her version that she was forcefully penetrated.
- [4] In the notice of appeal, heads of argument as well as arguments before us the appellant assails the conviction on the grounds that the court erred in rejecting the evidence of the appellant and finding that the complainant, a single witness was both a reliable and credible witness.
- [5] Ms. Kruger, appearing for the appellant, further, submits that the complainant was a single witness and a child whose evidence must be approached with caution.
- [6] The State supports both the conviction and the sentence according to Mr. Bontes, who contends that the complainant's version was corroborated by the J88 and the appellant's mother who confirmed that complainant's father arrived at her house looking for the appellant.
- [7] The complainant was a single witness. Her testimony was to the effect that on 26 January 2013 she was accosted by the appellant

and four other unknown male persons. They covered her head with a cloth and took her to the appellant's place of abode. On their arrival the appellant's mother was present and she requested her to reprimand the appellant but she said no word. The appellant took her to the bedroom where he took off her tights and panty, and penetrated her vaginally with his penis.

- [8] Whilst the appellant was busy in the bedroom with her she heard her father's voice in the kitchen, tried to scream but the appellant put a cloth in her mouth. Her father was looking for the appellant, she managed to escape when the appellant went to the bathroom and only arrived home at around 12 midnight. On her arrival at home she reported to her mother that she was raped.
- [9] [D.....] [A.....] [T.....], the complainant's mother's testimony was to the effect that she sent the complainant to her father at around 18h00 and when she did not return until 20h00 she got worried and went out to look for her at Bergman Square. The search went on until 22h00 and the complainant only arrived home at 12 midnight. She was in tears and she reported that she was raped by the appellant. She was accompanied by her uncle whom she said she met along the way. The police were called.
- [10] The appellant simply denied his involvement in the offence. Ms. Kruger contended that there were material contradictions in the state evidence which called for its total rejection. The appellant admitted that he knows the complainant and his family. He admitted that he was earlier in the day at the complainant's place of abode which fact was disputed during cross examination of the

complainant. He later on under cross examination came up with an alibi defence which was never put to witnesses.

[11] It is trite that factual findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. The acceptance by a trial court of oral evidence and conclusion thereon are presumed to be correct, absent misdirection. I have no doubt that the trial court correctly found that the appellant penetrated the complainant vaginally with his penis without her consent. The appellant's mother corroborated the complainant when she said that her father arrived at her house on the night of the incident.

[12] Sentencing is pre- eminently in the discretion of a trial court. The sentence can only be interfered with if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate, or the trial court misdirected itself on the facts or the law.

(See **S v Pieters** 1987 (3) SA 717 of 727)

Rape of a minor justifies a sentence of life imprisonment.

[13] Ms. Kruger submits that there were substantial and compelling circumstances justifying a departure from the minimum sentence prescribed by the Act. She further contends that the period spent by the appellant in custody, awaiting trial, should be considered as a mitigating factor. The test for existence of substantial and compelling circumstances warranting deviation from the prescribed minimum sentence, is whether or not the cumulative

effect of mitigating factors on the gravity of the offence, the general aggravating factors and the interest of community render the relevant prescribed sentence unjust. (See **S v Malgas** 2001 (1) SACR 469 SCA.

[14] It is common cause that the complainant's life has been adversely affected by this offence. She struggled to concentrate at school, resulting in her repeating a grade. She had to uproot her life and move to Wepener. She did sustain injuries albeit not as serious.

[15] The appellant was 26 years of age at the time of the offence. He is not married but stays with a woman with whom he shares 3 children. The children receive social grants. He attended school until grade 9 and he did odd jobs where he earned R60 per day. He spent two years in custody awaiting trial.

[16] When weighing up the mitigating factors against the aggravating circumstances in this matter as well as the interest of the community, I am not persuaded that the sentence imposed is unjust. I am of the view that the trial court exercised its discretion reasonably. There is no justifying cause for us to interfere with the sentence.

ORDER

[17] I propose the following order:

The appeal fails and the conviction and sentence are confirmed.

N.M. MBHELE, J

I concur and it is so ordered.

A.F. JORDAAN, J

On behalf of applicant: Ms. S. Kruger
Instructed by:
Bloemfontein Justice Centre
Bloemfontein

On behalf of respondent: Adv. D.W. Bontes
Instructed by:
Office of the Director: Public Prosecutions
Bloemfontein