



Reportable:
YES/NO
Of Interest to other Judges:
YES/NO
Circulate to Magistrates:
YES/NO

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

Appeal Number: A161/2015

In the appeal between:

LAZOLA MAXWELL NGANTWENI

Appellant

and

THE STATE

Respondent

CORAM: NAIDOO, J *et* MOHALE, AJ

JUDGMENT BY: MOHALE, AJ and NAIDOO J

HEARD ON: 9 DECEMBER 2015

DELIVERED ON: 31 May 2016

- [1] The appellant was charged in the Regional Court, Welkom with contravening the provisions of Section 3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 (the Sexual Offences Act), read with Sections 51(1) of Criminal Law Amendment Act 105 of 1997 (the Minimum Sentences Act). He pleaded not guilty on 2 February 2015 and was convicted as charged on 18 May 2015. He was sentenced to Eighteen (18) years' imprisonment. The appellant, with the leave of the trial court, appeals against his conviction and sentence. Ms S Kruger represented the appellant in this court and Ms M Moroka appeared for the respondent.

BACKGROUND

- [2] On the evening of 11 August 2014, the complainant, a twelve year old girl was left by her older sister at the house of a friend called R., in Thabong, Welkom. It was late and her sister had not returned, so she slept over at this house. At about midnight the appellant and another male person called Malifu came to this house, while the complainant was asleep. After speaking to R. and ascertaining that the complainant was one of the occupants of the house, the appellant and Malifu left. The appellant returned a few minutes later and forced the door open to gain entry. He was alone. He then dragged the complainant out of the house and took her to his house somewhere across the street. He took her to the bedroom of this house and had sexual intercourse with her.

- [3] The complainant's evidence is that when the appellant was at R.'s house, he had turned on the torch on his cellular telephone and she was able to see his face. En route to his house, she was able to see his face by the light of the moon and the stars. At his house, the appellant lit a paraffin lamp, which was in the bedroom where he raped her. She was able to see his face clearly by the light of this lamp. She knew the appellant prior to this day, as she used to see him on the street. She, however, did not know his name. R., who witnessed the appellant dragging her out of R.'s house told the complainant his name.
- [4] The appellant denied the version of the complainant and said that he was never at R.'s house at the relevant time. He knew R. and was a friend of her brother. He had been to R.'s house previously. He did not know the complainant and that time in question he was asleep at his home. He was arrested a week later. With regard to sentence, the appellant avers that the sentence is out of proportion to the totality of the accepted facts in mitigation.
- [5] The appellant placed identity in issue and the trial court, in arriving at its decision, examined all the factors that need to be considered when deciding the issue of identity. The grounds of appeal raised by the appellant are, in essence, as follows:
- 5.1 The court erred in finding that the evidence of the complainant as a single witness was clear and satisfactory in all material respects.
 - 5.2 The court erred in finding that the complainant correctly identified the appellant.
 - 5.3 The court erred in rejecting the appellant's evidence as false and not reasonably possibly true.

5.4 The sentence of 18 years' imprisonment is out of proportion to the accepted facts in mitigation.

[6] The only issue is one of identity. The trial court made a thorough analysis of the evidence, especially that of the complainant who was a child and a single witness. The trial court is steeped in the atmosphere of the trial and is in the best position to assess the conduct and demeanour of the witnesses and consider those factors, in conjunction with the evidence given in court. The appellant proffered an alibi defence, which only came to light when he was being cross-examined by the prosecutor. When the complainant was being cross-examined it was not put to her that his denial of the charge was based on his assertion that he was asleep at home at the time in question. The state therefore, had no reasonable opportunity to investigate or disprove the alibi defence. It does appear that this defence was an after-thought on the part of the appellant. The court, therefore assessed this defence in the light of all the other evidence, and particularly the opportunity the complainant would have had to see the face of the appellant and properly identify him.

[7] There was no issue with her evidence that she had previously seen the appellant in the street and knew him, but not his name. If he was nowhere near R.'s house on the night in question, it begs the question why his name would come up in the conversation between the complainant and R.. The probabilities certainly favour the complainant's version that R. saw the appellant forcibly remove the complainant from her house, which would have initiated the subsequent conversation between them regarding his name. The

fact that the complainant did not mention to R., upon her return, that she had been raped does not bear on the identity of the perpetrator, but rather the complainant's state of mind. She was a child and did not have sufficient maturity to realize that rape was not something to be ashamed of. But ashamed she did feel, and that was the reason she did not tell R.. The trial court was correct in holding that she probably felt more comfortable telling her sister about the incident. The fact that she did so when they had left R.'s house strengthens the conclusion by the trial court that the complainant did not tell R. about the rape because she was embarrassed. It is unfortunate that R. could not be located and hence did not testify. I cannot, however, find fault with the conclusions of the trial court. I am satisfied therefore, that there is no ground for this court to interfere with the conviction in this matter.

- [8] With regard to sentence, an appeal court should interfere with the sentence imposed by a trial court only if the trial court has misdirected itself in the imposition of sentence, resulting in a sentence which is so inappropriate that it induces a sense of shock. It has been held that "As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence." (See **S v Pillay** 1977 (4) SA 531 (A) at p 535 E-F).

An Appeal Court should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial Court and it should be careful not to erode such discretion. The sentence should only be altered if the discretion of the trial court has not been “judicially and properly exercised”. (See **S v Rabie 1975 (4) SA 855**).

- [9] The accused’s personal circumstances are that he was unmarried and 26 years old at the date of conviction. He has a 7 year old daughter. Prior to his arrest he worked for the Harmony Mine, and earned R7500 00.00 per month. At the date of sentencing, he had spent approximately nine months in custody, awaiting trial. The accused has a previous conviction for assault, where the offence was committed in 2008 and in respect of which he paid an admission of guilt fine. It was argued in mitigation, on his behalf, that he is capable of being rehabilitated. It was also pointed out that it did not appear that the complainant suffered any physical injuries. The aggravating factors in this case are that the complainant was a child of 12 years, she was asleep when she was forcibly removed from the house in which she was sleeping, taken to another house and raped.
- [10] Section 51(1) of the Minimum Sentences Act prescribes a minimum sentence of life imprisonment for a person who has been convicted of raping a child under the age of 16 years. The prosecutor and the defence attorney both acknowledged this and both were of the opinion that a lengthy term of imprisonment would be appropriate in this case. I interpret this to mean that both the prosecutor and the defence attorney were of the view that substantial and compelling circumstances existed to justify the imposition of a lesser sentence than life imprisonment.

The trial court thoroughly considered the mitigatory factors and weighed these up against the aggravating factors in performing the fine balancing act required of it in the consideration of these factors. The court was consequently of the view that the accused's personal circumstances viewed against all the circumstances relevant to this matter, were substantial and compelling, and justified it in departing from the prescribed minimum sentence. It consequently imposed the sentence of 18 years' imprisonment. I am, therefore, unable to fault the reasoning or the approach of the trial court. In those circumstances, this court will not be justified in interfering with the sentence imposed by the trial court.

[11] In the circumstances, it is proposed that the following order be made:

11.1 The appeal against the conviction and sentence is dismissed.

11.2 The sentence and conviction in this matter are confirmed.

MOHALE, AJ

I agree and it is so ordered

NAIDOO, J

On behalf of the appellant: Adv. S Kruger
Instructed by: Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv.M Moroka
Instructed by: The State