



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

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

Appeal No.: A45/2016

In the appeal between:

NOHA ELVIS MANZINI

Appellant

and

THE STATE

Respondent

CORAM:

LEKALE, J *et* REINDERS, J

JUDGEMENT:

LEKALE, J

HEARD ON:

25 JULY 2016

DELIVERED ON:

28 JULY 2016

[1] On the 5th May 2011 the appellant, who was legally represented, appeared before the regional court at Sasolburg on a charge of rape, it being alleged that on or about 11 June 2010 he unlawfully and intentionally committed an act of sexual penetration with an 11 year old girl by penetrating her

vagina with his penis without her consent. He pleaded not guilty but was convicted and sentenced to imprisonment for life. He feels aggrieved by both the conviction and the sentence. He now exercises his automatic right of appeal against the same before us.

- [2] On returning the guilty verdict the trial court effectively rejected, as not reasonably possibly true, the appellant's version to the effect that, although he had contact with the complainant and her three friends on the day in question, he did not rape her but simply used his belt to scare them and chase them away. The court below, further, accepted the complainant's version as corroborated, to a certain extent, by the medical practitioner who examined her some four months after the incident and her two friends one of whom called by the appellant as his witness.
- [3] In argument on the papers and before us it is contented for the appellant that the trial court erred in rejecting the appellant's version and accepting that of the complainant as true regard being had to, *inter alia*, contradictions in the same. It is further contended for the appellant that the trial court misdirected herself in finding that there existed no cause whatsoever to deviate from life imprisonment as the prescribed minimum sentence regard being had to the appellant's personal circumstances and the fact that there existed no evidence that the complainant sustained any permanent damage or injuries among others.

- [4] The State, on its part, supports both the conviction and the sentence on the papers and contends that the trial court did not misdirect herself when she imposed the minimum sentence of life imprisonment in the circumstances of the instant matter. In argument before us Mr Hoffman correctly concedes that the trial court erred in finalising the matter without first ensuring that she has all the necessary information before her to enable her to properly determine an appropriate sentence.
- [5] The State's version, as accepted by the trial court, was to the effect that on the 2 October 2010 the complainant's friends and classmates reported to the class teacher an incident involving the appellant which report was, in turn, conveyed by the latter to the head of remedial department at the complainant's school. The head of the department, thereupon, called the complainant's classmates and asked them about such an incident, whereafter, she called the complainant and had a one on one discussion with her. Although the complainant confirmed having been at the appellant's place with her friends when the appellant allowed her to touch his penis and to fondle it, she stated that nothing further happened in the appellant's bedroom after the latter locked the door with only the two of them inside. The departmental head in question had suspicions and eventually called the police who hit the complainant when she persisted in her attitude of maintaining that nothing happened in the bedroom between her and the appellant. The complainant, eventually, disclosed that the appellant inserted his penis into her vagina and made up and down movements on top of her,

whereafter, he gave her a R2,00 coin and threatened her and her friend known as O., with death if they talked about the incident.

- [6] The state's version with regard to what transpired in the presence of the complainant's friends is that the complainant told her friends that the appellant owed her some money and invited them to accompany her to his residence where they found him busy painting the walls inside the house. The complainant thereupon instructed him to stop painting and proceeded to unzip his trousers and to fondle his penis without any resistance from his side. The complainant, thereafter, called her friends to join in but two of them refused and ran away only to wait for her and O. at the gate.
- [7] The medical practitioner, on his part, testified that he detected some old scars in the complainant's genitals and, further, that the complainant presented with obnoxious white discharge which is common amongst sexually active women as opposed to children. The practitioner, thus, did not exclude the possibility of sexual assaults having taken place. The appellant's own witness, O. also confirmed that the complainant fondled the appellant's penis without any resistance on the latter's part although she, in effect, could not assist with regard to whether or not the rape took place.
- [8] It is patent *ex facie* the recorded evidence that the complainant was a single witness on what transpired behind closed doors in the appellant's bedroom and was also a child witness. Cautionary rule was, as such, applicable to her

evidence in that regard as correctly submitted for the appellant.

- [9] An application of cautionary rules to the evidence of a single or child witness in essence requires the court to satisfy itself that despite the defects, shortcomings and contradictions in such evidence the truth has been told and the child's evidence is trustworthy. (see **S v Sauls** 1981 (3) SA 180 (A) and **Woji v Santam Insurance Company Ltd** 1981(1) SA 1020 (A)).
- [10] When confronted with conflicting versions which cannot be reconciled the court adopts a holistic approach to all the evidence available and has regard to probabilities. (See **S v Guess** 1976(4) SA 715 (A))
- [11] The legal position in our criminal justice system is that a complaint is not admissible as evidence if it is made as a result of intimidation. In the case of an involuntary complaint the question on appeal is whether the trial court hearing all the evidence but refusing to admit such complaint would inevitably have convicted the appellant. (See **S v T** 1963(1) SA 484 (T) at 486H- 487D and **Vilakazi v The State** [2016] ZASCA 103 at *para* [14])
- [12] In our law children under the age of 12 years are irrebuttably presumed to be incapable of consenting to a sexual act and, as such, a sexual act with such children constitutes rape or sexual assault. (See **section 57(1) read with sections 1(2) and 1(3) (d)(iv) of Criminal Law (Sexual Offences and**

Related Matters) Amendment Act 32 of 2007. (The Sexual Offences and Related Matters Act))

- [13] Factual findings of the trial court and its acceptance of oral evidence are presumed to be correct unless and until they are demonstrably or, on adequate grounds, shown to be wrong. (See **S v Francis and Others** 1991(1) SACR 198 (A))
- [14] The powers of the court of appeal to interfere with the sentence imposed are limited insofar as it can only interfere where the sentence is disproportionate, harsh or the sentencing court committed a material misdirection or did not exercise its discretion properly or at all. (See **S v Pieters** 1987(3) SA 717 (A))
- [15] The trial court was satisfied from the totality of evidence before her that the truth had been told and properly rejected the appellant's version as not reasonably possibly true regard being had to the evidence of his own witness who contradicted his evidence on what happened at his place on the day in question before he ended up in the bedroom with the complainant. The court below, further, in my view approached the evidence with caution despite her somewhat terse judgment and effectively had regard to probabilities when she accepted the State's version notwithstanding the contradictions between its witnesses with regard to, *inter alia*, the purpose of their visit to the appellant's residence insofar as such contradictions were not material to the charge regard being had to the contradictions in the defence's case and the

fact that the appellant's own witness corroborated the State's case to a large extent.

[16] The problem with the trial court's judgment is that all the preceding conclusions which are consistent therewith and, reasonably possibly, constituted its *ratio decidendi* are not expressly apparent *ex facie* the same. The reason why the court below returned the impugned verdict is simply not easily and fully identifiable from the judgment.

[17] In my judgment the trial court can, further, not be faulted for accepting the complainant's evidence on what transpired behind closed doors between her and the appellant in the latter's bedroom despite the fact that she did not freely and voluntarily disclose the incident to those she could, reasonably, be expected to confide and only told the head of the department at her school about the same after she was given a hiding by the police and some four months after the incident. Her evidence before the court below was credible and explained, adequately and satisfactorily, her failure to report the matter voluntarily and her earlier reluctance to tell the truth to the police and the head of the department despite contentions to the contrary by the appellant party when regard is had to the fact that she is a child. The foregoing finding, however, in no way justifies the unlawful and despicable actions of the law enforcers in resorting to violence when confronted with a situation calling for skill and competence on their part. Such conduct on the part of the police remains criminal and has no place in our constitutional democracy.

[18] The complainant's conduct in relation to the appellant, as at the date of the incident, suggests that she had a continuing sexual relationship with him, inclusive of grooming as correctly observed by the trial court in her questions to prosecution during the trial, insofar as she was not scared to fondle his private parts, she did not resist or scream when he led her to the bedroom, undressed himself, pulled off her dress and let her lie supine on the bed. In my view if she was 12 years of age or older but less than 16 years at the relevant time, statutory rape in terms of section 15 of Sexual Offences and Related Matters Act would, most probably, be appropriate as a competent verdict insofar as, save for her age, there existed no evidence whatsoever to suggest that the carnal intercourse in question was unlawful for lack of consent.

[19] The conviction can, in my opinion, not be faulted insofar as the trial court undertook a holistic consideration of the evidence without any reliance on the involuntary report and was, correctly, satisfied that the appellant's guilt had been established beyond reasonable doubt. The next enquiry is whether or not the sentence imposed is just regard being had to the cumulative impact of mitigating factors on aggravating factors inclusive of the interests of society. (See **S v Malgas** 2001 (1) SACR 469 (A))

[20] The trial court had regard to the appellant's personal circumstances as well as the victim impact assessment report and the gravity of the offence before she found that there existed no cause to deviate from life imprisonment as the prescribed minimum sentence.

[21] It is clear from such impact assessment report that the rape affected the complainant in her school performance and this was also confirmed by the head of remedial department at her school. The report, however, contains very scant information to assist the sentencing court in assessing an appropriate sentence if regard is had to the fact that it is silent on whether or not the crime had any emotional, psychological or social impact on the complainant as a girl child. It simply does not indicate presence or absence of any severe or permanent detrimental consequences on her part. The medical report, on its part, does not reflect any serious physical injuries on the victim's part.

[22] The importance of placing as much information before the sentencing court as possible in respect of the perpetrator, the victim and the circumstances surrounding the commission of the offence has been stressed by the Supreme Court of Appeal. If the defence and the prosecution fail to adduce such relevant evidence the trial court is obliged to take steps to receive such evidence in order to determine whether there exists cause to deviate from the prescribed minimum sentence. In my opinion such a duty on the part of the sentencing court is more pronounced where the accused stares life imprisonment in the eye as a prescribed minimum sentence. (See **S v Olivier** 2010(2) SACR 178 (SCA) *para* [8] and **Calvin v The State** [2014] ZASCA 145)

[23] To the extent that the trial court failed to ensure that all the relevant information was before her before she could consider

the sentence in the instant matter, the court misdirected herself materially by effectively depriving herself of the opportunity to assess the sentence properly and, thus, did not exercise her discretion properly. We are, as such, at large to interfere and consider the sentence afresh regard being had to the fact that the appellant was sentenced in 2011 and to remit the matter to the trial court would only serve to delay finalisation further.

[24] In my judgment the appellant took advantage of the victim's pubertal naivety and polluted her mind with sexual immoralities to the extent of depriving her of the ability to distinguish morally reprehensible conduct from acceptable behaviour by recognising that it is both a crime and taboo, in society, for a child of her age to fondle an elderly man's private parts and to engage in carnal intercourse with him. Even after the unpalatable experience in question the complainant did not rush home to the safe and comfortable arms of her guardian to report the incident but proceeded to spend the money the appellant gave her on light snacks and to join her friends in playing. Such conduct cannot, in my view, reasonably be expected from a rape victim immediately after the incident, let alone from a victim of her age. The appellant effectively robbed her of her innocence as a child insofar as she even presented with a sexually transmitted condition at the time of examination by the medical practitioner.

[25] On available evidence I am, however, persuaded that cause exists to depart from life imprisonment as the prescribed

minimum sentence regard being had to, *inter alia*, the physical condition of the victim immediately after the rape, the fact that the complainant did not sustain any serious physical injuries, the appellant is a family man and a first offender who is on medical pension. (See **S v Mahomotsa** [2002] 3 All SA 534 (A))

[26] In my opinion the instant matter presents a clear illustration of the reason why children under 12 years of age require the protection afforded them by law insofar as they are conclusively regarded as incapable of consenting to sexual activities. It is, thus, legally accepted that a girl of the complainant's age, as at the date of the crime, is, in general, fragile, not sufficiently informed and intellectually matured to make sound decisions on sexual matters. That the complainant fondled the appellant's genitals, in the presence of her friends who were not part of that immoral exercise for that matter, and did not, at any stage, resist when she was led to the appellant's bedroom where the act of sexual penetration took place against her without any protestations from her side and force from the appellant all serve to give credence to the legal position in question. The matter, therefore, cries out for a long period of imprisonment as a sentence.

ORDER

[27] In the result the appeal against sentence succeeds.

[28] The conviction is confirmed but the sentence is set aside and, in its place and stead, it is substituted the following:

“The accused is sentenced to imprisonment for 20 years.”

[29] The sentence is antedated to 5 May 2011.

L. J. LEKALE, J

I concur.

C. REINDERS, J

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

On behalf of the respondent: Adv. R. Hoffman
Instructed by:
Director: Public Prosecutions
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