



**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

Case number: 3996/2013

In the matter between:

DAVID MOFOKENG

Appellant

and

THE STATE

Respondent

CORAM: DAFUE, J *et* GELA, AJ

HEARD ON: 10 OCTOBER 2016

JUDGMENT BY: GELA, AJ

DELIVERED ON: 20 OCTOBER 2016

- [1] This is an appeal against both the conviction and sentence imposed by a Regional Magistrate, in the Welkom Regional Court on 31 October 2014. The appellant was convicted on a charge of rape and sentenced to 16 (sixteen) years imprisonment. The

appellant was granted leave to appeal his conviction and sentence by the High Court, Bloemfontein on 26 April 2016.

GROUND OF APPEAL

- [2] It is the appellant's case that the court *a quo* erred in finding that (a) the case against appellant was proved beyond reasonable doubt, (b) the trial court erred in not finding that the version of the appellant is reasonable possible true.
- [3] The grounds of appeal relating to sentence are that the (a) sentence imposed by the trial court is harsh and shockingly inappropriate, (b) the trial court misdirected itself by not exercising its discretion judicially but did so improperly and unreasonably (c) that the trial court did not properly consider all the relevant factors in the context of the case (d) the trial court paid scant if any proper attention to the personal circumstances of the appellant.

THE CHARGE AND SUMMARY OF COMPLAINANT'S VERSION

- [4] The appellant faced one count of rape, that on the 25th January 2013 in Reitzpark, Welkom he raped the complainant, an 11 year old girl, by penetrating her vagina with his penis without the consent of the complainant.
- [5] The evidence of the complainant is that she was playing on the street until about 20H00 that night when she was called by her grandmother and ordered to make a bed for the appellant. She went to sleep and while asleep she was woken up by the

appellant who was undressing her underwear and inserting his penis “on my koekie, meaning vagina”.

[6] Upon further clarity by the state, she explained that the appellant had placed his penis on her vagina and made up and down movements which she described as being funny things. She told the appellant about her nose which began to bleed and he let her go. She ran to her grandmother who was asleep in the lounge and woke her up. She then reported to her grandmother what the appellant had done to her, and her version from the first report onwards was corroborated by her grandmother.

[7] The appellant appeared from the complainant's bedroom, still busy putting on his clothes and approached them in the lounge. The police were contacted and the complainant was taken for a medical examination. Mavis Quewba, a forensic nurse who examined the complainant, noted redness and erosion on the perineum the labia majora and minora, the frenulum of the clitoris and also that the clitoris was bruised and swollen. She concluded that penetration took place between the two labias. During cross-examination Mavis Quewba maintained that there was penetration through the two labias until the vestibule.

THE SUBMISSIONS on behalf of the parties:

[8] Adv. Strauss who appeared on behalf of the state conceded in his heads of argument that the state did not succeed to prove beyond reasonable doubt that penetration did occur and therefore the appellant should have been convicted of sexual assault in

contravention of section 5 (1) of Act 32 of 2007. When the definition of “penetration” as per section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32/2007 was put to him during oral argument he ceased to maintain his argument with conviction. Based on an offence of section 5 he submitted, that in respect of sentence, 5 year’s imprisonment period antedated from the date the appellant was sentenced by the court *a quo* would be appropriate.

- [9] Adv. Van Rensburg drafted appellant’s heads of argument and argued the appeal before us as well. He attacked the reliability of the complainant and that of the forensic nurse who examined the complainant. He emphasised that the evidence given by the complainant ruled out any form of penetration, i.e. even the slightest degree of penetration.
- [10] Adv Van Rensburg submitted that due to the contradictions in the evidence of complainant and her supporting witnesses and more specifically that the version of accused is reasonably possibly true, the conviction of the appellant should be set aside.

LEGAL PRINCIPLES AND LEGISLATION RELATING TO THE CRIME

- [11] The court approaches the evidence of a child witness and a single witness with caution, by ensuring that despite any defects, shortcomings and contradictions, it is satisfied that the truth has been told, and in the case of a child witness, that such evidence is trustworthy. (See *S v Sauls and Others* 1981 (3) SA 172 (AD))

at 180E; **Woji v Santam Insurance Co Ltd** 1981 (1) SA 1020 (A) at 1028 and **S v Dyira** 2010 (1) SACR 78 (ECG) at para [11].

- [12] I also wish to refer to **S v Banana** 2000 (2) SACR 1 (ZSC) and the following dictum:

“Where the evidence of the single witness was corroborated in any way which tends to indicate that the whole story was not concocted, the caution enjoyed may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the confidence of the court in the reliability of the single witness may also overcome the caution.”

- [13] The 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)) at 204 d-e.

- [14] When confronted with conflicting versions which cannot be reconciled the court adopts a holistic approach to available evidence and has regard to probabilities. (See **S v Guess** 1976 (4) SA 715 (A) at 718-9.

- [15] Where an appeal is lodged against a trial court’s findings of fact the court of appeal must take into account that the court *a quo* was in a more favourable position than itself to form a judgment. When inferences from proven facts are an issue, the court *a quo* may also be in a more favourable position than the court of appeal because it is better able to judge what is probable or improbable in the light of its observation of witnesses who

appeared before it. Therefore, where there has been no misdirection of fact, a court of appeal assumes that the court *a quo*'s findings are correct and will accept these findings, unless it is convinced that the trial court is wrong. See **R v Dhlumayo and Others** 1948 (2) SA 677 (AD) at 705-706.

[16] It follows therefore that in order to interfere with the trial court's judgment, it has to be established that there were misdirections of fact, either where reasons on their face are unsatisfactory, or where the record shows them to be such.

[17] In **S v Monyane and others** 2008 (1) SACR 543 (SCA) the SCA at para 15 stated that it is only in exceptional cases that it will be entitled to interfere with the trial court's evaluation of oral evidence and concluded as follows:

“This court's powers to interfere on appeal with the findings of fact of a trial court are limited. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e - f).”

[18] The crime of rape is committed when a person unlawfully and intentionally commits an act of penetration with another (the complainant) without the consent of the complainant. “Sexual penetration” as defined in section 1 of Act 32 of 2007 includes “any act which causes penetration to any extent whatsoever by (a) the genital organs of one person into or beyond the genital organ, anus or mouth of another person;” (emphasis added.)

- [19] “Sexual assault” is defined in section 5 of Act 32 of 2007 as the crime in terms whereof a person unlawfully and intentionally sexually violates a complainant without the consent of the complainant. Sexual violation includes any act which causes (a) direct or indirect contact between the genital organs or anus of one person ...” (See section 1 of the aforesaid Act).
- [20] It is therefore clear that in terms of the aforesaid Act, the crime of rape is not only committed when for example the penis of one person penetrates into the vaginal or anus opening of another person, but also when the penis of that person causes penetration to any extent whatsoever, i.e. into or even beyond the vagina or anus of the other person.

LEGAL PRINCIPLES PERTAINING TO SENTENCE:

- [21] The appellant was sentenced to 16 (sixteen) year’s imprisonment in terms of section 51(1), read with para 1 of Schedule II of the Criminal Law Amendment Act, 105 of 1997 and after a finding that substantial and compelling circumstances existed. The prescribed minimum sentence for the rape of the complainant, an 11 year old girl and thus under the age of 16, is life imprisonment. Although the appellant is not the natural grandfather of the complainant, he is old enough to be the complainant’s grandfather.
- [22] In **S v PB** 2013 (2) SACR 533 (SCA), in line with **S v Matyityi** 2011 (1) SACR 40 (SCA) and **S v Malgas** 2001 (1) SACR 469

(SCA), the Supreme Court of Appeal emphasised that prescribed minimum sentences should not be departed from lightly or for flimsy reasons.

- [23] The determination of sentence in a criminal case is a matter for the discretion of the trial court. Our powers, sitting as we are on appeal, are limited when it comes to the sentence in so far as we can only interfere with the same where the sentencing court committed a material misdirection or the sentence imposed is not proportionate or such that the court did not exercise its discretion properly or at all. (See **S v Pieters** 1987 (3) SA 717 (A)). (See also **S v Kibido** 1998 (2) SACR 213 (SCA) at 216 g-i.
- [24] It is also settled law that the court of appeal will not alter a sentence imposed by a trial court unless it has established that no reasonable person ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial court has not exercised its discretion properly. See **S v Fhetani** 2007 (2) SACR 590 (SCA) at para 5 and **DPP Kwazulu Natal v P** 2006 (1) SACR 243 (SCA) at 254 c-f, **S v Bogaards** 2013 (1) SACR 1 (CC) at para 41.

FINAL EVALUATION OF EVIDENCE

- [25] On the night of the 25 January 2013 complainant who had been sleeping in her bedroom woke up her grandmother who had been sleeping in the lounge and reported what the appellant had done

to her. The appellant came out of the complainant's bedroom still fiddling with his clothes and approached them. The appellant denied that he had any form of sexual contact with the complainant.

- [26] The medical report and the testimony of Sr Mavis Quewba corroborate the complainant's version in that Sr Quemba concluded that penetration took place between the labias as per the injuries seen.
- [27] The appellant gave an improbable version which was in many aspects not even presented to state witnesses for comment. His version was correctly rejected as false with regard to the events that occurred on 25 January 2013.
- [28] It is accepted that "full" penetration did not occur, however the facts stated by the complainant and corroborated by objective facts are indicative that the crime of rape, based on the definitions referred to above, was committed.
- [29] I am satisfied that a proper case has been made out for the conviction of the appellant, and that the appeal in this regard should be dismissed.
- [30] With regard to sentence, in my opinion the trial court correctly found that there were substantial and compelling circumstances justifying the deviation from the prescribed minimum sentence of life imprisonment. Regarding the sentence of 16 years imprisonment, it is trite law that this court will not interfere with the

sentence imposed by the trial court, unless it is satisfied that the sentence has been vitiated by misdirection or is disturbingly inappropriate. No misdirection has been alluded to, nor can we find any. It also cannot be said that the sentence induces a sense of shock.

ORDER:

[31] Consequently the following order is made:

The appeal against both the conviction and sentence is dismissed.

The conviction and sentence are confirmed.

N. GELA, AJ

I concur

J.P. DAFFUE, J

On behalf of the appellant: Adv. Van Rensburg
Instructed by: Jacques Groenewald Attorneys
Kroonstad

On behalf of the respondent: Adv. Strauss
Instructed by: Office of the Director: Public Prosecutions
Bloemfontein