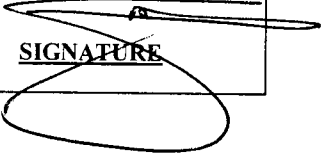


IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED. ☒ .	
10/3/2015.	
<u>DATE</u>	<u>SIGNATURE</u>

10/3/15
Case Number: A474/2014

In the matter between:

KHULU FRANK SIMELANE

Appellant

and

THE STATE

Respondent

JUDGMENT

POTTERILL J

- [1] The appellant was charged with three counts of contravening section 3, read with sections 1, 56(1), 57, 58, 59, 60, 61 and 68(2) of Act 32 of 2007 in raping

three girls under the age of 16, all of them between the ages of 7-8. The appellant was found guilty on counts 1 and 2 and was found not guilty and discharged on count 3. The court *a quo* took the two charges together for sentencing purposes and imposed life imprisonment.

[2] The appellant is with the leave of the court *a quo* before us.

[3] The grounds as supplemented for the appeal are either nonsensical, ill-conceived or bad in law and require only a short address.

[4] There were three little girls testifying about three different incidents. The mere fact that the Magistrate found that the state did not on count 3 prove beyond reasonable doubt that the appellant had raped the complainant can cast no suspicion on counts 1 and 2. One count was not reliant on another and no corroboration was necessary for the other. The court *a quo* found that due to the fact that the J88, the medical report was not available, there was no objective independent corroboration for this charge. It was also clear from the complainant's testimony that she was in fact raped by two persons, also a Mr. Dlamini, and that it casted doubt as to whether this incident related to this appellant or to another person. The court *a quo* thus correctly exercised caution and did not find the appellant guilty on count 3 beyond reasonable doubt.

[5] The next ground of appeal is also bad in law. There is no rule of evidence that the J88 is insufficient to corroborate a witness that rape took place. There is certainly no rule of law that there must be a corroboration with DNA tests. The court *a quo* quite correctly found all the single witnesses and their first report witnesses to be reliable and truthful and the J88 corroborated that they had in fact been raped.

[6] It was further submitted and I quote *"that the vulnerability of the complainants in their vicinity made it possible for anyone to seize the opportunity of committing the offence"*. If this relates to the mistaken identity of the appellant then this argument is rejected. All the complainants identified the appellant in court. Of course a dock identification can be tainted, but it must be remembered that these children were in a different room and taken out of that room and presented to court with four males in the court. Despite this all of them identified the appellant as the person with the yellow T-shirt. Ms. G. Nkosi on count 1 referred to him by name i.e. Simelane and further identified him as living near her parental home knowing him from sight. Nomthado Nkosi, the complainant in count 2, also referred to him as Simelane. Ms. Mokoena on count 3 also referred to the appellant as Simelane, also staying close to her parental home. In the trial identity was never put in dispute by the appellant, he did not for instance aver that he did not stay close to their parental home or was at work or forwarded any other reason as to why it could not have been him. On the J88's, completed by two different doctors, the girls already gave the name of Simelane being their rapist to the doctors. I am satisfied that there was no

misdirection on the part of the Magistrate in him finding that the appellant was the perpetrator of the crimes.

[7] It was also submitted that the parents coached the kids. This submission was not canvassed in cross-examination of any of the witnesses by the appellant. In fact the appellant only forwarded this in his own evidence. This despite the fact that he had not spoken to the parents or knew their names and could not give any reason why he would be pinpointed by these unknown people. Later on he changed this version of him to in fact having a problem with the granny of Ms. Mokoena (count 3) and this was because she was blaming him for the gossip about her grandchild being raped. I am satisfied that the court *a quo* did not err in rejecting the appellant's version as not being reasonably possibly true.

[8] A further argument was that the South African Police's investigations were not approached with caution. Counsel could not motivate this submission and it requires no further address.

[9] It was also submitted that the gathering prior to the appellant's arrest where the appellant was implicated was not given the necessary weight. It was argued that at this gathering the complainants were in fact coached. This was addressed in paragraph [7] *supra* and no further address is required.

[10] I am satisfied that the court *a quo* did not err in finding the appellant guilty on counts 1 and 2.

[11] Ad sentence

The appellant set out that life imprisonment was too harsh if cognisance is taken of the fact that the appellant was a first offender. The court *a quo* thus erred in not taking this as a substantial and compelling factor. Furthermore the appellant was employed and this should also have constituted a compelling and substantial circumstance.

[12] The court *a quo* found that there were no substantial and compelling circumstances.

I cannot find that the court *a quo* in imposing life imprisonment imposed a sentence disproportionate to the appellant.

[13] Raping two little girls of between 7 and 8 years is indeed despicable. In **S v**

Chapman 1997 (2) SACR 3 (SCA) at 5b-c rape was describe in these terms:

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.

Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

Furthermore in ***N v T* 1994 (1) SA 862 (C)** at 864G rape was described as:

"Rape is a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victims."

Even more so when two young children are exposed to such a crime. The imposition of the life sentence is thus not disproportionate to the crime itself.

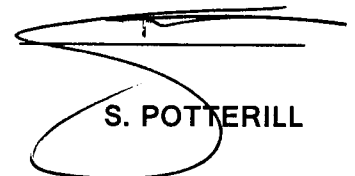
[14] In addressing the needs of society the Minimum Sentence Act was promulgated to address specifically rape in this country. A court should thus not lightly deviate from the minimum prescribed sentence unless there are compelling and substantial circumstances. Society urges the court to address these horrific crimes with the minimum sentence. The imposition of life imprisonment is thus also addressing the needs of society.

[15] The court must however also take cognisance of the personal circumstances of the offender and must deviate from the prescribed minimum sentence if the sentence is disproportionate to the appellant. There is nothing in the personal circumstances as a factor alone, or cumulatively, that can be seen as substantial and compelling circumstances. This sentence is prescribed specifically for first offenders. The appellant abused his power as an older person to gain sexual pleasures from very small children, dismissing them with R2. I cannot find that the court erred in sentencing the appellant to life imprisonment.

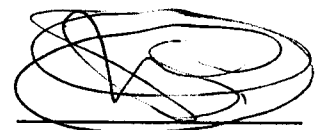
[16] I accordingly propose the following order:

That the appeal against conviction and sentence is dismissed.

I agree

A handwritten signature in black ink, appearing to be 'S. POTTERILL', written over a horizontal line.

JUDGE OF THE HIGH COURT

A handwritten signature in black ink, appearing to be 'S.A. THOBANE', written over a horizontal line.

S.A. THOBANE

ACTING JUDGE OF THE HIGH COURT

CASE NO: A474/2014

HEARD ON: 6 March 2015

FOR THE APPELLANT: ADV. P.M. KHUNENE

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. A.P. WILSENACH

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 10 March 2015