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

Appeal Number: A223/14

In the appeal between:

SANDILE PHALISO

Appellant

and

THE STATE

Respondent

CORAM:

VAN ZYL, J *et* JORDAAN, J

JUDGEMENT BY:

VAN ZYL, J

DELIVERED ON:

21 MAY 2015

- [1] The appellant appeared in the Regional Court, Bethulie, on a charge of rape in terms of Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007. It was alleged that on 10 July 2011 the appellant unlawfully and intentionally committed an act of sexual penetration with the complainant, K.M. M., a [.....] year old girl, by penetrating her vaginally with his penis. The charge was to be read with Section 51 and Part 1 of Schedule 2 of the Criminal Law Amendment Act, 105 of 1997.
- [2] The appellant was legally represented during the trial. He pleaded not guilty to the charge and in his plea explanation it was indicated that the appellant denies that he raped the complainant and that he furthermore has an alibi witness. He was however convicted as charged on 15 August 2012 and was sentenced to life imprisonment on the same day. The appellant's appeal is directed at both the conviction and the sentence with the leave of the Court *a quo*.
- [3] The complainant, who was [.....] years old at the time of the trial, testified with the assistance of an intermediary and by means of a close circuit television system. It should be mentioned that it is apparent from her evidence that she was [...] years of age at the time of the incident and not [...] years as stated in the charge sheet. She testified that on 10 July 2011, a Sunday, she was watching a gospel television programme at the house of one B.. After the programme had finished at about 21h30, she walked home alone. Whilst walking she realised that somebody was following her. She tried to run away, but her assailant followed

her, grabbed her from behind and closed her mouth with his one hand. He then lifted her up with his one hand over her stomach just below her chest, whilst still closing her mouth with his other hand, and then carried her with her back towards his chest. When they arrived at his home, he unlocked the door and without putting any lights on in the house, her assailant took her to his bedroom and put her on his bed. He undressed her jeans and underwear by pulling it down to her knees. He then undressed himself and had sexual intercourse with her. She asked him not to do it, but he still went ahead with his actions. After he had finished and whilst he was getting dressed again, the complainant got an opportunity to run out of the house and ran to S.'s house to ask for help.

- [4] After reporting to S. what had happened, S. said that they should go to B.'s house where, on arrival, S. reported to B. that the complainant had been raped by Stokenyana (the defence admitted that this is the appellant's nickname). B. suggested that they should go and look for the appellant at the place where the appellant goes to church. They did not find him there, whereupon they all went to the police station where they laid a charge of rape against the appellant. The police immediately went to fetch the appellant and upon his arrival at the police station, the complainant was asked to identify him, which she positively did.
- [5] The following day, on 11 July 2011, she was taken to a clinic at Trompsburg for examination. The J88, which clearly indicates that the complainant had been vaginally penetrated considering the fresh tears in her hymen, was handed in as exhibit "A" by agreement between the State and the defence.

- [6] M. C. K., also known as S., a [...] year old woman, was also called by the State as a witness. She confirmed that at about ten o'clock the evening of the incident the complainant arrived at her house, crying, and reported to her that she had been raped by Stokenyana. The complainant also told her that she was from B.'s house where she watched Gospel Time on the television on her way home when this incident occurred. The complainant informed her that she had been raped at the appellant's parental home. The witness then suggested that they should go to B.'s house, which house is only about five houses from that of the complainant. She furthermore confirmed that the appellant was identified by the complainant at the police station as the person who had raped her.
- [7] The appellant's version was that he and two of his friends were drinking at Jackson's Tavern that evening until 22h45 after which he went home. On his arrival he knocked on his sister's bedroom window, whereupon she opened the door for him. Just before they went to sleep, his sister requested him to bring her a "vetkoek". After he gave her the "vetkoek" he went to sleep, shortly after which he saw a light shining in his face. It was the police who came to arrest him. The appellant denies that he raped the complainant.
- [8] The appellant's sister who stayed with him at the time of the incident, Mercy Noqaba Noasa, was called as a defence witness. She testified that on the night in question, she and her children were at the house of her stepfather, known as Oupa. They returned home at 19h00. After preparing something to eat at

home, they immediately got into bed because of the cold weather, but did not go to sleep as they waited for the appellant to come home. At approximately 12h00 that night the appellant knocked on the door of the house and she asked her daughter to go and open the door for the appellant. According to her the appellant told her that he was at the tavern and when he left the tavern, he went to Oupa's place, from where he came home. She told him that there were some fruit cakes and asked him whether he wanted any, whereafter he took one and ate it whilst standing in the doorway of her bedroom. Before she fell asleep, she saw torch lights at her window and heard a knock at the door. It was the police. She did not go with the appellant to the police station.

- [9] The crucial point of dispute in this matter is the identification of the appellant as the complainant's assailant. The complainant testified that there was a bright light outside the appellant's neighbour's house and that she managed to turn her head to look her assailant in the face and due to the bright light and the fact that the assailant did not try to hide or cover his face, she identified him as the appellant. She also testified that the appellant has been known to her for a very long time as his parental house where he and his sister and his sister's children stayed, was only one or two houses from her parental home. The appellant in his own evidence confirmed that he and the complainant have been very well known to one another for many years. It was also evident from his evidence that the complainant knows his parental house very well and his sister confirmed this, testifying that the complainant often came to their house to play with her children and to watch television together. The appellant also confirmed during his

evidence that his next door neighbour has a light outside his house which shines up to the door of his own house. The appellant even went further and testified that there are also two flood lights in the street. The complainant's sister during her evidence testified that the one flood light in the street shines bright into her bedroom at night.

[10] It is apparent from the judgment of the presiding Regional Magistrate that she was aware of the rules of caution applicable in this instance:

“It is so that the complainant is a single witness regarding the allegation of rape itself. For that reason, plus the fact that she is a child, I do approach her evidence with the necessary caution.”

[11] The Court *a quo* in her judgment referred to the following factors regarding the complainant's identification of the appellant:

11.1 The appellant was very well known to the complainant.

11.2 The house of the appellant was very well known to the complainant.

11.3 The scene next door to the complainant's house, as well as at the appellant's house itself, were very well lit by the light at the neighbour's house and also, apparently, by the flood lights in the street.

11.4 The complainant explained how she turned her face backwards at the stage when she identified the appellant as being her assailant, in circumstances where there was bright light, the face of her assailant was not covered and she saw his face from a very close distance.

11.5 Immediately after the incident when the complainant ran to S.'s house for help, she cried and reported to S.e that Stokenyana had raped her.

[12] Regarding the evidence of the appellant's sister, the Court *a quo* duly dealt with the contradictions between her evidence and that of the appellant. These discrepancies were, *inter alia*, their evidence as to whether the appellant knocked at the door or at the window of the house, which person opened the door for the appellant, where the appellant came from at that stage and the circumstances surrounding the eating of the so-called "vetkoek", (which the appellant's sister referred to as fruit cakes in her evidence). The Court *a quo* furthermore referred to the fact that it is common cause that the complainant knew the house of the appellant very well, including the inside thereof, and she testified that all the bedroom doors were open and that she could see that there was no other occupant in the house at the time of the rape incident. The Court considered this evidence of the complainant to not only be credible, but also reliable, especially in view of the evidence of the appellant's sister herself that the light from outside illuminates her bedroom. The Court *a quo* consequently rejected the evidence of the appellant's sister.

- [13] In these circumstances the following conclusion by the Court *a quo* in her judgment can, in my view, not be faulted:

“For all the reasons I have given that I am satisfied that K. had enough opportunity to see your face, to see your home and your sister having confirmed the set up in your house, I am satisfied that you are the person who committed the offence. And accordingly I find that the State succeeded in proving its case beyond reasonable doubt against you.”

AD SENTENCE:

- [14] The Court *a quo* found that there are no substantial and compelling circumstances which justify the Court to deviate from the prescribed minimum sentence of life long imprisonment. Mr Makheni, on behalf of the appellant, indicated that it is his instructions that the appellant’s personal circumstances constitute substantial and compelling circumstances and that the Court *a quo* erred in not finding as such.

- [15] The following personal circumstances of the appellant were taken into consideration by the Court *a quo*:

15.1 The appellant was 26 years of age at the time of sentencing;

15.2 The appellant is not married but has a minor child who was at the time about [...] months old;

15.3 At the time of his arrest, he was permanently employed as a construction worker earning R150.00 per day;

15.4 The appellant had attended school up to Grade 9;

15.5 The appellant had spent 13 months in custody awaiting trial.

[16] The appellant is not a first offender. He has one previous conviction of assault and two previous convictions of housebreaking with the intent to steal and theft. The Court *a quo* correctly referred to the fact that both assault and rape involve the violation of bodily integrity.

[17] Regarding the impact of the rape on the complainant she herself testified that she has “not (been) feeling well” since the incident. B. Matilda Motantsi was called as a witness by the State during the sentencing proceedings. The complainant and her family are very well known to her and she basically assists in looking after the complainant due to the illness of the complainant’s mother. She also knows the appellant very well. She testified that as a result of the rape incident the complainant changed drastically. The complainant initially could not walk properly nor eat properly. She became withdrawn and isolated herself. The witness even sought professional help by taking the complainant to a clinic. Her school work also deteriorated to the extent that she did not pass Grade 6 at the end of 2011. She also tells her friends that they should not trust male persons, because they are rapists. All these circumstances deteriorated even more after the complainant’s father passed away in August 2011, moreover so because her

father had promised her that he would take her to doctors who would assist her in getting well again. This witness also presented a letter from the school which the complainant is attending from which letter it is evident that her school work deteriorated severely after the rape incident. This letter also states that the complainant prefers to be alone and tends to act aggressive towards other learners. This letter was received in evidence as exhibit "C".

[18] In her judgment on sentence the Court *a quo* correctly also referred to the further aggravating factors:

18.1 The appellant and the complainant knew one another very well and the appellant was in a position of trust towards the complainant.

18.2 The appellant has shown no remorse throughout the proceedings.

18.3 The seriousness of the offence and the its prevalence in the area of jurisdiction of the Court.

18.4 The appellant continued with his conduct despite the complainant`s plea that he should not do it to her.

18.5 The appellant did not use a condom.

[19] The Court *a quo* consequently found that the minimum sentence is the only just and appropriate one under these circumstances.

[20] Having regard to all of the abovementioned factors, I can find no justification to interfere with the Court *a quo*'s finding that there are no substantial and compelling circumstances which justify a deviation from the prescribed minimum sentence of life imprisonment.

ORDER:

[21] The appeal against both the conviction and the imposed sentence is dismissed.

C. VAN ZYL, J

I concur:

A.F. JORDAAN, J

On behalf of the Appellant:

Adv. J.S. Makhene
On instructions of:
Justice Centre
BLOEMFONTEIN

On behalf of the Respondent:

Adv. L. Zweni
On instructions of:
Office of the Director: Public
Prosecutions
BLOEMFONTEIN

