

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A84/2015

In the appeal between:

JOHANNES MOSUWE MONENDE

Appellant

and

THE STATE

Respondent

CORAM:

DAFFUE, J *et* MOKOENA, AJ

JUDGMENT:

DAFFUE, J

HEARD ON:

24 AUGUST 2015

DELIVERED ON:

27 AUGUST 2015

I INTRODUCTION

- [1] On 7 November 2011 appellant was convicted on two counts of rape and one count of sexual assault in the regional court held in Sasolburg. The charges were taken together for purposes of sentence and he was sentenced to life imprisonment. Appellant has an automatic right of appeal.

II GROUNDS OF APPEAL

- [2] It is the appellant's case that the court *a quo* erred in convicting him in that (a) the State failed to prove his guilt beyond reasonable doubt, (b) his version should have been found to be reasonably possibly true, (c) the negative DNA result is indicative of his innocence and (d) the complainant's version is a fabrication.
- [3] The grounds of appeal relating to sentence are that the court *a quo* failed to take into account (a) the harsh conditions in the correctional centre and (b) the mitigating factors, i.e. he is a first offender, he spent time awaiting trial and he co-operated with the police.

III THE CHARGE SHEET AND A BRIEF SUMMARY OF COMPLAINANT'S VERSION

- [4] The appellant faced three counts of rape, the first that on 11 July 2010 he raped the complainant, a [...] year old girl, by inserting his penis into her vagina, the second that in or about 2010 he raped the same complainant by inserting his penis into her anus and thirdly, that in or about 2010 the same complainant was raped by him in that he inserted his penis into her vagina. It is alleged that all three crimes were committed at or near Somerspost and in all three instances the deeds were executed without the consent of the complainant.
- [5] Complainant testified, in line with the allegations contained in counts 1 and 2, that she was in the care and custody of her

stepfather, the appellant, on 11 July 2010 during her mother's hospitalisation, that appellant took her into his bedroom, locked the room and raped her by inserting his penis into her vagina, where after he also inserted his penis *"in between her bums"*. Me A. S., a [...] year old cousin of the complainant came looking for her and knocked at the bedroom door, but appellant did not open the door. She went to call her sister-in-law where after they went to appellant's home and knocked at his bedroom door. Appellant came out, informing them that he was not aware of complainant's whereabouts and went to the toilet. The two ladies came across complainant inside appellant's bedroom where she was hiding behind the curtains, wearing a panty and T-shirt only. Complainant made her first report to the two ladies and confirmed that she had been raped by appellant. She also informed them that appellant used two condoms. The complainant was examined by a medical practitioner a few hours later who found abrasions on her private parts, the para-urethral folds in particular, but no tears. A fresh tear was found at the 11o'clock position in her anus. The medical practitioner testified as well and denied that his findings were consistent with *"forced penetration"*, although he stated that *"there was alleged sexual offence"*.

- [6] Count 3, as is the case with count 2, does not indicate the specific date of the alleged offence, but the offence referred to allegedly occurred prior to the incidents of 11 July 2010. According to complainant she was again left in the care of appellant when her mother attended a funeral. At that time the appellant allegedly raped her by inserting his penis *"in her*

bums”, the effect of her testimony being that she was raped by way of penile-anal penetration. She tried to tell her mother when she returned, but the mother stopped her. However if one scrutinises the evidence, it is apparent that complainant wanted to convey to the court that appellant threatened to beat her if she dared informing her mother of the incident and that she did not try to tell her mother. The difficulty with the conviction in respect of this matter is the clear allegation in count 3 that rape occurred by way of penile-vaginal penetration and not as described by complainant. No effort was made by the prosecutor to ask for an amendment of the charge sheet. There must have been uncertainty as to whether complainant changed her version as conveyed in her witness statement, or whether a *bona fide* mistake was made in drawing the charge sheet. This aspect was never taken any further, neither during evidence in chief, nor during cross-examination, or in the arguments addressed to the court *a quo*. The court *a quo*, without making any specific findings in this regard, convicted appellant of sexual assault in respect of count 3 and not rape, it being a competent verdict on a charge of rape. These aspects will be dealt with later in this judgment.

IV THE SUBMISSIONS ON BEHALF OF THE PARTIES

- [7] Mr Hoffman who appeared on behalf of the State submitted that the court *a quo* did not make any misdirections and that the appeal in respect of both the convictions and sentence should be dismissed. When it was put to him during oral argument that there was a clear discrepancy between the allegations contained in count 3 and the version of the

complainant which version was not corroborated at all, that the court *a quo* decided to convict appellant of sexual assault only without explaining why, whilst the scribe of this judgment was of the view that appellant should have received the benefit of the doubt, he conceded that the appeal in respect of the conviction pertaining to count 3 should succeed.

- [8] Mr Hoffman submitted in respect of sentence that appellant was in a position of trust, complainant was a young girl and based on authorities such as **S v Chapman** 1997 (2) SACR 3 (SCA), **S v Malgas** 2001 (1) SACR 469 (SCA) and **S v Matyityi** 2011 (1) SACR 40 (SCA), the court *a quo* was correct in imposing life imprisonment notwithstanding the fact that there was a failure by the court *a quo* to deal with the various aggravating and mitigating factors and indicating why no substantial and compelling circumstances were present. The court *a quo* briefly referred to the fact that the minimum sentence legislation applies to first offenders as well and that the appellant was trusted by his partner and mother of the complainant to such an extent that the complainant was left in his care and custody during her hospitalisation. The point was made that appellant was expected to protect the complainant and not to abuse her.
- [9] Appellant's heads of argument were drafted by Mr Reyneke, but oral argument was presented to us on his behalf by Mr Makhene. Neither of these two legal representatives argued the matter with conviction and I got the distinct impression that they did not believe that the court of appeal should interfere with either the convictions or the sentence. When I

addressed my difficulty with the conviction on count 3 to Mr Makhene, he conceded that he had not considered the aspect at any stage and that it would be difficult for him to make submissions in that regard.

V LEGAL PRINCIPLES AND LEGISLATION RELATING TO THE CRIMES

[10] 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 have 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.

[11] Therefore in order to interfere with the court *a quo*'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. See also **S v Monyane and Others** 2008 (1) SACR 543 (SCA) at para [15] where the SCA 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),"

- [12] In assessing the evidence the trial court must in the ultimate analysis look at the evidence holistically in order to determine whether the guilt of the accused is proved beyond reasonable doubt. Inherent probabilities and improbabilities may be considered in evaluating the evidence in totality. See **S v Chabalala** 2003 (1) SACR 134 (SCA) at para [15]). It is permissible to test the accused's version against the inherent probabilities, but it cannot be rejected merely because it is improbable. It can only be rejected on the basis of the inherent probabilities if it can be said to be so improbable that it cannot be reasonably possibly true. See **S v Schackell** 2001 (2) SACR 185 (SCA) at para [30].

- [13] Section 208 of the Criminal Procedure Act, 51 of 1977, provides that an accused may be convicted of any offence on the single evidence of any competent witness. There is no magic formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of a single witness and consider its merits and having done so should decide whether it is satisfied that the truth has been told despite the

shortcomings or defects in the evidence. See **S v Sauls** 1981 (3) SA 172 (AD) at 180E-G. See also **Stevens v S** 2005 (1) All SA 1 (SCA) at 5d-e. Where the evidence of a single witness is corroborated in any way the caution enjoined 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.

[14] There is no statutory requirement that a child's evidence must be corroborated, but it has been accepted for a long time that the evidence of young children should be treated with caution and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach. See **S v V** 2000 (1) SACR 453 (SCA) at 454i-h.

[15] Rape is the crime in terms whereof a person unlawfully and intentionally commits an act of sexual penetration with another (the complainant) without the consent of the complainant. See s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007. "*Sexual penetration*" is defined in s 1 of the aforesaid Act to include "*any act which causes penetration to any extent whatsoever by - (a) the genital organs of one person into or beyond the genital organs, anus or mouth of another person; (b).... (c)....*" (emphasis added.)

"*Sexual assault*" is defined in s 5 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 (i) genital organs or anus of one person or,” See s 1 of the aforesaid Act.

- [16] There can be no doubt that the crime of rape is not only committed when for example the penis of one person penetrates the vagina or anus 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. The translation of *“beyond”* in the Afrikaans text is *“verby”*.

VI LEGAL PRINCIPLES PERTAINING TO SENTENCE

- [17] The appellant was sentenced to life imprisonment in terms of the provisions of s 51(1), read with Part 1 of Schedule II of the Criminal Law Amendment Act, 105 of 1997. The prescribed minimum sentence for the rape of complainant, a 10 year old girl and thus under the age of 16, is life imprisonment. Although appellant is not the father of the complainant, he is her stepfather in so far as he has been living with the complainant's mother as husband and wife for a considerable period of time. The Supreme Court of Appeal found in **MDT v S** (548/2013) [2014] ZASCA 15 (20 March 2014), delivered on 20 March 2014 at para [6] that one can rightly ask what could be considered more heinous than the rape of a child by a father. The SCA referred with approval to the remarks of Cameron JA in **S v Abrahams** 2002 (1) SACR 116 (SCA) at paras [17] – [23].

- [18] In **S v PB** 2013 (2) SACR 533 (SCA), in line with **Matyityi** *loc cit*, the Supreme Court of Appeal emphasised in para [20] that prescribed minimum sentences should not be departed from lightly or for flimsy reasons. The SCA refused to interfere with the prescribed sentence of life imprisonment imposed on a father who had raped his 12 year old daughter. As mentioned in paragraph [7] of **MDT** *loc cit* “*child rape is a national scourge that shames us as a nation*”. The courts have a serious duty to prevent young girls from being abused. Sachs, J stated the following in a unanimous judgment of the Constitutional Court in **Bothma v Els** 2010 (2) SA 622 (CC) at para [47]: “*Child rape is an especially egregious form of personal violation.... By its very nature it is frequently characterised by secrecy and denial. There is accordingly a special public interest in taking action to discourage and prevent rape of children. Because it often takes place behind closed doors and is committed by a person in a position of authority over the child, the result is the silencing of the victim, coupled with difficulty in obtaining eyewitness corroboration.*”
- [19] The determination of a sentence in a criminal case is pre-eminently a matter for the discretion of the trial court. In the exercise of this function the trial court has a wide discretion in deciding which factors should be allowed to influence the court in determining the measure of punishment and in determining the value to attach to each factor taken into account. A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carry clear conviction that an error has been committed in this regard. A mere misdirection is not by itself sufficient to entitle a court of appeal to interfere with the sentence as the

misdirection must be of such a degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably. See **S v Kibido** 1998 (2) SACR 213 (SCA) at 216g-j.

- [20] It has also been stated that the court of appeal will not alter a sentence imposed by the trial court unless it is found 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 **Director of Public Prosecutions KwaZulu Natal v P** 2006 (1) SACR 243 (SCA) at 254c-f, **S v Bogaards** 2013 (1) SACR 1 (CC) at para [41] and **Monyane and Others** *loc cit* at paras [23] and [26].

VII FINAL EVALUATION OF THE EVIDENCE

- [21] On 11 July 2010 the complainant was found in appellant's bedroom, hiding behind the curtains whilst wearing her panty and T-shirt only. Appellant, who exited from that room and passing the two ladies who had been knocking on his door, indicated that he did not know anything about the whereabouts of the complainant. He initially refused to open the door when Me Sompane knocked at the first occasion and it is apparent from the evidence of the complainant that he was at that stage busy with his heinous deed of raping

her. When Me Sompane left to call her sister-in-law and only when the two ladies approached the bedroom of appellant and knocking on the door again, did appellant open the door. The ladies confronted complainant who informed them that she had been raped, causing them to visually examine her at that stage.

[22] As indicated above, the medical report and the testimony of the medical practitioner confirm the complainant's version although the medical practitioner was not prepared to testify that forced penetration occurred. It must however be taken into consideration that he is not a legal expert and not necessarily aware of the definition of rape.

[23] Appellant was a poor witness who was in essence caught red-handed. He advanced a pathetic and false explanation as to the whereabouts of the complainant. His version was correctly rejected as false in respect of the events of 11 July 2010. I am satisfied that a proper case has been made out for the convictions on counts 1 and 2 and that the appeal in this regard should be dismissed. Even if it is accepted that "full" penetration did not occur in either or both instances, the facts stated by complainant corroborated by the objective facts are indicative that the crimes of rape, based on the definitions referred to above, were committed.

[24] The allegations pertaining to count 3 are more complex. Firstly, there is no corroboration in the form of a so-called first report or direct evidence of complainant's version; secondly, there is no objective evidence such as medical

evidence to corroborate her version; and thirdly, her version is in direct conflict with the allegations contained in count 3 as mentioned above. Appellant denied that he raped and/or sexually assaulted complainant at the stage when her mother attended the funeral. The fact that complainant's mother attended a funeral at a stage is common cause, but that is insufficient for a finding that the State has proven its case beyond reasonable doubt. Appellant was not convicted of rape – correctly so – but he should not have been convicted at all. The appeal must succeed in respect of the conviction on count 3.

[25] It is apparent that there was not full and forced penetration, particularly pertaining to complainant's vagina if one takes into consideration the medical evidence. However, abrasions were found and there was at least one tear at her anus. Complainant, a [...] year old girl at that stage, was severely abused by her stepfather and the person in whose care and custody she was left when her mother was hospitalised. This is a heinous offence and although appellant is not her natural father as was the case in the authorities mentioned above, complainant in all probabilities regarded him as her father and custodian. Appellant was in a position of authority and trusted to such an extent that her mother was prepared to leave her in his care and custody during her temporary absence.

[26] Appellant was entirely without remorse and maintained his innocence throughout the trial notwithstanding the fact that he was caught about red-handed. When the complainant's

mother testified about the telephone call and the fact that appellant asked for forgiveness for his wrongdoings, it was put to her on behalf of appellant that she was not telling the truth. This is further proof of his lack of remorse.

[27] It must also be accepted that although no expert testimony was led pertaining to emotional and psychological effects of the incidents on the complainant, logic dictates that she was in fact severely traumatised during and as a consequence of the rape episode and furthermore as a result of having to testify in the trial. Both the rape incident and the experience during the trial must have been nightmarish experiences and it was totally unnecessary for the complainant to be subjected to either of these.

[28] Although we are at liberty to reconsider the sentence of life imprisonment in so far as the court *a quo* has taken the three convictions together for purposes of sentence and we have found that the appeal should succeed in respect of count 3, I am satisfied, bearing in mind the evidence produced during the trial, the authorities and what have been stated above, that no substantial and compelling circumstances are present *in casu* and consequently life imprisonment was called for and should have been imposed. The appeal against sentence cannot succeed.

VIII ORDER

[29] Consequently the following orders are made:

1. The appeal succeeds partially in that the appeal pertaining to the conviction in respect of count 3 is upheld.
2. The appeal against the convictions pertaining to counts 1 and 2 is dismissed.
3. The appeal against the sentence of life imprisonment is dismissed.

J.P. DAFFUE, J

I concur.

R. MOKOENA, AJ

On behalf of appellant: Adv. O. Makhene
(Mr J D Reyneke drafted the Heads)
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. R. Hoffman
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