

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A51/2014

In the matter between:

M[...] K[...]

Appellant

and

THE STATE

Respondent

CORAM:

LEKALE, J et JAJI, AJ

JUDGEMENT:

LEKALE, J

HEARD ON:

23 JUNE 2014

DELIVERED ON:

26 JUNE 2014

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- [1] On the 5 August 2010 the appellant, who was legally represented, was convicted on and sentenced to 18 years and life imprisonment respectively for two counts of rape by the Regional Court sitting at Ficksburg. He feels aggrieved by both the convictions and sentences and now approaches us on appeal against the same with leave granted on petition by

members of this court.

- [2] On convicting him the trial court rejected his version as not reasonably possibly true and found that the same was fabricated during the trial insofar as certain material aspects thereof were not put to state witnesses. The court below, further, agreed with both the state and the defence that the two complainants, who happened to be the appellant's 16 and 14 year old daughters, corroborated each other's evidence where applicable and that they were good witnesses.
- [3] The appellant assails the convictions on, *inter alia*, the grounds that no medical or independent evidence was placed before the trial court to prove that the two complainants were sexually molested in that they were penetrated carnally. The appellant's tilt at the sentences is confined to and directed at the life imprisonment imposed in respect of the second charge in circumstances where no serious after effects exist. On its part the state supports the convictions and the sentences.
- [4] The evidence tendered in support of the charges was to the effect that the rape on the 16-year old complainant started in 2006 in Lesotho and continued at Ficksburg throughout 2007 and 2008 until February 2009 when it stopped because the complainant was then able to resist by overpowering the appellant. The trial court accepted that with regard to rape incidents in Ficksburg the only clear evidence related to what

happened in February 2009 when the appellant returned home after having been laid-off from work for poor health. On that occasion the appellant called the complainant in count 1 to the toilet at night and raped her. The 14-year old's case was that the appellant called her to the toilet at night in April 2009 and enquired from her after whether or not she knew what would happen when she met a boy. The appellant, thereafter, sat on the toilet seat and ordered her to undress her pants and panty and to sit on top of him. Whereafter the appellant took out his penis and penetrated her vagina therewith without her consent. When she cried in pain the appellant asked her if she did not want him to admonish her she should leave the toilet. She left the toilet, whereupon, the appellant asked her if she seriously did not want him to admonish her and told her to return to the toilet. When she returned the appellant once again directed her to sit on his lap and raped her again. The younger complainant, further, testified that one night the appellant woke her up from where she was sleeping on the floor with her sister and brother and directed her to get in bed with him, whereupon, he played pornographic material on the DVD player. The 16-year old, however, woke up and the appellant ordered the 14 year old complainant to go back to her sleeping place. The following day the appellant ordered her not to talk to him anymore or to use the appurtenances in the house because she did not want to be admonished. He, further, told her that if they did not want to be admonished they should go the family planning clinic to get an injection. The 16-year old complainant

corroborated her younger sister's evidence with regard to the night concerning pornographic material as well as the night when the latter returned from the toilet crying and the appellant was following her effectively pointing out that he was only admonishing her as he always did with her viz. the former.

- [5] The appellant's version was a bare denial and he accused the complainants of lying because they were either upset with him for always fighting their mother or because they did not want him to exercise control over them by reprimanding them for going out at night.
- [6] There is nothing on record to suggest that the trial court misdirected himself on the facts when he agreed with the parties that the complainants made a good impression as witnesses and corroborated each other where their evidence overlapped. (See **S v Francis** 1991 (1) SACR 198 (A)).
- [7] I am, further, not persuaded that it was necessary, in the circumstances of the instant matter, for independent or medical evidence proving sexual intercourse or penetration to be tendered in order for a guilty verdict to be returned. Such evidence would be corroborative probative material which is not mandatory for the purposes of a conviction in the present matter. As Ms Giorgi correctly points out, such evidence is not always necessary and would have been of great assistance in the state's case if it was tendered but its absence is not fatal.

The question is simply whether or not available evidence was sufficient to prove the state case beyond reasonable doubt. To require such corroboration in the instant matter would simply serve to reintroduce the cautionary rule in sexual assault cases which was abolished in **S v J** 1998 (4) BCLR 424 (A).

- [8] The evidence of the two complainants, as corroborated by the report witness of the 16-year old complainant, was accepted as credible and reliable by the court below. In this regard it is worth noting that the said report witness' uncontroverted evidence was to the effect that the 16-year old complainant was crying when she reported her ordeal, at the hands of the appellant, to her. Such acceptance of the relevant evidence by the trial court has not been demonstrably shown to be clearly wrong.
- [9] The convictions can, thus, not be faulted. The appellant effectively feels that the trial court misdirected himself by imposing life sentence in the case of the rape of the 14-year old girl when the *modus operandi* was the same in both cases and the age difference between the two girls was only one year.
- [10] Life imprisonment is ordained, as a minimum sentence, for rape of a person under the age of 16 years. The court below could only deviate from such a mandatory minimum sentence where a legal cause, in the form of substantial and compelling circumstances, existed. The question is, therefore, whether or

not the cumulative effect of mitigating factors on the gravity of the crime, the aggravating circumstances and the interest of the society rendered such a sentence unjust. (See **S v Malgas** 2001 (1) SACR 469 (SCA)).

[11] We are not convinced that the trial court failed to exercise its discretion reasonably or appropriately so as to justify interference by this court insofar as the victim is the appellant's daughter and was exposed to the risk of contracting human immunodeficiency virus (HIV) as the appellant intimated to the trial court that he is HIV positive. (See **S v Malgas** (*supra*))

ORDER

[12] The appeal fails.

[13] The convictions and sentences are confirmed.

L. J. LEKALE, J

I concur.

N. P. JAJI, AJ

On behalf of appellant:

Adv J.S Makhene
Instructed by:
Bloemfontein Justice Centre

BLOEMFONTEIN

On behalf of respondent:

Adv S. Giorgi
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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