

THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

CASE NO. A 69/2014

In the matter between:

OUPA ELLIOT NKABINDE

APPELLANT

Versus

THE STATE

RESPONDENT

CORAM: NAIDOO, J *et* WRIGHT AJ

JUDGMENT BY: NAIDOO,J

HEARD ON: 28 July 2014

DELIVERED ON: 18 September 2014

NAIDOO J

- [1] The appellant was charged with two counts of Rape, in contravention of section 3, read with other relevant provisions of Act 32 of 2007(the Sexual Offences Act), together with the relevant provisions of the Criminal Procedure Act 51 of 1977 (the Act) and sections 51, 52 and Schedule 2 of Act 105 of 1997 (the Minimum

Sentences Act). He was convicted on both counts and sentenced, on 20 May 2010, to life imprisonment in the Harrismith Regional Court, both counts being treated as one for the purpose of sentence. He now appeals to this court against his conviction and sentence, by virtue of his automatic right of appeal. Mr JS Makhene appeared for the appellant and Mr Chalale appeared for the State in this court.

- [2] The complainants in both counts are sisters who live alone with their six year old younger sister. The complainant in count 1, TM, is 14 years old, while the complainant in count 2, MA, is 11 years old. Both complainants testified with the assistance of an intermediary, and although no specific mention of this was made on the record, a written admission by the appellant in terms of section 220 of the Act, admitting the qualifications and competence of the intermediary and that the complainants would suffer prejudice if an intermediary was not used, is attached to the record.
- TM testified that she and her sisters were asleep. She woke up to go and urinate when she realised there was someone in the room. She told her sister MA, who at

first did not believe her. When MA realised this was true, she covered her head. By this time the intruder asked TM to climb onto the bed and when she refused, he threatened her with an object which she later testified was a panga. He then climbed on the bed and held TM and MA by their necks, informing them that he is Oupa Tshabalala who is at school in grade 8. He also told them that their brother had asked him to look after them and that he can pay himself by sleeping with them. The intruder then proceeded to remove her underwear, as she lay on her stomach and raped her by penetrating her anally. He then went to her sister, MA and raped her. When he was done with MA, he returned to TM, turned her around onto her back and raped her again, this time penetrating her vaginally. During the second rape on her, she recognised her assailant. He then jumped off the bed, wiped himself with the blanket and as he was leaving, he ordered her to close the door. She locked the door and peeped through a hole to make sure that the person who raped her was the person she thought it was. She saw the appellant as he was leaving her house, and was able to do so because there was light outside. Under cross examination she said that she

recognised him three times, firstly when he was in the house, then when he turned her around (to rape her for the second time) and thirdly when she peeped through the hole and saw him outside. TM testified that the appellant was not friends with her brother. She reported the incident to her family the next morning, and was taken to a doctor to be examined. A charge was presumably thereafter laid.

[3] The evidence of MA, the complainant in count 2, was the same as that of the first complainant in all material respects.

[4] The neighbour of the complainants, Evelyn Nomvula Mokoena (whom both complainants referred to as their grandmother) confirmed that the complainants had reported to her that they had been raped by Oupa who owns a shop, and she advised them that as she is elderly, she can do nothing about it and asked them to report it to their family.

[5] Nomvula Celina Vilakazi confirmed that she is related to the complainants, and that early on the morning of 12

September 2009, they reported to her that they were raped by the person called Oupa and that he is the person who owns a shop. She further testified that she was informed by the complainants that they did not scream as they were threatened with a panga and told by their assailant that he would kill them if they screamed. This witness confirmed that it is well known in the area that the complainants lived alone, and also that the accused was not friends with the brother of the two complainants. She said that when the complainants made this report to her they looked scared and kept peeping outside. This witness called the police, who came and took them to the police station.

- [6] The version of the appellant which was put to the two complainants was that he was never at their house, but was in fact at his home with his wife. He repeated this when he testified and added that at the time the complainants allege he raped them, he was also playing cards with some friends at his house. He denied going to the house of the complainants or raping them, and said that they are mistaken in identifying him as the person who raped them. He knew them both as they

were customers at his shop, and he knew where they lived because he would pass their home when he went to buy stock. He said he was not aware that they lived alone. He also testified about the Apollo lights that the first complainant mentioned, but said it was far away from the area where they lived. It provided very dim lighting and denied that one could see clearly in that light. He did, however, concede that at close proximity a person could identify another.

- [7] It is not in dispute that the complainants were raped and neither is the sequence of events as narrated by them. The only issue in this matter is one of identity. The court a quo analysed the evidence in detail and concluded that the evidence presented by the state was reliable and could be accepted as true, whereas the version of the appellant fell to be rejected as false. Regarding the identification of the appellant, the court held that, given the proximity of the assailant to the two complainants, the fact that he was known to them, and the action of the first complainant in looking through the hole to confirm the opinion she had formed regarding the identity of the assailant, it was satisfied that the

identification of the appellant by the two complainants was reliable. I agree, and so too did Mr Makhene who appeared for the appellant.

- [8] Although the court *a quo* did not specifically deal with the alibi defence proffered by the appellant, it is noteworthy that both complainants appeared to have knowledge of the family situation of the appellant, both testifying that his wife had left his home as a result of domestic discord between them. The state, which bore the onus to disprove the alibi defence, made attempts to trace the appellant's wife, without success. The mother of the appellant's wife was contacted and she advised that his wife was in Sasolburg, thus lending credence to the evidence of the two complainants regarding the absence of the appellant's wife. It also indicates that his alibi defence cannot be true. It is furthermore telling that no effort was made by the appellant to secure the attendance at court of the two friends who were allegedly playing cards with him on the night in question, or to furnish their details to the investigating officer for that purpose. In any event, the version that he was also in the company of these two

friends emerged only when he testified. It was never put to the complainants so that the state could have been alerted that the two friends would have to be located in order to confirm or disprove the alibi defence.

- [9] Turning to the question of sentence, Mr Makhene argued that the sentence of life imprisonment was too harsh in view of the personal circumstances of the appellant. The appellant's legal representative in the trial court specifically refrained from addressing the court on whether substantial and compelling circumstances existed that would have justified the court's departure from imposition of the prescribed minimum sentence.

It is well settled in our law that an appeal court should interfere with the sentence imposed by a trial court only if the trial court has misdirected itself in the imposition of sentence, resulting in a sentence which is so

inappropriate that it induces a sense of shock. [The principle in this regard is expressed as follows by Trollip JA in S v Pillay 1977 \(4\) SA 531 \(A\) at p 535 E-F:](#)

"Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."

In the case of **S v Rabie 1975(4) SA 855 (A)** Holmes JA set out on page 857 the following guiding principles with regard to interference with a sentence on appeal:

- "1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –
 - (a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and
 - (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate”

This principle was confirmed by Holmes JA in **Sv Giannoulis 1975(4) SA 867 (A)**

[10] In the present matter, the appellant’s personal circumstances that were put on record are that he:

10.1 is 30 years old

10.2 is married and has two children, aged 7 and 5 years old

10.3 is self-employed, owns a “spaza” shop and is the sole breadwinner of his family

10.4 left school in Standard 9

10.5 has no parents as they are deceased.

[11] The trial court balanced these personal circumstances against what it considered to be aggravating factors, namely that the crimes committed by the appellant were serious and very prevalent in South Africa, that children were vulnerable and were increasingly being abused and violated, that the complainants in both counts were very young, that the appellant had taken advantage of the vulnerable situation of the complainants who lived

alone. The trial court also correctly pointed out that the provisions of Act 105 of 1997 (the Minimum Sentences Act) applied in this matter and prescribed a minimum sentence of life imprisonment. The court was further correct in pointing out that it is entitled to take into consideration factors which were substantial and compelling in order to justify a departure from the prescribed minimum sentence. It is clear that the trial court did not consider that the personal circumstances of the appellant were substantial and compelling, justifying it in departing from the prescribed minimum sentence of life imprisonment.

[12] I cannot fault the reasoning of the trial court with regard to sentence. It is also apparent that it gave proper consideration to all pertinent circumstances for the purpose of sentencing, and in the fine balancing act that it was required to perform, it ordered that the convictions be taken as one for the purposes of sentence, so that the sentence would be fair, would address the seriousness of the offence, the interests of society and give the appellant an opportunity to rehabilitate himself.

[13] I am, therefore, unable to find any misdirection on the part of the trial court to warrant the interference of this court in the sentence imposed in this matter. In my view the sentence is not inappropriate or so excessive as to induce a sense of shock.

[14] In the circumstances, the following order is made:

14.1 The appeal is dismissed;

14.2 The convictions and sentence are confirmed.

S. NAIDOO, J

I agree

JM Wright, AJ

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Instructed by:

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The State