

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A41/09

In the appeal between:

VUYISILE THABISO ALI

Appellant

and

THE STATE

Respondent

CORAM:

MOLOI, J *et* KUBUSHI, AJ

HEARD ON:

7 MARCH 2011

DELIVERED ON:

12 MAY 2011

KUBUSHI, AJ

[1] This is an appeal against the judgment from the Regional Magistrate's Court Bloemfontein. The appellant was charged and convicted of rape of a five year old girl. He was sentenced to life imprisonment on the 24 October 2008. The appellant originally filed a notice of appeal against sentence only, however it was argued by his legal representative that since the appellant had an automatic right of appeal such appeal

embraced both conviction and sentence. This court had to decide on both conviction and sentence.

[2] The facts of the case are that on the 28 December 2006 appellant waylaid complainant, a five year old girl, from the street and took her to his place where he raped her. He was seen by Marcia Qoto (Thandeka), one of the state witnesses when he grabbed the complainant from amongst her friends and walked away with her. The rape was discovered by Maria Mothwana, complainant's neighbour, who noticed that the complainant was walking with difficulty and the rape was subsequently reported to the police.

[3] As regards the conviction, Mr Makhene for the appellant, in the Heads of Argument stated that:

- a. the trial court did not apply the cautionary rule to the evidence of the complainant who was a single witness and a child witness. The argument was reiterated at the appeal hearing and Mr Makhene also submitted that the

trial court did not refer to a single case law on the issue and that it (the trial court) mentioned the cautionary rule in its judgment just in passing.

- b. the trial court erred in accepting the evidence of the complainant as admissible although the complainant delayed in reporting the rape. The delayed reporting of the rape cast doubt as to whether this complaint was made freely and voluntary or not.
- c. the court erred in rejecting the alibi defence of the appellant as being reasonably possibly true.

[4] Adv Giorgi respondent's legal representative argued that the trial court applied the cautionary rule. She contended that the trial court relied on the evidence of Marcia Qoto and that of the nursing sister who examined the complainant after the incident as corroborating the complainant's evidence as a single witness. She argued further that as a child of five years the complainant was able to positively identify the appellant.

[5] As regards sentence appellant's legal representative declared

that the sentence imposed by the trial court was unjust and disproportionate to the offence. He contended that there are a number of authorities that state that it is not in every case where the prescribed sentence is imposed. There are cases where it has been held that some rapes are more serious than others and referred the court to the case of **S v TYATYAME** 1991 (2) SACR 1 (SCA) as an example of a serious rape where the complainant was severely injured.

- [6] Respondent's legal representative contended that the sentence imposed by the trial court was proportionate and just and that there were no circumstances justifying the imposition of a lesser sentence. She based her argument on the fact that the complainant was injured, that the complainant's personal circumstances were not peculiar and that society needed to be protected from people like the appellant.
- [7] The issues to be answered by this court as regards conviction are whether the trial court
- (a) failed to apply the cautionary rule to the evidence of the

complainant who was a child witness and a single witness in a sexual case;

- (b) erred in accepting such evidence as admissible although the complainant delayed in reporting the rape.

And as regards sentence this court is to decide whether the sentence imposed by the trial court was unjustified and disproportionate to the offence.

- [8] The principle as enunciated in **S v DE VILLIERS AND ANOTHER** 1999 (1) SACR 297 (OPD) is that a complainant in a sexual case ought to make her complaint at the first opportunity that it could reasonably be expected of her to do so. My view is that the trial court did not err in accepting the evidence of the complainant even though it was reported a day later. Such a delay is to me not unreasonable. Taking into account that the complainant was a child of five years, what had happened to her was something very unusual to her and it might not have been easy for her to report immediately after the incident either to her grandmother or her mother. She might

have been afraid because of the threat made to her by the appellant or just merely ashamed to tell her grandmother or her mother. At that age, she could also have not known how to deal with the matter. I am satisfied that the delayed reporting of the rape, as in this case, does not, as argued by the respondent's legal representative, cast any doubt as to whether this complaint was made freely and voluntary or not. This case is distinguishable from **S v DE VILLIERS AND ANOTHER**, supra, where the appeal court upheld a delay of approximately one year in disclosing the rapes as an unreasonable factor against the acceptance of complainant's evidence.

- [10] It is established judicial practice for trial courts to apply cautionary rules to the testimony of young children and single witnesses and also to adopt a cautionary approach to complaints in sexual cases. The purpose of the cautionary rule, as stated by DT Zeffert in **The South African Law of Evidence** 2nd ed at p961, is to assist the court in deciding whether or not guilt has been proved beyond reasonable doubt.

[11] It is common cause that the complainant in this case was a single witness in regard to the commission of the offence. She was also a child witness and a complainant in a sexual case. The trial court had to treat her evidence with the required caution. In my view the trial court's treatment of the evidence in this case constituted misdirection on its part in that it did not apply the cautionary rule. It is not evident from its reasons for judgment that the evidence in this case was treated with the required caution.

[12] In **S v AVON BOTTLE STORE (PTY) LTD AND OTHERS** 1963 (2) SA 389 (A) it was stated that the best indication that there was proper appreciation of the risks is naturally to be found in the reasons furnished by the trial court. The trial court must demonstrate that it has in fact heeded the warning and that it was well aware of the dangers of wrong conviction by its treatment of the evidence. See also **R v MANDA** 1951 (3) SA 158 (AD).

[13] It is apparent from the trial court's reasons for judgment that it was aware that it ought to approach the complainant's evidence with caution. The trial court mentioned in its judgment that

“whilst I am cautious of the fact that the complainant herein is a single witness regarding the rape itself and also that she is a child witness ...”,

however it failed to fully appreciate the evidence of the complainant and in my view thus did not treat the evidence with the required caution. In **S v MGENGWANA & OTHERS** 1964 (2) 149 (CPD) the court observed as follows:

“The difficulty I have with this part of the magistrate's judgment is that although he states that it is necessary to approach the evidence with caution, there is nothing in his treatment of the evidence that indicates that he did adopt a cautious approach to this evidence”.

[14] There is nothing in the trial court's treatment of the evidence in this case that indicates it adopted a cautionary approach to the complainant's evidence. As contended by Mr Makhene, the

trial court mentioned the cautionary rule only once and in relation to the acceptance of the evidence of Thandeka as corroborating that of the complainant. In **R v MANDA**, *supra*, which dealt with the evidence of children, which is apposite in this case, the court at 163H commented that a brief treatment of the matter does not in itself reveal a full appreciation of the danger of relying upon the evidence of the children.

[15] The finding of this court is that in the course of its adjudication upon the guilt of the appellant in this case, the trial court misdirected itself by failing to apply the cautionary rule to the evidence of the complainant. This misdirection is of a sufficiently serious nature to constitute an irregularity leaving this court at large to reconsider the case against the appellant on the record.

[16] From the record it is apparent that the complainant's evidence was clear and satisfactory in every material respect. For a child of five years, she was a reliable and truthful witness and she did not contradict herself in any material way. She was also

able to positively identify the appellant. Immediately she was ready to tell her grandmother who the perpetrator was she named him and she also positively identified the house where the incident took place and where the appellant resided.

- [17] The cautionary rule requires that the court having warned itself of the danger inherent in the acceptance of such evidence, it must look for some safeguards like corroboration in order to reduce the risk of wrong conviction. *In casu* the trial court sought and found in the evidence of Thandeka what it considered to be corroboration of the complainant's evidence implicating the appellant in the offence. The evidence of Thandeka, that she saw appellant grab the complainant and walk away with her, served as that of an independent source that connected the appellant with the crime. She had no interest or bias adverse to the appellant and had no reason to lie about what she saw. She was an honest and truthful witness and did not even contradict herself in the witness box.

See **R v MOKOENA** 1932 OPD 79 and **R v MANDA**, *supra*, at 162E.

[18] The trial court also considered the probabilities of both the State's evidence and the defence's evidence. **S v SINGH** 1975 (1) SA 227 NPD at 228. It rejected as false the alibi defence of the appellant and also rejected the evidence of the defence's witnesses as being not reasonably possibly true. It was, in my view, entitled to do so, on the basis of the strong evidence of Thandeka that the prosecution had placed before it linking the appellant to the offence.

[19] After proper consideration of the evidence with the caution required in law, I am beyond all reasonable doubt certain that the story told by the complainant and as corroborated by Thandeka is the truth. I am therefore satisfied that a reasonable court properly informed would have inevitably convicted the appellant. The conviction is therefore confirmed.

[20] The crime, of which the appellant was convicted, falls within the provisions of the Criminal Law Amendment Act, 105 of 1997 as amended ("the Act"). In terms of section 51 (1) read with part I of schedule II, where a person is convicted of an offence of

rape and the victim is a person under the age of 16 years the sentence of life imprisonment must be imposed unless there are substantial and compelling circumstances which will justify the imposition of a lesser sentence.

[21] In determining whether there are substantial and compelling circumstances which justified the imposition of a lesser sentence the trial court, rightly so, considered the particular circumstances of the case in accordance with the well known traditional triad of factors relevant to sentence and concluded that there were no circumstances justifying a deviation from the prescribed minimum sentences. See **S v MALGAS** 2001 (1) SACR 469 (SCA). I do not agree with this finding.

[22] When considering all the factors of the case my opinion is that the imposition of a life sentence in this case was unjust and disproportionate to the offence. The trial court overemphasised the gravity of the offence and the interests of society and underplayed the personal circumstances of the appellant. In reaching this conclusion, the trial court was swayed by the fact

that the trial was being finalised four weeks before the activism period of violence against women and children.

[23] At the time of sentencing the appellant was 34 years of age. He was single and had a daughter of eleven years in grade 3. He was in a stable employment, having being employed by Garden Village since 1996. He had fixed property – a house. He maintained his daughter who was staying with her maternal grandmother because her mother passed away. He paid R200.00 per month towards the maintenance of the said child. Since his incarceration there was no one maintaining the child as the grandmother did not work and the maternal uncle who was helping had since passed away. He was a first offender and had been in custody for this offence since he was arrested on the 28 December 2006 i.e. twenty two months.

[24] It is worth noting that in the process of sentencing, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. In **S v VILAKAZI** 2009 (1) SACR 552 (SCA) the court commented that once it becomes clear that the crime is

deserving of a substantial period of imprisonment the questions of whether the accused is married or single, whether he has children or not, whether or not he is employed are in themselves largely immaterial to what that period should be. But they are none the less relevant in another respect.

[25] A material consideration, according to **S v VILAKAZI**, *supra*, is whether the accused can be expected to offend again. While that can never be confidently predicted, his or her circumstances might assist in making at least some assessment. In this case, as in the present case, the accused had reached the age of 30, *in casu* 32, without any brushes with the law. He was in a stable employment and apparently stable family and taking care of his daughter. These circumstances are not indicative of an inherently lawless character.

[26] I am satisfied that cumulatively considered the appellant's personal circumstances must be regarded as substantial and compelling justifying the imposition of a lesser sentence. I

therefore find that the trial court misdirected itself in finding that no substantial and compelling circumstances existed.

[27] The court made it clear in **S v MALGAS**, *supra*, that even when

“substantial and compelling circumstances are found to exist, the fact that the Legislature has set a high prescribed sentence as ‘ordinarily appropriate’ is a consideration that the courts are to ‘respect, and not merely pay lip service to’. When sentence is ultimately imposed, due regard must therefore be paid to what the Legislature has set as a ‘bench mark’.”

[28] I therefore consider the sentence of 25 years imprisonment as appropriate and just in the circumstances.

[29] In the circumstances I would make the following order:

1. The appeal succeeds as far as sentence is concerned.
2. The conviction stands.
3. The sentence imposed by the trial court is set aside and replaced by the following:

“25 years imprisonment antedated to the 24 October

2008”.

E.M. KUBUSHI, AJ

I concur and it is so ordered.

K.J. MOLOI, J

On behalf of the appellant:

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On behalf of the respondent:

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