

REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA****(GAUTENG DIVISION, PRETORIA)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: 27 May 2024

27/5/2024
DATE

SIGNATURE

APPEAL CASE NUMBER: A 259/2022

In the matter between:

JOHANNES HENDRIK VAN STADEN

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT: APPEAL

(The appeal was heard in open court but judgment be handed down by uploading the judgment onto the electronic file of the matter on CaseLines. The date of uploading onto CaseLines is deemed to be the date of the judgment)

Before: HOLLAND-MUTER J and STRIJDOM J:

[1] The appellant as arranged in the Gauteng Regional Court sitting in Pretoria North on the following charges:

1.1 Count 1: Contravention of Section 3 of the Sexual Offences Act, Act 32 of 2007 – Rape.

1.2 Count 2: Contravention of Section 5 of the Sexual Offences Act, Act 32 Of 2007- Sexual Assault.

1.3 Count 3: Contravention of Section 19(a) of Sexual Offences Act, Act 32 of 2007- Exposure or display of pornographic material.

1.4 Count 4: Contravention of Section 18 (2) (a) of the Sexual Offences Act, Act 32 of 2007- Sexual Grooming.

1.5 Count 5: Contravention of Section 24 B(1)(b) of the Films and Publications Act, Act 65 of 1996- Production of Child Pornography.

[2] The appellant was legally represented by Legal Aid South Africa during the trial. He pleaded not guilty to all the charges and elected to remain silent and no plea explanation was given. Legal Aid provided the necessary assistance to prosecute the appeal.

CONVICTION:

[3] He was convicted of charges 1 to 3 on 18 October 2021. The Magistrate correctly acquitted the appellant on charges 4 and 5. He was sentenced on 23 May 2022 as follows:

3.1 Charge 1: Life imprisonment.

3.2 Charge 2: 5 years imprisonment.

3.3 Charge 3: 1 year imprisonment.

3.4 In terms of Section 280(a) of the Criminal Procedure Act, Act 51 Of 1977 (the "Act"), the court a quo ordered that the sentences on charges 2 and 3 will run concurrently with the sentence on charge 1.

3.5 Being sentenced to life imprisonment in the Regional Court, the appellant has an automatic right to appeal the convictions and sentence in terms of Section 309(1)(a) of the Act.

[4] The State presented the evidence of the complainant, RL (via an intermediary, Me Postmus; Me YL, the complainant's mother; Warrant Officer Khoza and Dr Eugene Seller. The appellant was the only witness for the defence.

[5] The complainant, RL, was 7 years old when testifying during the trial. The presiding Regional Magistrate conducted a competency test on her and was

satisfied that, despite her age, she was competent to testify. She testified with the assistance of an intermediary, Me Postmus.

[6] RL's evidence summarised is that the appellant resided on the same small holding ("plot") as herself and her family. There were several other dwellings on the plot but she made no mistake as to the identity of the person who did the terrible things towards her. She referred to him as "Johan". She described how he inserted his finger into her private parts on several occasions, rubbing her private parts. He also requested her to pull down her panty to allow him to take a photograph of her private parts. She refused this request. She also declined his request to touch his private parts. She referred to her private parts as her "piepie" place (vagina).

[7] She further testified that the appellant showed her photos of naked men and women who were lying on top of each other and kissing. This was on a tablet in his possession. The tablet became a bone of contention later during his evidence.

[8] RL reported the matter to her mother. She described the events as '*painful and bad*'. The events took place outside his dwelling during the middle of the day. She testified that the appellant threatened her should she report the matter that her mother will be taken away from her. This was her reason for not reporting the matter earlier.

[9] She was adamant on the identity of the appellant as the person who did the awful things to her.

[10] Although cross-examined, her evidence remained intact and the Regional Magistrate found her a reliable witness. The Magistrate applied the necessary caution towards her evidence being a minor and single witness. The appellant

could not forward any reason why she would falsely accuse him. She did not elaborate or exaggerate her evidence to make it worse for the appellant. All in all there is no reason to fault the magistrate finding her an honest and reliable witness.

[11] The Magistrate correctly evaluated her evidence as minor child and single witness applying the necessary guidelines as in **S v V 2000 (1) SACR 453 SCA at 454 h; S v Jones 2004 (1) SACR 420 C at 427** and **S v Hammond 2004 (2) SACR 303 SCA 306 [9]**. The Magistrate held that, despite some unsatisfactory aspects in her evidence, she was a reliable and competent witness and that he could not find any reason not to accept her version.

[12] The evidence of her mother, Me YL was without any criticism of kind. She explained how the complainant reported the incident and what transpired at the hospital where the doctor examined the complainant. She confirmed that the appellant resided on the same small holding in a separate dwelling and that he indeed worked at the Nissan Fabric in Rosslyn. Cross-examination did not reduce her evidence's value at all. She confirmed the complainant's explanation as reported to her which was the same as testified to by the complainant.

[13] The evidence of Warrant Officer Khoza was so limited that the court found on reason not to accept it. It was merely regarding the arrest of the appellant and about his investigation of the matter.

[14] The evidence of Dr Seller, the doctor who examined the complainant after the alleged incident. He testified that although his examination was more than 72 hours after the incident, he could not exclude that any penetration of the private parts of the complainant occurred. His uncontested evidence was that healing of injuries of kind takes place within 48 to 72 hours.

[15] The appellant's version was a denial of any penetration of the complainant by him. He tried to shift the blame to unknown persons but was vague in this regard. He could not think of any reason why the complainant would accuse him but made critical mistakes regarding whether he had a tablet (electronic device) as described by the complainant. He seriously contradicted himself in his evidence whether he had a tablet or not during the incidents with the complainant. His version varied from not having a tablet at all to having a defective tablet at the time. The appellant could give no reason why he would be accused of such serious charges.

[16] The court deems it not necessary to repeat the evidence in any further detail. No reason could be found to interfere with the factual finding of the Magistrate. There is no material misdirection by the trial court in the evaluation of the evidence, considering that the trial court correctly applied the cautionary rules accepting the complainant's version and rejecting the appellant's version.

[17] When considering the two destructive versions by the complainant and the appellant, only one version can be accepted excluding the other version. It is also not expected for the State to close every escape avenue an accused may embark upon. The State only needs to produce evidence of such a high degree of probability that the reasonable court after consideration, will conclude that no reasonable doubt exists that the accused committed the offence charged by. **S v Pallo and Others 1999 (2) SACR 558 SCA at 582 [10]** and **R v Mlambo 1957 (4) SA 727 A at 738 A-C.**

[18] The Court is satisfied that there was no material misdirection by the court a quo and the convictions should be upheld. The court a quo addressed the multiple charges and convicted the appellant on only three charges.

AD SENTENCE:

[19] The imposition of a sentence is pre-eminently within the discretion of the presiding Magistrate. A Court of Appeal will only interfere with a sentence where it is satisfied that the court a quo's discretion was not judicially exercised. **S v Anderson 1964 (3) SA 494 AD at 495 C-E.**

[20] The Appeal Court will not intervene with the Magistrate's discretion when imposing sentence unless the sentence is striking or disturbing inappropriate different from what the Court of Appeal would have imposed. **S v Sadler 2000 (1) SACR 331 SCA,**

[21] The legislator deemed it appropriate to prescribe a minimum sentence with regard to offences of kind. A court may not depart from a minimum sentence unless substantial and compelling circumstances are placed before the court warranting departure thereof. **S v Malgas 2001 (2) SA 1222 SCA;**

[22] The offence committed by the appellant and the subsequent conviction thereof prior to the enactment of the Criminal LAW Amendment Act 32 of 2007 would have attracted a lesser sentence of life imprisonment on count one but it was deemed necessary by the legislator to amend the sentences applicable to sexual offences as a result of the escalation of sexual offences against children. The present matter clearly illustrates that perpetrators are not easily deterred hereby.

[23] An accused who wants to persuade a court to deviate from the prescribed minimum sentence should advance more than the usual mitigating factors. This is apparent from **Malgas supra**. A court will as starting point take the triad in **S v Zinn 1969 (2) SA 537 A**, consisting of the crime committed, the circumstances of the accused and the interests of society. These aspects have to be balanced and the court will also "cover" it with the mercy it requires.

[24] It is clear from the record that the Trial Court considered the personal circumstances of the appellant, inter alia his advanced age, his ill health, being a first offender, his financial difficulties, the disability of his own daughter and the impact thereof on his family and his place of residence.

[25] It was however aggravating that he showed no remorse, that the complainant was a child of six (6) years old when the offence occurred, the relationship between the appellant and the complainant and her family on the small holding, that the young victim was basically defenceless against the adult appellant, the breach of the trust of the victim by the appellant and that the appellant conduct was solely for his own pleasure.

[26] This court cannot fault the trial court for not finding any substantial and compelling circumstances to deviate from the prescribed minimum sentence with regard to the first charge. The trial court ordered that the sentences on the second and third charges be served concurrently with the life sentence which is the norm when imposing life imprisonment sentence.

[27] This court is satisfied that the imposed sentences are not shockingly inappropriate that it should interfere.

[28] The following order is made:

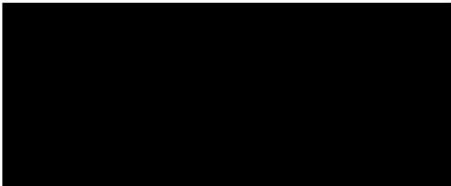
ORDER:

The appeal against conviction and sentence is dismissed and the conviction and sentence imposed by the Court a quo is confirmed.


J HOLLAND-MUTER 27/57 2024

JUDGE OF THE PRETORIA HIGH COURT

I agree.


J STRIJDOM

JUDGE OF THE PRETORIA HIGH COURT

APPEARANCES:

FOR THE APPLICANT: M G BOTHA

ATTORNEY AT THE PRETORIA LEGAL AID BOARD

FOR THE STATE: ADV M MARRIOTT

OFFICE OF THE DIRECTOR PUBLIC PROSECUTIONS

PRETORIA

Matter heard on 15 May 2024

Judgment handed down: 27 May 2024