

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

APPEAL NUMBER: A182/2023

In the matter between:

REINIER ANDRIES BOTHA

APPELLANT

And

THE STATE

RESPONDENT

HEARD ON: 20 MAY 2024

CORAM: NAIDOO, J et REINDERS, J

JUDGMENT BY: NAIDOO, J

DELIVERED ON: 28 MAY 2024

[1] The appellant was convicted on 12 April 2017 of Rape, in the Brandfort Regional Court, the allegation being that he raped a minor child more than once. He was sentenced to Thirty (30) years' imprisonment on 26 April 2017. The appellant approaches this court with the leave of the court a *quo*. The appeal lies against both his conviction and sentence. Mr JD Reyneke appeared for the appellant and Ms

S Tunzi for the respondent (the state).

[2] The Appellant's grounds of appeal against the conviction and sentence are, in essence, that the court *a quo* erred in:

2.1 failing to approach, with caution, the evidence of the complainant who was a single, child witness;

2.2 disregarding the contradictions in the evidence of the state witnesses, which cast doubt on whether sexual penetration or sexual assault occurred.

2.3 finding that the complainant was a credible and reliable witness regarding the act of penetration;

2.4 finding that the state proved its case against appellant, beyond reasonable;

2.5 With regard to sentence, in:

2.5.1 over-emphasising the seriousness of the offence and the interests of society, over the personal circumstances of the appellant;

2.5.2 over emphasising the two principles of sentencing, namely deterrence and retribution over the principle of rehabilitation;

2.5.3 not taking into account that the appellant spent two years in custody awaiting trial.

[3] The complainant's biological parents were divorced, and her mother became involved in a relationship with the appellant. They started to live together as a family, and the complainant's mother at some stage became pregnant with the appellant's child. While the complainant and her mother lived together with the appellant, it would appear that he began molesting the complainant. Early in 2014, when the

complainant went to visit her biological father during a weekend, she told him that the appellant was touching/playing with her genitals. She also indicated to her father that she was afraid of the appellant, as he would kill her. The father communicated this to the complainant's mother. Shortly thereafter, the mother found a blood-stained panty belonging to the complainant in the laundry.

[4] The mother's evidence was that she showed it to the appellant, who said she should take it to the social worker, which was done. There is no further evidence in this regard so it is unknown what became of the panty. At some stage the complainant was removed from the care of her mother and placed in a children's home. It was thereafter that the investigation into the complainant's allegations began. She was seen by a social worker as well as a doctor who examined her to determine if she was sexually abused. The social worker employed different tests and techniques to ascertain what the complainant was exposed to and also if she was indeed sexually abused. She assessed the complainant over seven sessions.

[5] In brief the evidence of the social worker, Ms MM Joubert, was that she ascertained during her assessment of the complainant that the appellant exposed his genitals to her, and told her that if she told anyone her would choke/strangle her. During the session using what she referred to as the castle technique, the complainant was asked who she wanted to live in her house, she said she her biological parents, her baby sister, her grandmother and herself inside the house while the appellant and a child called M[...] outside her house. I pause to mention that M[...] is a four year child who was also resident in the children's home at which the complainant was placed when she was removed from her mother's care. M[...] was allegedly also sexually abused. The complainant alleged (to the social worker) that M[...] also touched the complainant's genitals.

[6] The social worker's further evidence was that towards the end of her assessment, the complainant revealed to her that she had been sexually penetrated by the appellant. The description she gave is that he put his "wrong place" (a reference to his genitals) into her "wrong place", being a reference to her genitals. She said his "wrong place" was big and she felt pain. Later she noticed blood. Her mother was outside, talking to someone at the time. The social worker indicated that

when the complainant was narrating events that caused her trauma, she was able to see the pain, sadness and discomfort in her face, and sometimes the reluctance to talk. She further indicated that due to the complainant's age, she would not have been able to feign the kind of emotions she observed, if the complainant had been relating events, which she had heard and which happened to someone else. She was therefore satisfied that that complainant had related what in fact had happened to her.

[7] The doctor examined the complainant a few weeks after she was removed from her mother. She did not pursue the history of the matter, as the complainant merely told her that she had been touched. The doctor found warts on the genitals of the complainant, and testified that on its own and without knowledge of the circumstances of the matter, no conclusions can be drawn about sexual abuse, but penetration could not be excluded.

[8] The court *a quo* found the appellant's version not to be reasonably possibly true for a number of reasons. It found that it could not be ascertained from his evidence when he stayed with the complainant and her mother, that it is not clear when the complainant's grandfather passed away, as he had said that they were together when the grandfather passed away. The court concluded that he must have been living with the complainant and her mother when the grandfather passed away. The court also found that his version was fabricated especially with regard to the reason for removing the complainant from the care of her mother (which he said was due to alcohol abuse) and the issue of the protection order which was allegedly obtained against him by the complainant's mother. These aspects were never put to the state witnesses. It seems the court held the view, although not expressed in so many words, that the appellant attempted to create the impression that he did not spend much time with the complainant, so that he would not have had the opportunity to sexually molest her.

[9] In other respects too, my view is that he was an untrustworthy witness, for example, fabricating the version about the errant behaviour of the complainant (a six year old child). He alleged that she improperly sought male attention, saying that she would grab his genitals, and even did so to her late grandfather. This too was never

put to any of the state witnesses, especially as it would have been an important aspect of his defence. In my view, it appears that the trial court regarded the version of the appellant as being so improbable that it could be rejected as false, and correctly so.

[10] It is trite the state bears the onus to prove its case beyond reasonable doubt, while there is no such duty on the appellant to prove his case. Not only was the court essentially faced with two mutually destructive versions in this matter, but it also had to deal with the evidence of a single witness, who was a child. The task of analysing and evaluating evidence is vested in the trial court. An appeal court is limited in its ability to interfere with the trial court's conclusions, and may not do so simply because it would have come to a different finding or conclusion. The trial court's advantage of seeing and hearing witnesses places it in a better position than a court of appeal to assess the evidence, and such assessment must prevail, unless there is a clear and demonstrable misdirection. This is a principle that is well established in our law.

[11] In *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 the majority, per Greenberg JA and Davis AJA (Schreiner dissenting) said: "The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness and being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing their demeanour, but also their appearances and whole personality. This should not be overlooked." A similar view was adopted in *S v Pistorius* 2014 (2) SACR 315 (SCA) par 30, which cited, *inter alia Dhlumayo* with approval:

"It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 706; *S v Kebana* [2010] 1 All SA 310 (SCA) para 12. It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere

of the trial. Absent any positive finding that he was wrong, *this court* is not at liberty to interfere with his findings."

[12] The trial court, in evaluating the evidence before it, was eminently aware that the complainant was a single, child witness and reminded itself of the caution to be exercised when dealing with such evidence. The trial court cited the relevant case law which set out guidelines for the admission of the evidence of a single witness and a child witness, upon which a court can convict an accused person. The learned authors *Du Tait et al* in the *Commentary on the Criminal Procedure Act* introduce their commentary on section 208 of the CPA thus:

"The danger of relying exclusively on the sincerity and perceptive powers of a single witness has evoked a judicial practice that such evidence be treated with the utmost care. This practice seems to have originated in the following remarks made by De Villiers JP in R v Mokoena 1932 OPD 79 at 80:

*'Now the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by [section *256], but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect. Thus the section ought not to be invoked where, for instance, the witness has an interest or bias adverse to the accused, where he has made a previous inconsistent statement, where he contradicts himself in the witness box, where he has been found guilty of an offence involving dishonesty, where he has not had proper opportunities for observation, etc.'* (RS 67, 2021 ch24-p1). [*Section 256 of the old CPA 56 of 1955 was the predecessor of the current section 208]

[13] The guidelines set out in *Mokoena* have solidified the manner in which courts approach the evidence of a single witness. It has become trite that the final evaluation of the evidence of a single witness can rarely be made without considering whether such evidence is consistent with the probabilities. Where there is even a small measure of corroboration, the court is no longer dealing with the

evidence of a single witness, and such corroboration renders the accused's version less probable on issues in dispute. Courts generally employ corroboration as a safeguard against the dangers of relying on the evidence of a single witness. [See *S v Teixeira* 1980(3) SA 755 (A); *S v Letsedi* 1963(2) SA 471 (A); *S v Gentle* 2005(1) SACR 420 (SCA)].

[14] In the present matter, the complainant was six years old when the incidents happened. The court correctly found that the complainant was consistent in her version, as relayed to her father, the social worker and the medical practitioner who completed the J88 medical examination form. The issue was raised about the complainant reporting that her genitals were touched and/or played with. The social worker testified that the complainant was too young to fabricate the events she conveyed to her. The doctor testified that at six years old, the complainant would not have had the kind of experience to know the difference between touching and penetration. The complainant's narration to these two persons as well as her father, in my view, provides the corroboration the court relied on to make the credibility findings in respect of the complainant. The bloodied panty is another important aspect of corroboration, which the court took into account. The complainant had said that when the appellant had penetrated her sexually, she noticed there was blood. It appears that it was at this time that the mother found the panty with the blood on it, lending credence to the complainant's version.

[15] The trial court also evaluated the evidence of the appellant in the light of the probabilities of the case as well as the version of the complainant, and found that his version was not credible. This was especially so in view of the version of complainant, where the trial court, cited with approval a Zimbabwean case and agreed with that court's dictum, which appears to have held a similar view to the court in the matter of *S v V* 1995(1) SACR 22 (O), that "children do not fantasise over things that are beyond their own direct or indirect experience". I mention that Mr Reyneke argued that the complainant repeatedly reported that she had been touched, hence creating doubt that there was penetration. While he conceded that the appellant had done "something" to the complainant, it cannot be said with certainty that he had sexually penetrated the complainant. I do not agree.

[16] In view of what I said in respect of the social worker's and the doctor's evidence, I am in agreement with the court's assessment of the quality of the complainant's evidence, as it was clear that a six year old child has neither the intellectual development nor the mental sophistication to fabricate such a detailed version as to what the appellant had done to her. Mr Reyneke argued that the court did not deal with the contradictions in the evidence of the state witnesses. The court evaluated all the evidence, and in my view, the fact that the court did not specifically articulate that it did not consider such variances to be contradictions, does not amount to a misdirection nor does it vitiate the judgment. The manner in which the court evaluated the evidence indicates that it did not consider such contradictions to be material. This the court *quo* specifically said at p229, lines 3-6 of the record - *"The witnesses for the state were good credible and reliable witnesses. Even though discrepancies (sic) they were not material in order to disregard the evidence in totality. I could not detect any motive or reason to falsely implicate the accused either."* The court's rendering of a guilty verdict cannot be faulted, and consequently the grounds of appeal in respect of the conviction, which I set out earlier in this judgment, cannot be sustained.

[17] With regard to sentence, it is well established that sentencing is a matter which is within the discretion of the trial court. It is trite that an appeal court will only interfere with a sentence if the trial court misdirected itself in imposing sentence or its discretion is vitiated by irregularity, or if the sentence is unreasonable, unjust, or disproportionate to the offence. This trite principle has been well settled in our law, and was succinctly enunciated approximately 50 years ago in the case of *S v Rabie* 1975(4) 855 (A) at 857, where Holmes JA said:

"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 subsequently re-iterated in the much-quoted case of *S v Malgas 2001(1) SACR, 469 (SCA) at, 478 para12*, where the court remarked that:

"...A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh...".

[18] In this matter, the appellant's personal circumstances, as placed on record by his attorney, are that he was a 26 year old, unmarried man who was living with his mother at the time of his arrest, and has a three year old daughter with the complainant's mother. He was, at the time of his arrest, employed and earning a salary of R6 500.00 per month. His mother is very sickly. The appellant spent two years in custody awaiting trial. In this regard, I mention that Mr Reyneke argued that this court should sentence the appellant afresh. He conceded that the major part of the two years that the appellant spent in custody awaiting trial, was due to his bail being forfeited to the state. He also argued that the appellant has served approximately five years of his sentence, which he requested the court to take into account in sentencing the appellant

[19] The trial court also undertook a comprehensive examination of the case law relevant to sentencing and applied the established principles of sentencing in its consideration of the appellant's personal circumstances. The court found that substantial and compelling circumstances, justifying a departure from imposing the

prescribed minimum sentence of life imprisonment, were present. The trial court's comprehensive analysis of the various factors relevant to sentencing in this matter cannot be faulted, and I am unable to find any material misdirection in the imposition of the sentence of Thirty (30) years' imprisonment in this matter.

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

20.1 The appeal in respect of the conviction and sentence is dismissed

20.2 The conviction and sentence imposed on the appellant are confirmed.

NAIDOO, J

I concur.

REINDERS, J

On behalf of appellant: Mr JD Reyneke
Instructed by: Legal Aid South Africa
Bloemfontein Local Office

On behalf of respondent: Ms S Tunzi
Instructed by: The Office of the DPP
BLOEMFONTEIN