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

CASE NO: A307/2022

DOH: 30 MAY 2024

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

SIGNATURE

DATE: 12/8/2024

In the matter between:

L[...] S[...] M[...] M[...]

APPELLANT

and

THE STATE

RESPONDENT

This Judgment was handed down electronically and by circulation to the parties' legal representatives' by way of email and shall be uploaded on caselines. The date for hand down is deemed to be on 12 August 2024.

JUDGMENT

Mali J

[1] *“The complainant’s youth, neediness and vulnerability, on the one hand, and the situation of quasi-familial trust, authority and subordination in which she found herself, on the other, cast light on the rest of her evidence. The phenomenon of domestic sexual predation required especial understanding appropriate to its distinct characteristics, failure to appreciate properly how feelings of guilt, complicity, fear and shame might in a domestic situation operate to entrap a victim could lead to a failure of justice.”*¹

[2] The above findings by Cameron JA as he then was, bear relevance in the present appeal. The appellant Mr L[...] S[...] M[...] M[...], who was convicted and sentenced for raping his two minor daughters as well as sentenced for the sexual assault of his niece. He is appealing both conviction and sentence.

[3] The appellant was sentenced on 18 March 2022 by the Benoni Regional Court. On the two counts of rape, he was sentenced to life imprisonment per count, and 10 years imprisonment for sexual assault. All counts were ordered to run concurrently for the purposes of serving the sentence. He now appeals in terms of section 10 of the Judicial Matters Amendment Act 42 of 2013². (Automatic right to appeal).

[4] The facts giving rise to the sentencing of the appellant relate to incidents that happened over a period of time. From the grounds of appeal the common thread is that in all the counts, the complainants were single witnesses. This is not true, the

¹ S v M 2006 (1) SACR 135 (SCA) para 77 – 80.

² Section 309 of the Criminal Procedure Act, 1977, is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph: “(a) Subject to section 84 of the Child Justice Act, 2008 (Act No. 75 of 2008), Any person convicted of any offence by any lower court (including a person discharged of conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act No.105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order a contemplated o section 302(1)(a).”

witnesses were “child witnesses” not single witnesses as will be shown below. In *Woji v Santam Insurance Co Ltd*³ it is held

“The question which the Trial Court must ask itself is whether the young witness’s evidence is trustworthy. Trustworthiness depends on factors such as the child’s power of observation, his power of recollection and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears ‘intelligent enough to observe’. Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion ‘to remember what occurs’ while the capacity of narration or communication raises the question whether the child has the capacity to understand the question put, and to frame and express intelligent answers . . . there are other factors . . . does he appear honest – is there a consciousness of the duty to speak the truth?”

[5] In respect of the complainant in count 1, on 25 December 2015 the appellant summonsed the complainant who was 11 years old at the time to the shack known as the laundry room. The appellant instructed her to sit on his lap, she obliged and the appellant touched her buttocks. She felt uncomfortable and decided to run away. Whilst running she met her aunt Ms A[...] M[...] who was referred to as A[...] T[...] and reported the incident to her.

[6] The appellant’s argument is that the complainant was a single witness, her evidence was contradictory therefore there was no basis for conviction. From the record it is clear that three witnesses testified, the complainant, A[...] T[...] and Ms L[...] M[...].

[7] The appellant decries immaterial contradictions arising from the evidence. There was an issue about whether the appellant was sitting on the bucket or a sofa when the incident occurred. The complainant conceded that it was possible that the appellant was sitting on something else other than a sofa. It was clarified during the

³ 1981 (1) SA 1020 (A)

trial that the laundry room was later furnished with a sofa and that the complainant testified 5 years ago, since the incident.

[8] The second witness, A[...] T[...] corroborated the complainant's evidence, that she witnessed the appellant's misdemeanour. Her testimony was that she met the complainant on her way from the laundry room and she immediately reported to her. She approached the appellant who dismissed her by telling her she was overreacting as nothing had happened. A[...] T[...] then reported to her sister Ms L[...] M[...], the third witness. Ms M[...] confirmed same and she testified that she confronted the appellant.

[9] It is trite⁴ that contradictions per se do not lead to the rejection of a witnesses' evidence, they may be indicative of an error. Not every error made by a witness affects his credibility. The Appellant's complaint about whether he was seated on the bucket or sofa is immaterial. The trial court correctly accepted the evidence of the complainant.

[10] In respect of counts 2 and 3, that of raping his daughters the appellant complains that the trial court should not have accepted their evidence because they were single witnesses. His daughter, the complainant in count 2 testified that the appellant raped her over time since she was young.

[11] She recalled the incident when her mother was away attending the initiation school. The appellant demanded to share a bed with her. The appellant had an argument with his mother (the grandmother to the complainant) about the complainant and her sister's sleeping arrangements. The grandmother had proposed to sleep with both complainant and her sister in the dining room floor. She resisted and ultimately gave in.

[12] When they got to the bedroom the appellant instructed the complainant to take off her under wear and the night dress which she did. He then instructed her to get on top of him and hug him to which she did as she was told. He then opened her

⁴ S v Mkohle 1990 (1) SACR 95 (A)

legs and inserted his penis into her vagina and instructed her to make bumpy movements which she complied.

[13] The following morning, he told her not to go to school. When she was about to tell her grandmother about the incident the appellant appeared from his bedroom and looked at her in an angry manner as if he was going to hit her. She refrained from telling her grandmother and went to play outside.

[14] During the same night she refused to share the bed with the appellant as she was scared of him and she told him as such. The appellant threatened to hit her in the event she told anyone. She believed him as he used to hit her with a sjambok; as a result, she joined her father in bed. In this instance the appellant inserted his penis into her vagina from behind, raping her. She kept on stopping him as she was in pain, but the appellant refused and continued raping her. She did not tell anyone for a long time until her sister (the complainant in count 3) spoke about her ordeal of being raped by the appellant. This is after she had attempted suicide and was hospitalised, at that time the appellant was no longer living with them.

[15] The appellant takes an issue with the fact that no medical report confirmed that the complainant in count 2 was ever raped. This arises from the evidence of the complainant's mother that she was taken to various clinics for painful vagina when she was between 8 and 11 years old. The medical staff unfortunately did not pick up that she was raped. The omission cannot be attributed to the child or even the mother who would not have thought about it. The appellant says since there is no medical evidence corroborating the second complainant's evidence the trial court misdirected itself.

[16] The complainant's mother corroborated the fact that she was missing school. This supports the complainant's version that the appellant would stop her from going to school, therefore lends credibility to her version. The similar fact evidence by the complainant's mother Ms L[...] M[...] backs up the complainant's evidence in many ways. Ms M[...] testified that she attended the traditional healing school and left the children with the appellant and their grandmother, that there was a sjambok in the house and that the appellant would always discourage the complainant from

attending school. Over and above all Ms M[...] is the one who attended to her when she complained about vaginal pains. The trial court was correct in convicting the appellant.

[17] In respect of the complainant in count 3 (the appellant's daughter), the trial court accepted her evidence and the medical evidence pointing to the long-term sexual assault. The complainant testified that the appellant started raping her when she was 8 years old. Although she could not remember other incidents very well, she testified about two occasions.

[18] One incident is when the complainant was 13 years old when she was about to go to school, the appellant summonsed her to his bedroom. He instructed her not to attend school. He directed her to get under his blankets and told her to undress. Having complied he got on top of her and inserted his penis into her vagina.

[19] Another incident she recalled was when her mother was attending the initiation school. She was watching television at night when the appellant joined her. He offered her a cigarette whilst telling her that he knew that she smoked cigarettes. He suggested that it was better that they smoke together and told her to undress and sit on top of him. She did as she was told, and whilst she was sitting on top of him the appellant forced his penis into her vagina, at the same time he was touching her breasts. The appellant warned her not to tell her mother. The reason being that her mother was suffering from heart problems, she would die of a heart attack if she found out.

[20] The straw that broke the camel's back was the incident of 5 August 2017 when the appellant wanted to rape her again. The appellant called the complainant to the outside shack telling her that he missed her. She complied, when they got to the shack he instructed her to undress, an instruction she refused. The appellant went on to aggressively tore the pair of tights she was wearing. She managed to push him away as he was drunk and she ran away. The following day she drank poison in an attempt to kill herself because she could not endure being raped again. She was taken to hospital where she spilled the beans about the multiple rapes she

suffered in the hands of her father. The appellant was later arrested. The complainant in count 1 and 2 also got the courage to report the appellant.

[21] The appellant's grumble is that the trial court did not take into consideration the complainant's conduct of past sexual activity and that she once got pregnant. He further denounces the evidence from the medical evidence. His argument is that it could not be concluded that it is associated with him and should not have been relied on for his conviction.

[22] Section 227(2) of the Criminal Procedure Act 51 of 1977 as amended⁵ prohibits the adducing of evidence of sexual experience unless certain provisions are met. In the present case there is no evidence that the appellant followed the procedure laid down in section 227(2).

[23] Furthermore, the common factor in the evidence of the complainant in count 2 and 3 is that some of the rapes occurred when their mother attended the initiation school, something corroborated by their mother, Ms L[...] M[...]. Further that both complainants would be raped in the morning before going to school or told not to attend school. There is no evidence that all the complainants discussed what happened to them amongst themselves. However, from the evidence it is apparent that the appellant followed a similar *modus operandi*.

[24] The trial court's finding that the appellant failed to establish a reason why he would be falsely implicated is indeed a misdirection. It is trite that the onus rests upon the state to prove the case against the accused. However, taking into consideration the evidence in totality this finding does not taint the conviction of the

⁵ (2) No evidence as to any previous sexual experience or conduct of any person against or in connection with whom a sexual offence is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no evidence or question in cross examination regarding such sexual experience or conduct, shall be put to such person, the accused or any other witness at the proceedings pending before the court unless-

(a) the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such question; or

(b) such evidence has been introduced by the prosecution.

appellant. The trial court did not misdirect itself in convicting the appellant for the rape of the complainant in count 3.

Sentencing

[25] It is trite law that punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances. In *S v Malgas*⁶ the Court intimated as follows:

“The Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment as the sentence that should ordinarily in the absence of a weighty justification be imposed for listed crimes in the specific circumstances. Unless there are and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe standardized and consistent approach from the courts. These sentences are not to be departed from lightly and for flimsy reasons.”

[26] In *S v Matyityi*⁷ the court held that:

“There was all too frequently a willingness to on the part of the courts to deviate from the sentences prescribed by the Legislature for the flimsiest of reasons. Court had a duty, despite any personal doubts about the efficacy of the policy, or aversions to it, to implement those sentences, Parliament had ordained minimum sentences for certain specified offences and they were to be imposed unless there were truly convincing reasons for departing from them, Court were not free to subvert the will of the Legislature by resort to vague, ill-defined concepts such a relative youthfulness or other equally and ill-founded hypotheses that appeared to fit the sentencing officer’s notion of fairness.”

[27] The appellant’s submission is that the minimum sentence of life imprisonment is harsh. Furthermore, the court must find that there are substantial and compelling

⁶ 2001 (1) SACR 469 (SCA)

⁷ 2011 (1) SACR 40 (SCA) at para 41(g),

circumstances. The appellant was 42 years of age at the time of the commission of the offence. He was married with six children including the two complainants. He was not formally employed although he is a qualified artisan. The court must also consider that the appellant spent 4 years in custody awaiting trial.

[28] In my view when someone's age is thrown to the court without submitting how it impacts the sentencing, it becomes irrelevant. The appellant's age militates against the considerations for deviation from the prescribed minimum sentences. The very fact that at his mature age he decided to rape his children and sexual assault his niece in the absence of his wife is the reason for the court to seriously consider the sentencing.

[29] Although he was married with six children, on his own admission he was not supporting them as he was not working. Again, the court is left wondering as to what to do with this information without submissions on the sentencing implications.

[30] With regards to the time he spent in custody awaiting trial in *S v Radebe*⁸ it is held that *"the test was not whether on its own that period of detention constituted a 'substantial and compelling circumstance', but whether the effective sentence proposed was proportionate to the crime or crimes committed: whether the sentence in all circumstances, including the period spent in detention prior to conviction and sentencing, was a just one."*

[31] From the above it is apparent that the period spent in custody cannot be substantial and compelling on its own. The test is whether the sentence in all circumstances taking into consideration the crimes committed is a just one.

[32] What mercy does the merciless father deserve if he is convicted of repeatedly raping his daughter, worse a minor? If he rapes the second minor daughter in the same manner as the first, is he entitled to any clemency? Over and above all how is the court expected to sentence the father of two minors convicted of sexual assault

⁸ 2013 (2) SACR 165 (SCA) at 14

for his niece (a minor too), the cousin of her minor daughters. What is a just sentence?

[33] The answer to the above is straightforward, “no deviation from the prescribed minimum sentences.” Almost on daily basis our courts condemn the gender-based violence against women and children, but it does not look like the perpetrators take this killer scourge seriously. One does not need to be an expert to understand that the scourge kills the emotions; it kills the dreams; it kills the future of the victims etc.

[34] In this case there is only one option, that the perpetrator must be sentenced accordingly. The appellant betrayed the father- daughter and uncle-niece trust in a family setting. The appellant is an old man who even when his own mother saw through him contravened the law and defied the morals. His mother made it clear that the girls would sleep with her on the floor, he forced his way to rape his own child under the same roof with his mother. Not only did he rape one, but two in the bed he shared with the complainants’ mother.

[35] He had no mercy towards his children as he went on to destroy their future. After raping them he instructed them not to attend school for his own selfish reasons. He feared that he would be reported. He did not care about the education of his children who were brave enough to desire to go to school even after such a violation.

[36] Having regard to the above it is found that the trial court did not misdirect itself in convicting and sentencing the appellant. In the result the following order is granted:

ORDER

1. The appeal is dismissed.

N P MALI
JUDGE OF THE HIGH COURT

I AGREE
BALOYI-MERE
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

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