

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED: YES/NO

27 SEPTEMBER 2024

DATE

SIGNATURE

Case No: A245/2023

In the matter between:

VICTOR CELEBUSA SHONGWE

APPELLANT

and

THE STATE

RESPONDENT

APPEAL JUDGMENT

FRANCIS-SUBBIAH J:

[1] This is an appeal against conviction and sentence on a charge of rape of a minor child. The provisions of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007 find application. The effective sentence of life imprisonment was imposed in the Regional Court of Tsakane. The appellant has an automatic right of appeal in terms of section 309 of the Criminal Procedure Act 51 of 1977 read with section 10 and 43(2) of the Judicial Matters Amendment Act 42 of 2013.

[2] The issue in dispute is whether the State produced sufficient evidence to prove beyond reasonable doubt that the appellant raped the child complainant. In particular, it is submitted that the State failed to prove the identity of the person that raped the child on the 14th of November 2020. It further questions whether the court *a quo* was correct in rejecting the version of the appellant as not reasonably possibly true. The appellant's version throughout the trial was that he did not meet with the child on the day of the offence and that he did not rape her. It is further argued that the court relied on the hearsay evidence of the mother of the child. At all times the appellant was legally represented by Ms. Magayi from Legal Aid South Africa.

[3] The State concedes that evidence was tendered by the mother of the child. However, the State submits that the so-called hearsay evidence was not a material factor that exclusively contributed to the conviction of the appellant. The undisputed DNA evidence of the State was material in the conviction. The evidence of the child's mother provided the context to the assault of the child complainant.

[4] The so-called hearsay evidence related to the name of the person who injured her, namely Mfundisi (Pastor). The evidence of the mother was that the child told her that "*the Pastor inserted his induku into her private part*" by demonstrating with her hand and her body movements. This is relevant because the child has a limited ability to verbally express herself due to her mental condition. It is this that rendered her incompetent to testify on the aspects that her mother testified about. The psychologist report indicated that the child was not fit to testify due to her limited expressive and responsive ability but she was able to demonstrate to her mother what the appellant did to her and how.

[5] In **S v Skepe** 2019 (2) SACR 349 (ECP) the trial did not get off the starting blocks because the child was unable to give evidence. Upon conducting the competency test the presiding Judge found the child could not distinguish between truth and falsity and was therefore held not to be a competent witness. The child, being the only witness with no other collaboration, could not tell her story and the accused was found not guilty and discharged. In balancing the rights of the accused and the victim the court correctly emphasized that a court will sometimes seek collaboration which implicates the accused, before it will convict beyond reasonable doubt.

[6] Collaborating factors can assist the court in the assessment. Collaboration can be provided by oral evidence, documentary or real evidence including scientific DNA analysis. In the present matter the trial court indeed relied on collaboration. The child's mother testified about what she personally observed when the child demonstrated to her what had happened. On this point the appellant complains that the trial court in

accepting the evidence of the complainant relied on circumstantial and hearsay evidence.

[7] Section 3(4) of the Law of Evidence Amendment Act 45 of 1988 defines hearsay as 'evidence whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence'. In the context such a demonstration by the child does not constitute hearsay evidence because the child's mother testified about what she saw or witnessed as demonstrated to her by the child herself. No probative value, either, was derived from this evidence of the child's mother in relation to the identification of the perpetrator. Most importantly because the corroborative, independent and unchallenged DNA results linked the appellant to the rape of the child. The mother's evidence provided the context surrounding the offence.

[8] The chain of custody of DNA evidence and the analysis thereof was carried out with meticulous care and there were no missing links in the evidence. The doctor completed the J88 form confirming that there was indeed penetration of the child. The examination was conducted within 24 hours and fresh injuries were noted by the doctor. The soft tissue injuries were consistent with the history given. DNA samples were taken by the doctor from the child and then also when the appellant was arrested DNA samples were taken from him. The DNA forensic analysis confirmed the appellant's DNA was found inside the child. The appellant's legal team accepted the forensic results and did not dispute it.

[9] The appellant could not explain how his DNA was found in the child. For this reason, the version of the appellant, that he was asleep, and that the child did not come to his place on that day was not reasonably possibly true. The DNA evidence proved beyond reasonable doubt that the child was raped by the appellant.

[10] It follows that the onus on the State is not to prove the case against the appellant beyond all doubt but beyond *reasonable* doubt and nothing more. In this regard in ***Miller v Minister of Pensions*** 1947 (2) ALL ER 372 on 373H the court remarked as follows:

“It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible’, but not in the least probable’, the case is proved beyond reasonable doubt.”

[11] The learned magistrate in her evaluation of the evidence established that the appellant knew the complainant and was fully aware of her mental condition. She was an 8-year-old minor child and was well known to the appellant. She often visited the appellant place to play with her peers. She found no contradictions in the evidence of the state witnesses and together with the DNA evidence found that the State had proved its case against the appellant beyond reasonable doubt. Even though the child did not testify as to what happened, the circumstantial evidence confirms that the child

was indeed raped on that time on that date. The child had pointed out the appellant to her mother by using her method of communication, "by entering his room." This is coupled with the DNA report confirming the appellant's DNA found inside the child which confirms that the appellant did indeed rape the child on that date. Due to her age and mental disability, she was incapable of consenting to sexual penetration.

[12] I find no misdirection in the magistrate's evaluation of the evidence and the conclusions reached. The conviction of rape is hereby confirmed.

The Appropriate Sentence

[13] The power of the appeal court to interfere with a sentence is constrained. In **S v Rabie** 1975 (4) SA 855 (A) the court held that the imposition of a sentence is solely within the discretion of the trial court and that a court of appeal will not interfere with that discretion unless it is satisfied that the trial court exercised its discretion unreasonably. In an evaluation of judicial discretion an appeal court may not interfere with a sentence merely because it would have imposed a different sentence than the one imposed by the trial court in **S v Skenjana** 1985 (3) SA 51 (A). Nevertheless, a striking disparity between the sentence and that which the appeal court would have imposed had it been the trial court remains an element for interfering with the trial court's sentencing discretion as it was held in **Director of Public Prosecution KZN v P** 2006 (1) SACR 243 SCA. Additionally, the power of the appeal court to interfere with a sentence extends to a finding of irregularity and misdirection of sentencing powers.

[14] Further in **S v Pillay** 1977 (4) SA 531 (A) at 535E-F, the court held that:

“...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....”

[15] In determining an appropriate sentence the ideal outcome is to achieve a proper balance between this triad as it was entrenched in **S v Zinn** 1969 (2) SA 537 (A), namely: the nature of the crime, the personal circumstances of the appellant and the interests of society.

[16] It remains a question in this matter whether to deviate from the minimum sentences prescribed by the legislator for crimes against children who remain one of the most vulnerable members of a community. Parliament has made it clear that minimum sentences for specific offences such as rape are to be imposed. Courts are therefore obliged to impose these sentences unless they are truly convincing reasons for departing from them.

[17] The offence is serious as the legislature prescribes life sentence be ordinarily imposed for the commission of rape. In **S v Malgas 2001 (1) SACR 469 (SCA)** at para 8, the Supreme Court of Appeal held:

“... In short, the Legislature aimed at ensuring a severe, standardized, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence, the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations are to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.”

[18] It was submitted that the magistrate erred by not finding substantial and compelling factors to depart from the prescribed life sentence and the imposed sentence is shockingly inappropriate. That considering the factors cumulatively may be construed as substantial and compelling factors which required a deviation from the prescribed life sentence.

[19] The first factor is rehabilitation. It is submitted that life sentence imposed will not aid the appellant's rehabilitation. Secondly, he was 24 years old at the time of the offence. Thirdly he is a first-time offender and fourthly he spent 2 years and 8 months in prison awaiting trial. Taking these factors cumulatively into account, it was argued that the magistrate failed to take cognizance of the effect which long term imprisonment would have on the appellant. In particular, that he will not be rehabilitated if he is incarcerated for such a lengthy time. Finding support in **S v**

Skenjana 1994 (2) SA 163 (W))168 E-G where the court expressed its opinion as follows:

"As I observed in *S v Khumalo and Another* 1984(3) SA 327(A) at 331, it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner. Wrongdoers "must not be visited with punishments to the point of being broken." (per HOLMES JA in *S v Sparks and Another* 1972(3) SA 396(A) at 410G).

[20] Correctional supervision is designed to support the appellant in his rehabilitation. It is within the appellant's power to choose to rehabilitate if he desires. Education and skills development are available to the appellant during his incarceration. The sentencing court took this factor into account. The remaining factors relating to the appellant's youth, time spent awaiting trial and being a first-time offender was also addressed but did not sway the trial court in deviating from the prescribed minimum sentence.

[21] Considering these factors in the sentence the Magistrate took into consideration the mitigating factor that the appellant is a first-time offender. She found that the minimum sentence was well considered and thought out and it is designed to apply to a first-time offender. Neither was his age a convincing reason to depart from the minimum sentence. The Magistrate considered youthfulness to be relevant when an offender is below the age of 18. In these circumstances what is aggravating is the appellant was a 24-year-old man at the time of the offence when he raped an 8-year-

old child. No reasons were submitted why he committed such a heinous crime. He was fully aware of her mental condition and inability to express herself verbally. She was a neighbour and well known to the appellant.

[22] In considering the awaiting trial incarceration the Magistrate considered that the appellant was arrested during the Covid-19 pandemic. The impact of the pandemic created backlogs for the entire criminal judicial system that contributed to the appellant being in custody for 2 years and 8 months. This however is a neutral factor.

[23] In the case of *S v Makgopa and Others* 2023 (2) SACR 208 (GJ) Wilson AJ said the following:

“I would ordinarily agree that the least that I should do is give the accused persons credit for the period of their pre-trial incarceration. However, it seems to me that, where, as in this case, the ordinary statutory penalty is life imprisonment, the law does not recognise that pre-trial incarceration is, in itself, a substantial and compelling circumstance, or a basis on which to reduce the non-parole period that attaches to the penalty.”

[24] In the context of the present matter, similarly this factor is in itself; not a basis to reduce or to deviate from the statutory penalty of life imprisonment.

[25] The best interests of the child remain paramount. Section 28 of the Constitution of 1996 demands that the rights of children must be protected. They must be protected

from abuse, maltreatment or degradation. The appellant was an elder to the child and had the responsibility to protect and take care of a child living in his neighborhood. Instead, he abused the child, by committing an opportunistic crime against her due to her inability to express herself. He abused the child's trust and the trust of her family. The child's mother trusted him and those residing at his place, by allowing her child to play at their home with her peers.

[26] It was submitted that the appellant is ashamed on the betrayal he brought on the child and her family as they were close. The sentencing court, however, reasoned that his shame is a result of regret and not remorse. She found there were no factors that indicated the appellant's remorse for his actions and therefore concluded that the appellant did not appreciate the consequences of his actions.

[27] The sentencing court held that the seriousness of the offence outweighed the personal circumstances of the appellant.

[28] Even at this stage, the appellant does not advance any mitigating factors which sway this appeal court to deviate from the prescribed sentence.

[29] I relate to the insightful dictum in **S v Jansen** 1999 (2) SACR 368 (C), where Davis J appropriately stated:

“Rape of a child is an appalling and perverse abuse of male power it strikes a blow at the very core of our claim to be a civilized society the community is

entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure. It is actually terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short our children must be able to develop their lives in an atmosphere which behaves any society which aspires to be an open and democratic one based on freedom, dignity and equality the very touchstones of our Constitution".

[30] Life imprisonment is appropriate. The imprisonment of the appellant should sufficiently rehabilitate him if he chooses to participate in the rehabilitation programs. This sentence would also restore the community's faith in the courts to deal harshly with people who commit offences like this. It follows that the Magistrate in exercising her sentencing discretion took into account the factors necessary to impose an appropriate sentence and there was no misdirection in her sentencing powers. In the circumstances the statutory minimum sentence imposed by the Magistrate is confirmed. It effectively serves the purpose of the punishment and has the necessary rehabilitative, redistributive, deterrent and preventative objectives.

[31] In the result:

31.1 The appeal is dismissed.

32.2 The conviction and the sentence imposed by the court *a quo* on the appellant is hereby confirmed.



R FRANCIS-SUBBIAH

JUDGE OF THE HIGH COURT,

PRETORIA

I agree,



W AMIEN

ACTING JUDGE OF THE HIGH COURT,

PRETORIA

APPEARANCES:

COUNSEL FOR THE APPELLANT: ADV. S SIMPSON

INSTRUCTED BY : LEGAL AID SOUTH AFRICA, PRETORIA

COUNSEL FOR THE RESPONDENT: ADV. M MASILO

INSTRUCTED BY : DPP, PRETORIA

HEARD ON : 31 JULY 2024

JUDGMENT DELIVERED ON : 27 September 2024

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties.

The deemed date and time for the delivery is **27 September 2024**.