

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: A136/2024

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE: 2024-10-14

SIGNATURE

In the matter between:

SIMON MAHLANGU

Appellant

and

THE STATE

Respondent

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 14 October 2024.

JUDGMENT

POTTERILL J

Introduction

[1] The appellant, Mr Simon Mahlangu, is appealing against his convictions on two counts of rape in terms of the Sexual Offences and Related Matters Amendment Act, 32 of 2007 and one count of assault with the intent to do grievous bodily harm. The two counts of rape relate to two incidents wherein the same complainant was respectively 8 and 10 years old at the time. The assault charge relates to the mother

of this child. The appellant was sentenced to life imprisonment on counts one and two and cautioned and discharged on count 3. The appellant is also appealing against the two sentences of life imprisonment.

The evidence of the State

[2] The state called the complainant who testified with the help of an intermediary and was cautioned to tell the truth. At the time of testifying she was 12 years old. Her evidence can shortly be summarised as that the appellant acted as her stepfather and initially they had a good relationship. However, that changed because when she was eight years old she woke up in the night from pain with something heavy lying on top of her. She saw it was the appellant and realised that his penis was inside her vagina and he was moving on top of her. He held his hand over her mouth preventing her from screaming. When he got off from her she noticed that she was bleeding from her vagina. The appellant saw this and handed her a tissue and instructed her to go and wash herself. The appellant told her not to tell anyone what happened because he would throw her in the dam. She believed that he would throw her in the dam because there is a dam at KwaMhlanga where she had to fetch water from for their daily water needs. Her brother P[...] had fallen into this same dam. At that time they were staying in KwaMhlanga and it was during the school holiday. Her mother was not at home at the time and she did not tell her mother because she was scared. This incident took place in her bedroom. Her siblings shared a bedroom and her mother and the appellant slept in a separate bedroom. After this incident she was scared of the appellant. She persisted that he promised her chips and chocolates while he was on top of her and in fact gave her a Kit-Kat.

[3] The second incident occurred when she was 10 years old and when her mother had gone from where they now stayed to check on the house in KwaMhlanga. In the new premise she and her siblings all slept in one room but in different beds. Again she woke up due to pain and a heavy object on top of her. It was the appellant with his penis in her vagina and the appellant was moving up and down. She was again prevented from screaming because his hand was over her mouth. Directly after the incident she took a bath because she had to go to school. She encountered her mother on the way to school and her mother enquired why she

was late, she did not answer and her mom told her that she changed. Later on her mother asked her why she had changed and she told her mother about the incident when she was 10. She did not at that stage tell her mother about the incident when she was eight years old because the appellant had threatened her many siblings by illustrating with a finger moving across his neck. She understood this as that he would kill them. She did not know why the police did not in her statement record the threats because she told the police officer. She did not know when her statement was read back to her that she had to correct the statement.

[4] Her mother and the appellant's relationship was bad culminating in verbal and physical fights between them. She saw an incident where her mother was talking on the phone and the appellant grabbed the phone and took off the cell phone battery. He confronted the child and poked her on her forehead asking her what she had told her mother. She was inside the house and when her mother came inside the house she noticed that her mother had injuries on her forehead.

[5] Her mother confirmed the two different dwellings. She confirmed that at first the relationship between her child and the appellant was good but that it changed. In fact, she had beaten the child because she thought that the child disrespected the appellant.

[6] The child's behaviour changed. She often requested to visit her grandmother. She was not sleeping, nor playing with her siblings, in fact she showed aggression towards them. The child was also wetting her bed. She then noticed a discharge on the child's panty while bathing the children.

[7] After the appellant's arrest she took the child to the clinic due to the bed-wetting. She was as the clinic told to report to the police if she suspected rape. She then took the child to the park and asked her what was wrong. The child informed her of the rape when she had gone to Kwa-Mhlanga to check on the house. They went to the police and then to the doctor.

[8] While the appellant was in custody the child's behaviour returned to normal. Except when on 29 June they had to fetch water from the dam. The child refused

and she whipped her. The child then broke down and told her about the other incident and that the appellant had threatened to throw her in the dam. She recalled that the child had to save P[...], her brother, who was 3 at the time from the dam. She then called the investigating officer and a further statement was taken from the child.

[9] On 25 February 2019 she and the appellant were sitting outside the shack. She mentioned to him that she is surprised by the rapid female development of the child's body. The appellant became aggressive and walked to the child. He poked her forehead with his finger while asking her what she had told her mother.

[10] He then assaulted the mother by grabbing her around the throat, picked up a stone and hit her on the forehead with the stone. She had an injury on her forehead. She went to the police station and while she was there he arrived at the police station and was arrested. She denied that the charges were trumped up because the appellant had an accident with her family's taxi.

[11] The state called Dr Moloto whose expertise and experience was accepted. He confirmed that he completed the J88. His own observation was that: "hymen open, vagina admitting one finger without pain, suggestive of possible penetration according to history given." There was also a discharge from the vagina. He could not associate breast development with sexual activity. Bed-wetting could be a result of urinary or bladder infection or psychological trauma. He was surprised that as a 10-year old she did not experience pain when he examined her. He testified that the discharge he observed is not normal for a 10-year old girl.

[12] Sergeant Phasha also testified on behalf of the State. She was on duty when the mother reported the assault at the police station. She observed a swelling on the left and right side of the forehead of this complainant. She was not informed about being throttled or her missing SIM card. She could not see any injuries on the appellant or that his shirt was torn when he arrived at the police station.

The evidence of the appellant

[13] The appellant testified that he was in a relationship with the mother of the child [Ms M[...]] and knew the child from a very early age. One night after work the mother told him that she wanted to share a secret with him. She took him to a nearby field where she threw a 30cm rock at him and she pulled and pushed him and tore his shirt. She accused him of not sleeping with her, but with the child. He left and went to his employer to report the assault on him. He found Ms M[...] there. He denied that he assaulted her or that he raped the child. He denied that the child's attitude changed towards him and did not know of the bed-wetting.

[14] He for the first time raised that he was not alone with the children for three weeks when the mother was away, they were staying with the grandmother. He did not call the grandmother because to him it meant that he would not adhere to his bail conditions. He assumed that these charges were laid against him because of the family taxi that was involved in an accident and was standing at the panel beaters for more than two years.

The conviction

[15] It was submitted on behalf of the appellant that as a child single witness her evidence must be accepted with caution specially because she did not tell her mother of the rapes and the long delay in reporting the rapes. She only reported the rapes after her mother put some pressure on her.

[16] The court applied this cautionary rule and correctly found her evidence to be substantially satisfactory in every material respect and found corroboration in the evidence of the doctor. The contradictions in her evidence were minimal. She explained that she told the police that he threatened to kill her siblings and she did not know when the statement was read back to her that she had to correct it.

[17] The threat to be thrown in the dam was corroborated by there being a dam in the vicinity and her knowledge of what can happen in a dam when she had to save her brother. That incident had clearly traumatised her and being threatened with being thrown into the dam was to her a real threat having experienced the consequences thereof.

[18] Her evidence was logical and chronological and there were no signs of rehearsed evidence. The argument that the evidence of both incidents was startlingly similar does not render her evidence unreliable. The action of rape is similar; inserting a penis in a vagina with movements up and down. The fact that she awoke with something heavy on her does not render her version improbable; that is how he forced himself on her. She could not scream because he covered her mouth and he threatened her.

[19] The doctor's evidence corroborated her version. He found it strange that she felt no pain when he examined her which was suggestive of possible penetration.

[20] The court *a quo* correctly found that the evidence of the child pertaining to the rape was reliable with no material contradictions in her evidence. The fact that she only reported the rapes much later was satisfactorily explained by her real fear.

[21] As for the assault to do grievous bodily harm the Magistrate correctly found the appellant guilty on this charge. The evidence of Ms M[...] was reliable. Her injuries were corroborated by the child and Sergeant Phasha. The circumstances that led to the assault is corroborated by the child.

Sentence

[22] The counts of rape attract a prescribed sentence of life imprisonment in terms of section 51(1) of Part 1 of Schedule 2 of Act 105 of 1997.

[23] The court had before it a pre-sentence report for the appellant and victim impact report of the child. It was also placed before the court that the complainants had relocated to Mpumalanga due to the conduct of the appellant.

[24] The court considered the appellant's personal circumstances, the severe emotional impact on the child and the interests of society. The court did not merely give lip service to these factors.

[25] The court correctly found a father-figure raping a child “constitutes deflowering in the most grievous and brutal sense.”¹ The seriousness was compounded by the age of the child, the rape in her own bedroom on her bed and the position of trust the appellant had.

[26] Society expects courts to appropriately sentence these crimes that deprive victims of their fundamental rights to dignity, privacy and security of person. The prescribed minimum sentence was promulgated to address these repugnant crimes.

[27] Pertaining to the appellant’s personal circumstances the court was aware that the sentence must be proportional to the crime and the appellant’s circumstances. The sentence must also take mercy into account. The court took into account that the appellant was 48 years old and a first offender. That he is married with six children, one employed, one jobless and the other four who receive grants. The court correctly found that none of these factors constitute substantial and compelling circumstances.

[28] I make the following order:

28.1 The appeal against the convictions and sentences are dismissed.

S. POTTERILL
JUDGE OF THE HIGH COURT

I agree

M.J. MOSOPA
JUDGE OF THE HIGH COURT

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¹ *S v Abrahams* 2002 (1) SACR 116 (SCA) par [17]

HEARD ON: 8 October 2024

FOR THE APPELLANT: ADV. L. AUGUSTYN

INSTRUCTED BY: Legal Aid Board

FOR THE RESPONDENT: ADV. L. SIVIDZHO

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 14 October 2024