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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR327/23

In the matter between:-

V[...] K[...]

APPELLANT

and

THE STATE

RESPONDENT

ORDER

-
1. The Appeal is dismissed.
 2. The Convictions and Sentences of the court *a quo* are confirmed.
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JUDGMENT

R. Singh, AJ (Olsen, J concurring)

[1] The appellant was convicted in the Durban Regional Court, on 17 July 2023 on two counts of rape. The charges were read with the provisions of s51 of the Criminal Law Amendment Act 105 of 1997 (the CLAA) and s256 and s261 of the

Criminal Procedure Act 51 of 1977 (the CPA) thus attracting a prescribed minimum sentence of life imprisonment as the complainants S M and A M were six years old and ten years old, respectively at the time of the offences. The court *a quo* did not find any substantial and compelling circumstances that warranted deviation from the prescribed minimum sentence. The appellant was sentenced to two terms of life imprisonment in respect of both counts. The appellant is exercising his automatic right of appeal provided for in s309 of the CPA in respect of conviction and sentence.

[2] The appellant was engaged in a relationship with Ms D M and they commenced living together in 2015. Ms D M's daughters, namely T S M, and the two complainants S M and A M lived with them. The appellant and Ms D M have one male child, K M.

[3] The first complainant A M testified that during 2020 when it was the lockdown period, there was limited attendance at school. The appellant would start work at 09h00 of each day and was off work on Wednesday of each week. She attended school on some days and on other days, she would be at home with the appellant and K M.

[4] During November 2020, she was at home doing chores when the appellant called her inside the house. He was seated on his bed and he told her to play a game on his cell phone. Whilst she was playing the game on his cell phone, he removed her underwear and his trunk. He inserted his penis into her vagina. She demonstrated what the appellant did to her to the court by using analytic dolls.

[5] He threatened her that she was not to tell her mother or he would kill them all. She told her sister T S M the following day. She stated that he continued the 'naughty deeds' over a period of time whilst her mother was at work and her siblings at school. On each occasion, he would threaten to kill her family.

[6] She denied that she was never alone with the appellant under cross-examination and that her mother would be at home. She refuted any suggestion that her mother used to go out and party and would quarrel with the appellant upon her return. She also denied that following one such quarrel, her mother threw the appellant's personal belongings out but they reconciled on 21 May 2021 when he

was thrown out again and arrested. She reiterated under cross-examination that she and her sisters went to school on different days and her mother went to work.

[7] A M was however unable to say when the incidents commenced. She stated that the first incident occurred when she was washing dishes and the appellant called her to him. The next incident occurred when she was cleaning dirt next to the television. She experienced pain in the area of her womb during the second incident. She did not embellish her evidence and readily conceded that the appellant treated her siblings and her as his own children except that he did 'silly things' to them.

[8] The second complainant, S M was eight years old at the time she testified. She stated that her mother had gone to work and A M had gone to school on the day of the first incident. Her sister T S M was at home hanging clothes. She was asleep in her bed which was in the kitchen. The appellant woke her up and carried her to his bed. He inserted his penis into her vagina. He threatened her not to tell anyone about the incident or he would beat them up. She told T S M about what had happened and expected T S M to tell their mother about the incident. She recalled being taken to the police station and speaking to a social worker but could not recall any medical examination. She stated that aside from the appellant no one else sexually violated her. She also stated that she had a good relationship with the appellant.

[9] The eldest of the three sisters, T S M was 13 years old and in Grade 8 at the time of the trial. She stated that one day when she was walking to the shop with S M, she noticed that S M had a lot of money in her possession. She questioned S M who told her that the appellant gave A M and her money to have sexual intercourse with him. She did not report this to her mother because she was afraid of the appellant. About two days after this conversation with S M, the appellant approached T S M when she was alone at home with him and told her to play games on his cell phone. She did not like the suggestion and left the house. She only returned home when her mother returned home from work.

[10] She further stated that S M had reported the rapes to her on two occasions, the one time being when she questioned S M about the money in her possession and the second time when they were by the showers doing washing, S M told her to

go to the house because the appellant was in bed with A M. T S M stated that she did not go immediately because she was afraid that the clothes would be stolen. When she went over to the house, A M did not want to speak about the incident and they were afraid that the appellant was overhearing their conversation. T S M denied that their mother drank alcohol when she came back from work or that the appellant and her mother had problems because of her mother consuming excessive alcohol.

[11] Ms D M, the mother of the two complainants testified that in 2021 she arrived home from work and the appellant told her that T S M left home in the morning and did not return. T S M was eventually found at the home of a neighbour. She questioned T S M about why she was not at home and T S M told her that the appellant had told her to come to the bed and 'play the game'. T S M told her that she became nervous and ran away. Ms D M stated that she confronted the appellant as she had an uneasy feeling and that 'something like that tweaked my mind'.

[12] On the Saturday of that week, D M asked T S M to explain again about what had transpired. She also spoke to both complainants who confirmed that they were being raped by the appellant. Ms D M said that at the time she was pregnant with the appellant's and her minor child, K M, she had not been working but after his birth she started working at a factory at Unit [...], Chatsworth. She denied any suggestion by the appellant's legal representative that she and the appellant quarrelled because she consumed alcohol to excess and that she was not employed.

[13] The J88 medical reports were completed by Dr B S Mdladla who also testified at the trial. In respect of S M, Dr Mdladla's conclusion was that there was evidence of 'previous penetration as noted by redness of vestibular and also opening of the hymen'. He also noted reddening around the external genitalia. He testified that the examination was consistent with the history provided in respect of the child.

[14] Dr Mdladla also examined A M on 21 May 2021 and recorded that there was redness on the vestibular arear with old scarring as well as an open vaginal orifice. He stated that this too was consistent with the history furnished to him.

[15] Under cross-examination he was adamant that he examined both children despite the evidence of S M being that she had not been examined by a doctor. He

stated that S M may have forgotten and further that he was dressed in civilian clothes when he examined S M because children are normally afraid of doctors. He was further emphatic that he remembered the two girls as they told him that on the day of the last rapes it was the Muslim festival of Eid and they had celebrated Eid.

[16] The appellant testified in his defence. The gist of his evidence was that the complainants and their mother were implicating him in these charges because the mother, Ms D M would go out to her sister's home and become intoxicated. She would arrive home in the late hours of the night and argue with him in the presence of the children. He conceded that there were no problems in his relationship with the complainants and their sister T S M. He was adamant that the complainants' mother was always at home as she was unemployed and that he was not alone with both complainants as they would have the court believe.

[17] It is well established that a court of appeal is not at liberty to interfere with the findings of the trial court unless they are clearly shown to be wrong.¹ The evidence in respect of both counts was based on the evidence of a single witness, namely the two complainants. Apart from being single witnesses to the acts of rape, the complainants were five and nine years old, respectively at the times of the incidents. For many years, the evidence of child witnesses, particularly single witnesses was treated with caution because of the perception that a child witness could easily be manipulated to implicate a perpetrator falsely. S208 of the CPA nonetheless provides that an accused may be convicted of any offence on the single evidence of any competent witness. The court in *Woji v Santam Insurance Company Limited*² stated that the court must be satisfied that the evidence of a single witness is trustworthy. The court must also take into account that trustworthiness depends on a number of factors such as the child's power for observation, recollection and his power of narration on the specific matter to be testified.

[18] The court in *Vilikazi v S*³ stated that the double cautionary rule should not be used to disadvantage a child witness on that basis alone and that the evidence of child witnesses must be considered as a whole taking into account the totality of the

¹ *R v Dhlumwayo* 1948 (2) SA 677 (A)

² *Woji v Santam Insurance Company Limited* 1981 (1) SA 1020 (A) at 1028 B to D

³ *Vilikazi v S* 2016 (2) SACR 365 (SCA)

evidence. The question of fairness in assessing a witness's evidence in relation to sexual offences was also dealt with in s59 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which is to the effect that late reporting of incidents does not take a matter any further when considering charges of rape⁴. S60 of Act 32 of 2007 further provides that 'notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence.'

[19] Both complainants in my view were consistent and corroborated by their sister T S M. They may not have been able to use correct biological terminology regarding the use of the words like 'penis' or 'vagina' and for that matter referred to the rapes as 'silly things'. However they were, with the help of the analytical dolls, able to give a clear account of what had happened to them. Their explanations for not reporting the rapes was also reasonable. One has to be mindful that the appellant threatened both of them with assault if they reported the incidents. In relation to S M, he was clearly bribing her by giving her money. This was not challenged by the appellant in the court *a quo*. I am therefore satisfied with both complainants' explanations for not reporting the rapes.

[20] Likewise, I find that the evidence of T S M and the complainants' mother Ms D M was clear and satisfactory in all respects. Both of them withstood cross-examination. There was no embellishment on their part. I find it noteworthy that if any credence is to be placed on the appellant's version that he was being implicated by the complainants' mother because they ended their relationship because of her excessive alcohol consumption, he could very well have been implicated in raping T S M as well. T S M however was clear that she became uncomfortable when the appellant suggested that she come to his bed to play the game on the cell phone and ran away. This, in my view is consistent with a child who had already been forewarned by her two siblings that they were sexually violated by the appellant.

[21] I am therefore satisfied that the court *a quo* correctly weighed up 'all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strength and

⁴ *Jantjies v S* [2023] ZASCA 3 para 9

weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt.⁵

[22] In relation to the appellant's evidence in the court *a quo*, save for his bare denial and his version that the complainants' mother was at home at all times, he raised no worthy defence. In my view, the court *a quo* was correct in rejecting his version. The trial court correctly convicted the appellant as charged. Consequently, the appeal against both convictions must fail.

[23] I now turn to the appeal on sentence. The trial court imposed a prescribed minimum sentence of life imprisonment in respect of each count. It is trite that sentencing or punishment is pre-eminently the discretion of the trial court. When exercising its appellate jurisdiction, the appellate court will not 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 simply because it prefers it. To do so would be to usurp the discretion of the trial court. Where however there is a material misdirection by the trial court, an appellate court is entitled to consider the question of sentence afresh. In doing so, it assesses the sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. Even in the absence of a material misdirection an appellate court may be justified in interfering with the sentence imposed by the trial court if there is a disparity where the sentence can be described as shocking, startling or disturbingly inappropriate.⁶

[24] In my view there is no irregularity or misdirection in the sentence imposed by the court *a quo*. I am satisfied that the court *a quo* exercised its sentencing in discretion judicially and that all other relevant factors and circumstances were duly considered and taken into account.

[25] There was nothing special about the appellant's personal circumstances. He has not shown any remorse despite being in a position of trust in respect of both complainants. They were both violated by the very same person whom they

⁵ *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 15

⁶ *S v Malgas* 2001 (1) SACR 469 (SCA) para 12

regarded as a father and to whom they would have looked for protection.⁷ The appellant took away both complainants' childhood, self esteem, peace and their right to freedom. As held in the matter of *Director of Public Prosecution, Eastern Cape, Makhanda v Coko*⁸:

'Rape is an utterly despicable, selfish and horrendous crime. It gains nothing for the perpetrator, save for fleeting gratification, and yet inflicts lasting emotional trauma and, often, physical scars on the victim.'

[26] In my view the personal circumstances of the appellant are far outweighed by the seriousness of the offences and the interests of society. I therefore do not believe that our interference in sentence is warranted. Counsel for the appellant chose not to make submissions in support of a contrary view.

[27] I accordingly propose the following order:

1. The Appeal is dismissed;
2. The Convictions and Sentences of the court *a quo* are confirmed.

R SINGH, AJ

I agree

OLSEN , J

CASE INFORMATION

APPEARANCES

⁷ *Tshabalala v S, Ntuli v S* 2020 (5) SA 1 CC

⁸ *Director of Public Prosecution, Eastern Cape, Makhanda v Coko* [2024] ZASCA 59, para 2

For Appellant	:	Mr P Daniso
Instructed by Appellant's Attorney	:	Legal Aid South Africa
For Respondent:	:	S Parak
Instructed by Respondent's Attorney	:	Director of Public Prosecutions Durban

Date of hearing	:	23 August 2024
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Date of judgment	:	30 August 2024
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