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

Not reportable

Case no: A66/2024

In the matter between

TSHOKOLO DAVID LESETLA

APPELLANT

And

STATE

RESPONDENT

Neutral citation: Tshokolo David Lesetla v State

Coram: Reinders J et Nemavhidi AJ

Heard: 28 October 2024

Delivered: This judgment was handed down and released to SAFLII. The date for hand-down is deemed to be 14 November 2024.

Summary: Rape – single child witness – double cautionary rule – s 60 of Act 32 of 2007 – alibi defense.

ORDER

The appeal against the conviction and sentence is dismissed.

JUDGMENT

Nemavhidi AJ (Reinders J concurring)

[1] This appeal concerns the rape of a seven year-old girl, the complainant, R[...] M[...], who was raped and assaulted in 2010. She was playing with the children at the neighbour's house in the evening when she was sent by one Mashoto to buy a soft drink at a shop. On her way back she was in the company of one Keke, when they met the appellant.

[2] The appellant tied her neck with his belt and dragged her to an open field where he removed her panty and inserted his penis into her vagina. Afterwards, he took her to a shack where he put her on the bed and proceeded to have sexual intercourse with her. When he was done, he then carried her on his back, dropped her off near her home, gave a five rand and admonished her not to tell her mother or anyone about this incident.

[3] The appellant was convicted in the regional court of rape and assault with the intent to do grievous bodily harm and sentenced to life imprisonment. In terms of s 309 of the Criminal Procedure Act 51 of 1977 (the CPA), read with the provisions of ss 10 and 43(2) of the Judicial Matters Amendment Act 12 of 2013 (JMA ACT 3 of 2013), once the regional court imposed the sentence of life imprisonment, the appellant is entitled to an automatic right of appeal to the full bench of the High Court.

[4] The trial court found that the appellant raped the complainant. The appellant raised the fact that the court erred by not taking into account, the discrepancies in the testimony of the complainant and also disregarded the alibi raised by him.

[5] The issue for determination before this court is whether the appellant was

properly convicted on the evidence of a single witness.

[6] The complainant was raped on two occasions on that fateful night. After the appellant dropped her off in the street next to her home, he was seen by her brother David and his friend Lehlohonolo. The appellant then turned back and started running, but David and Lehlohonolo ran after him in order to see who dropped the complainant off. Once they caught up with him, they turned back.

[7] Ms N[...] testified that on the 8th of April 2010, the complainant came to her home in order to play with her siblings. At about 22h00, the complainant's mother came to her home, inquiring about the whereabouts of the complainant. The search party went out to the streets looking for her while her mother and aunt went to the police station to report the missing child.

[8] Ms N[...] and other people stood at the gate hoping that the complainant would emerge. While standing at the gate, she observed the complainant approaching from the corner. She called her and she noticed that her pants were wet, her neck had multiple abrasions on the left cheek, and her eyes were red indicating that she had been crying. She then took her to her grandmother who observed that she had been raped. The complainant stated that she was raped by the appellant. After this statement, Ms N[...] went to the police station where she found complainant's mother and informed her about the rape of the complainant.

[9] Ms. M[...] M[...], the complainant's mother, testified that the complainant was born on the 1[...]th of J[...] 2003. She handed in her birth certificate. She knew the accused as he was a tenant at her sister's place. She regarded the accused as a family member and complainant regarded him as her brother. On the 8th of April 2010 she went to the police station to report that her daughter was missing. While she was at the police station, Ms N[...] arrived at the police station and reported to her that the complainant had been raped. She went home with the police and found their complainant's wet clothes. She was shivering and her head was full of grass.

[10] The complainant stated that she was sent by Mashoto to the shop to buy soft drink and on her way back she met the appellant who dragged her. She gave the things she bought to Keke.

[11] The appellant dragged her to the field, having tied her neck with his belt, undressed her panty, and had sexual intercourse with her, he thereafter took her to a shack, where he put her on the bed and had vaginal sex with her.

[12] The police took the complainant and her mother to the police station where female police officers examined her, and later took her to the hospital for a full examination. She was unable to walk properly and she had to carry her on her mother's back.

[13] This incident affected the complainant, which resulted in her failing her grade. She was afraid of sleeping, no longer played with the other children, could not eat normally and started bed-wetting while asleep.

[14] The accused ran away from Batho location in Bloemfontein and was arrested in Edenburg after two years and four months.

[15] She denied that she once had a romantic relationship with the appellant. She also denied that she asked the appellant to buy her soccer jersey.

[16] The complainant testified through the intermediary and the hearing was in *camera*. She narrated a horrific experience at the hands of the appellant. She witnessed her brother and Lehlohonolo chasing the appellant after he dropped her in the street and they were the ones who decided to chase the appellant in order to see who that person that was that dropped the complainant near her home.

[17] Two years and four months later, Constable Lekgoba managed to trace and arrest the appellant in an informal settlement in Edenburg. When he introduced himself as a police officer, the appellant jumped out through the window in order to avoid arrest. However, the police managed to arrest him after giving chase.

[18] The appellant's testimony is to the fact that the complainant's mother had a love relationship with him. He alleged that she asked him to buy her a soccer jersey, a ticket and to give her an amount of R500. He refused to give her those items, which resulted in her fabricating these rape allegations. The appellant conceded that the complainant could have been raped by someone else as on that day as he was at his workplace at Petrusburg. He, however, accepted the contents of the medical report (J88).

Ad Conviction

[19] The evidence in this case was based on the evidence of a single witness, namely the complainant who was seven years old at the time of the rape. For many years, the evidence of a child witness, particularly as a single witness, was treated with caution because cases prior to the advent of the Constitution (which provides in s 9 that all are equal before the law) stated *inter alia* that a child witness could be manipulated to falsely implicate a particular person as the perpetrator (thereby substituting the accused person for the real perpetrator).

[20] To ensure that the evidence of a child witness can be relied upon as provided in s 208 of the Criminal Procedure Act 51 of 1977 (the CPA), the court held in *Woji v Santam Insurance Co Ltd*¹ (*Woji*) that:

‘The question the trial Court must ask itself is whether the young witness' evidence is trustworthy. Trustworthiness, as is pointed out by Wigmore in his *Code of Evidence* para

¹ *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A).

568 at 128, 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 questions put, and to frame and express intelligent answers" . . . There are other factors as well which the Court will take into account in assessing the child's trustworthiness in the witness-box.'²

[21] The Court has, since *Woji*, cautioned against what is now commonly known as the double cautionary rule.³ It has stated that the double cautionary rule should not be used to disadvantage a child witness on that basis alone. The evidence of a child witness must be considered as a whole, taking into account all the evidence. This means that, at the end of the case, the single child witness's evidence, tested through (in most cases, rigorous) cross-examination, should be 'trustworthy'. This is dependent on whether the child witness could narrate their story and communicate appropriately, could answer questions posed and then frame and express intelligent answers. Furthermore, the child witness's evidence must not have changed dramatically; the essence of their allegations should still stand. Once this is the case, a court is bound to accept the evidence as satisfactory in all respects; having considered it against that of an accused person. 'Satisfactory in all respects' should not mean the evidence line-by-line. But, in the overall scheme of things, accepting the discrepancies that may have crept in, the evidence can be relied upon to decide upon the guilt of an accused person. What the Court in *S v Hadebe and Others*⁴ calls the necessity to step back a pace (after a detailed and critical examination of each and every component in the body of evidence), lest one may fail to see the wood for the trees. This position has been crystallised by the Legislature in s 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007,

² Ibid at 1028A-D.

³ See in this regard *Vilakazi v S* [2016] ZASCA 103; 2016 (2) 365 SCA.

⁴ *S v Hadebe and Others* 1998 (1) SACR 422 SCA.

which provides:

‘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.’

[22] As indicated, in his defense the appellant raised an *alibi* that he was at work when the complainant was raped. However, this was not put to the witnesses nor was it stated in his plea explanation, as the plea tendered on his behalf by his counsel was that of a bare denial.

[23] The only responsibility an accused person bears with regards to their *alibi* defense is to raise the defense at the earliest opportunity. The reason is simple: to give the police and the prosecution the opportunity to investigate the defense and bring it to the attention of the court. In appropriate cases, in practice, the prosecution can even withdraw the charge should the *alibi* defence, after investigations, prove to be solid.

[24] The alibi defence has received the attention of the courts, in particular that of the Constitutional Court in *Thebus and Another v S*⁵ (*Thebus*), where it stated:

‘. . . [A] failure to disclose an alibi timeously has consequences in the evaluation of the evidence as a whole [and] is consistent with the views expressed by Tindall JA in *R v Mashelele*. After stating that an adverse inference of guilt cannot be drawn from the failure to disclose an alibi timeously, Tindall JA goes on to say: “But where the presiding Judge merely tells the jury that, as the accused did not disclose his explanation or the alibi at the preparatory examination, the prosecution has not had an opportunity of testing its truth and that therefore it may fairly be said that the defence relied on has not the same weight or the same persuasive force as it would have had if it had been disclosed before and had not been met by evidence specially directed towards destroying the particular defence, this does not constitute a misdirection.”’⁶

⁵ *Thebus and Another v S* [2003] ZACC 12; 2003 (6) SA 505 (CC).

⁶ *Ibid* para 63.

[25] Applying the *Woji* principles to this case, I find that the evidence of the complainant is trustworthy and, thus, (supported by *aliunde* evidence of the forensic nurse) satisfactory beyond reasonable doubt. Despite her young age, the complainant's evidence was consistent and clear. She was able to respond to statements put to her and questions posed by the defence with certainty and clarity; intelligently and without difficulty. The cross-examination of the complainant was rigorous and to some extent unnecessary. Where she did not understand the question, the question was repeated and she responded appropriately. The complainant was consistent to the extent that her evidence was supported by independent medical evidence set out in the J88 form as well as the report she made to her mother. The nurse who examined the complainant noted that there was redness of the vagina. The appellant on his own (although not admitting that it was him) agreed that the complainant was raped and could not have fabricated a story of having being raped. She was observed by her grandmother as she was disheveled, wet and had dry grass on her clothes upon arrival at home. Her mother noted her reddened vagina, abrasions on her neck and some scratches on her face.

[26] The Court warned in *Thebus* that a court cannot attach much weight to an alibi that is raised later; in this case, more than two years later. This is because such an *alibi* is prone to fabrication, as evidenced in this case.

[27] The trial court in my view correctly convicted the accused as charged.

Ad Sentence

[28] I now turn to the question of sentence. The trial court imposed the prescribed minimum sentence of life imprisonment. It is common cause that the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 (Act 105 of 1997) are applicable. Section 51 of Act 105 of 1997 provides:

'51. Discretionary minimum sentences for certain serious offences—

(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional

court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life....

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence. . .’

[29] It is trite that sentencing or punishment is pre-eminently a matter of discretion of the trial court. A court exercising appellate jurisdiction cannot, in the absence of a 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.

[30] Where, however, a 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. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance.

[31] Nevertheless, even in the absence of a material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'.⁷

[32] When setting out minimum sentencing for certain offences, ‘the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission

⁷ See in this regard *S v Malgas* 2001 (2) SA 1222 (SCA).

of such crimes unless there were, and could be seen to be, truly convincing reasons for different response’

[33] The trial court dealt comprehensively with the personal circumstances of the appellant, the seriousness of the crime of rape of a child and the interest of society. It considered the interests of the child victim and held that “the traumatic effect of sexual abuse is argued to be most complexed and more persuasive in terms of the impact of a child life”

Having considered all factors placed before it in mitigation and aggravation of sentence the trial court was satisfied that there are no substantial and compelling circumstances which, would warrant a deviation from the prescribed minimum sentence of imprisonment for life. The trial court can in my view not be faulted in the conclusion so reached.

[33] In the result, the following order is granted:

The appeal against the conviction and sentence is dismissed.

MB NEMAVHIDI AJ

I concur

C REINDERS J

Appearances

For the Appellant

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