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

Not Reportable / Reportable

Case No: A21/2023

In the matter between:

S[...] J[...] T[...]

APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: *S[...] J[...] T[...] v The State (A21/2023)*

Coram: **Chesiwe, J et Daniso, J**

Heard: **03 February 2025**

Delivered: **This judgment was delivered by email to the parties and release to SAFLII. It shall be deemed to have been delivered at 09h00 on 08 May 2025**

ORDER

1. The appeal against conviction and sentence is dismissed.

JUDGMENT

Daniso, J

[1] The appellant was arraigned and convicted by the regional court, Bloemfontein for the rape of his 14-year-old stepdaughter. He was subsequently sentenced to life imprisonment the court having found no substantial and compelling circumstances warranting a deviation from the minimum sentence prescribed in terms of the Criminal Law Amendment Act 105 of 1997 (the CLAA).

[2] The appellant was convicted after pleading not guilty. This opposed appeal is directed against both conviction and sentence.

[3] In convicting the appellant, the trial court relied on the testimony of the complainant, Sergeant Jacob Kotoane and Constable Mamatsididi Elizabeth Phiri who testified in relation to the chain of custody of the deoxyribonucleic acid (the DNA) evidence.

[4] At the time of the incident, the appellant was in a love relationship with the complaint's mother. He lived with her, the complainant and the complainant's younger sister L[...].

[5] The conviction arose from the incident which took place on Sunday 19 May 2013 at their residence. The summary of State's case is that earlier on the day of the incident, the appellant fetched the complainant and L[...] from their grandmother's home. When they got home it was late in the evening, the complainant prepared school lunches for the next day whilst the appellant and L[...] watched television. Their mother was in hospital for breast surgery.

[6] The residence was a one roomed shack divided by a curtain separating the bedroom which had one bed and the living area. The complainant usually slept on the couch however on this evening she went and slept on the bed. She woke up later and saw that the appellant was also sleeping on the same bed, L[...] was in the middle. She fell asleep again only to be woken up by a pain in her private parts. When she opened her eyes, she saw the appellant on top of her raping her. He told her that he wanted to sleep with her and asked whether it was the first time that she had sexual intercourse. At that time, he had already undressed and penetrated her vagina with his penis. When the complainant tried to push him off he offered her R50 and continued to rape her. When he was done, he got off her and slept.

[7] L[...] was still very young as a result she slept through the incident. In the morning the appellant prepared water for the complainant and L[...] to bath and told the complainant not to tell anyone about the incident. The complainant was still in pain in the morning she could not even relieve herself. On the way to school she started to feel anxious. She told L[...] to continue on her way to school and went back home, packed her belongings and went to her aunt Mpho Mojakgomo's house.

[8] Upon arriving at her aunt's house she relayed the incident to her aunt who suggested that they should go to the complainant's grandmother's house. When the complainant arrived at her grandmother's house she went and sat in the toilet afraid of how her grandmother would react if she told her about the rape. Her grandmother noticed that she was limping as a result she had to tell her about the rape. The complainant's other aunt S[...] M[...] arrived and upon being informed about the rape she called an ambulance and the police. The complainant was transported to National Hospital by ambulance where she was examined. A rape case was also opened.

[9] The appellant testified in his defence. His version differs with the State's version only in respect of the rape. He testified that on the day of the incident he was at the University of Free State playing soccer. When he arrived home with the complainant and the seven-year-old L[...] he was very tired he went to sleep leaving the complainant and L[...] preparing school lunches for the next day. He denied having raped the complainant and stated that he only woke up to remind L[...] to switch off the television thereafter he slept until the next morning. He woke up and helped the complainant and L[...] to prepare for school thereafter they all left. He went to work whilst the complainant and L[...] went to school.

[10] He explained that the reason for the complainant to falsely implicate him in the rape was because he had told her that she must go live with her grandmother and this after he discovered that in addition to bunking school, the complainant was also accused by her school teacher for stealing money. It was his testimony that the complainant was an uncontrollable child. She regularly bunked school, spent nights out away from home stole his money.

[11] With regard to the evidence of the DNA, he confirmed that a blood specimen was obtained from him. He told the court that he could not admit or deny that the DNA sample extracted from the complainant's vaginal swab matched his DNA as he had no knowledge of how DNA works.

[12] The principle applicable in appeals where the factual findings of a trial court are attacked is trite: a court of appeal is not entitled to interfere with or tamper with the trial court's judgment or decision regarding either conviction or sentence unless it (the court of appeal) finds that the trial court misdirected itself as regards its findings of facts or the

law.¹ The principle was also restated in *AM & Another v MEC Health, Western Cape*² as follows:

“It is trite that an appeal court is reluctant to disturb findings of that character by a trial judge, who was steeped in the atmosphere of a lengthy trial and had the advantage of seeing and hearing the witnesses. Such findings are only overturned if there is a clear misdirection or the trial court’s findings are clearly erroneous. That has consistently been the approach of this court....”

[13] In the grounds of appeal including the heads of argument, the appellant attacks the conviction on the grounds that:

- “(i) The trial court erred in finding that the State proved its case beyond a reasonable doubt;*
- (ii) The trial court erred in not taking into account that there were two results of DNA whereas appellant only gave his blood sample once;*
- (iii) The trial court erred in not taking into account that the Complainant’s statement does not have a date upon which it was commissioned; and*
- (iv) The trial court erred in not considering the fact that the complainant contradicted herself during her testimony.”*

[14] It is the appellant’s case that the complainant’s version was also riddled with improbabilities namely that: it is improbable that the appellant would decide to rape the complainant on that day whereas he stayed with her for many years without raping her and would also rape her in the presence of her younger sister L[...] on the same bed without L[...] hearing what was happening. According to the appellant, it is also

¹ *R v Dhlumayo & Another* **1948 (2) SA 677** (A); *S v Mlumbi* **1991 (1) SACR 235** (SCA) at 247g.

² **2021(3) SA 337** (SCA) at paragraph 8.

improbable that the complainant would not wake L[...] up at the time she was being raped and would also not feel being undressed.

[15] In the record of the proceedings, it is clear that the trial court was alive to the cautionary rule applicable to the complainant's evidence due to her young age and also as a single witness to the rape. The trial court took into account that despite her young age the complainant was able to explain in detail how she was raped by the appellant, her version remained intact even after intensive cross-examination, there was nothing in her evidence which pointed to an ulterior motive for implicating the appellant in the rape and her version was also corroborated by the J88 medical evidence Exhibit "B" indicating vaginal abrasions and a probability of penetration including the DNA forensic evidence linking the appellant to the rape, Exhibit "I."

[16] A child witness's veracity and ability to give a succinct version of the events is an important consideration in applying the cautionary rules.³ Steadfastness and corroboration is also a clear indication that the complainant's version was not an afterthought but a reliable account of how she was violated by the appellant.

[17] In terms of section 208 of the Criminal Procedure Act⁴ an accused may be convicted of any offence on the evidence of any competent single witness. The court need only find that the evidence was trustworthy and that the truth has been told in that case, corroboration is not even necessary.⁵

[18] There is no merit to the appellant's complaint regarding the veracity of the DNA evidence. The evidence relayed by sergeant Kotoane and constable Phiri in relation to

³ *S v Sauls* **1981 (3) SA 172** (A) at 180E – G and *Woji v Santam Insurance CO Ltd* **1981 (1) SA 1020** (A) at 1028B-C.

⁴ Criminal Procedure Act No, 51 of 1977.

⁵ *S v Mahlangu* **2011 (2) SACR** 164 (SCA) at 171 B.

the chain of custody of the DNA evidence was not gainsaid by any evidence to the contrary. A cogent explanation was given for requiring and also obtaining a second blood sample from the appellant. It is also important to note that it was indisputable that the DNA samples extracted from the complainant's vaginal swabs matched the appellant's DNA.

[19] Similarly, the deficiency pertaining to the commissioning of the complainant's statement is a non-issue. A statement does not constitute evidence to prove an offence it is merely an investigative tool to determine whether a crime has been committed and the identity of the perpetrator.

[20] There is nothing improbable about the circumstances under which the complainant was raped. On the facts germane to this matter the complainant's mother was away from home and that could have presented the appellant with an opportunity to violate the complainant. Furthermore, it is pure conjecture that a seven-year-old L[...] who was sleeping should have heard when the complainant was being raped. In any event, what would a seven-year-old have done under those circumstances even if she had woken up during the rape. The assertion that the complainant should have felt being undressed is also unsound as it was her testimony that immediately before she felt the pain of being penetrated, she was asleep.

[21] Based on all the above reasons, I hold the view that the trial court was correct in its conclusion that the State had proved the guilt of the appellant beyond a reasonable doubt, he was correctly convicted.

[22] Regarding sentence, a court may impose a lesser sentence than the sentence prescribed by the CLAA only when the court is convinced the imposition of the

prescribed sentence would be unjust or disproportionate to the crime, the criminal and the legitimate needs of society.⁶

[23] The trial court is criticized for its finding that there were no substantial and compelling factors to deviate from the prescribed minimum sentence of life imprisonment essentially on the basis that the appellant was a first offender in that respect, it is argued that the sentence of life imprisonment is shockingly harsh and strikingly inappropriate.

[24] The fact that the appellant is a first offender on its own, does not constitute a substantial and compelling reason to justify a deviation from the prescribed minimum sentence. For this view, I am aligning myself with Satchwell, J's conclusions in *S v Muller* **[2006] ZAGPHC 51** (23 May 2006) that:

"[55] The Statute prescribes one sentence for all rapists convicted of rape or rapes which fall within the categories or circumstances described in Part I irrespective of the rapist's previous clean or sullied criminal record."

[59] ...There is no authority for the proposition that the previous clean record of an accused convicted of offences in Part I of Schedule 2 constitutes, in and of itself, a substantial and compelling circumstance. At most it would be one of the considerations considered for exploring the possibility that, in conjunction with other factors, it may persuade the sentencing court to make such a finding."

[25] In this matter, there is a number of aggravating factors namely, the age of the complainant at the time of the rape, that at such a tender age of 14 years she was raped by a person who was HIV positive thus exposed to the HI virus, that as her stepfather, the complainant was entrusted in his care. The appellant's personal circumstances as recorded by the trial court including his age, occupation, education,

⁶ *S v Malgas* **2001 (1) SACR 469** (SCA) para 22; *S v Dodo* **2001 (1) SACR 594** CC.

family and community background cumulatively, when weighed against the aggravating factors do not constitute substantial and compelling reasons to deviate from the prescribed minimum sentence.⁷

[26] The gravity of sexual violations of children in the domestic sphere was succinctly summed up by Cameron JA in *S v Abrahams*⁸ as follows:

“Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter’s best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter’s body constitutes a deflowering in the most grievous and brutal sense.”

[27] The nature and the seriousness of child rape can never be over emphasized. In *S v D* **1995(1) SACR 259(A)** it was pointed out that:

*“Children are vulnerable to abuse, and the younger they are, the more vulnerable they are. They are usually abused by those who think they can get away with it, and all too often do. ...” Appellant’s conduct in my view was sufficiently reprehensible to fall within the category of offences calling for a sentence both reflecting the courts disapproval and hopefully acting as a deterrent to others minded to satisfy their carnal desires with helpless children.*⁹

[27] A victim impact report was not presented in the court *a quo*, the court trial court relied (correctly so) on the complainant’s testimony that as a result of the rape she was left traumatized to the extent that she feared to be in public. In addition, at the time of the rape the complainant’s health was already compromised due to chronic illnesses.

⁷ *S v Vilakazi* **2012 (6) SA 353** (SCA).

⁸ **2002 (1) SACR 116** (SCA) at page 123 at para 17.

⁹ At page 260 f-g.

[28] In respect of serious and prevalent crimes such as child rape, retribution and deterrence must come to the fore.¹⁰ It is in that regard that I am of the view that the trial court exercised its discretion properly and judicially in imposing the sentence of life imprisonment. Accordingly, there is no basis to interfere with the sentence, it reflects the gravity of the crime and it also speaks to the plight of the victims and the society. In the result, I would make the following order:

Order

(1) The appeal against conviction and sentence is dismissed.

NS DANISO, J

I concur

S CHESIWE, J

On behalf of Appellant:

Mr P van der Merwe

Instructed by:

Legal Aid South Africa

BLOEMFONTEIN

On behalf of respondent:

Adv. L Mkhabela

Instructed by:

The Director of Public Prosecutions

BLOEMFONTEIN

¹⁰ *S v Mhlakaza and Another* **1997 (1) SACR 515** (SCA) at 519d-e.