



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

CASE NO: AR155/21

In the matter of:

BONGANI TSOTETSI

APPELLANT

and

THE STATE

RESPONDENT

ORDER

On appeal from: Madadeni Regional Court (Magistrate MT Lubuzo sitting as court of first instance):

The appeal against conviction and sentence is dismissed.

JUDGMENT

Pietersen AJ (Moodley AJ concurring):

Introduction

[1] The appellant was convicted in the Regional Court, Madadeni, on one count of rape and sentenced to 18 years' imprisonment. The appellant successfully applied for leave to appeal against both conviction and sentence to this court.

Conviction

[2] The State presented evidence before the court *a quo* that during 2013 and at or near Blaauwbosch, the appellant raped the complainant, a boy aged seven years at the time, by inserting his genital organ into the complainant's anus without the consent of the complainant. The complainant testified that on the day of the incident, he was walking in the street to his grandmother's house and, whilst on his way, the appellant grabbed him, took him to an unknown residence, closed his mouth and raped him by inserting his penis into his anus. When the appellant was done, he threatened to kill the complainant if he told anyone of the incident.

[3] The complainant further testified that after the incident, he could not sit as his anus was sore and he did not tell anyone about the incident until his mother confronted him about his strange conduct on 5 April 2013. He then proceeded to tell his mother about the rape. The complainant's mother took him to the police station where the charge was laid and, on the next day, 6 April 2013, the complainant was examined by Dr Balkanska.

[4] Dr Balkanska testified that she did not observe any signs of physical trauma and there were no injuries recorded insofar as the anal examination was concerned. However, she also testified that the absence of any injuries does not necessarily exclude penetration.

[5] The central issue which occupied the attention of the court *a quo* was whether the appellant was correctly identified by the complainant. This issue arose as the investigating officer initially approached the appellant's brother in the presence of the complainant in order to establish whether the brother was the assailant. The complainant testified that he initially identified the wrong person, being the appellant's brother, but he indicated that when the brother had removed his sunglasses, he realised that it was not the person who raped him because he noticed that the brother had only one eye. The complainant was, therefore, certain

that he had correctly identified the appellant, even though he initially identified his assailant as the appellant's brother. It is important to note in this regard that it is common cause that the incident took place in broad daylight.

[6] The appellant testified that he did not know the complainant at all and he saw the complainant for the first time when he was approached by the investigating officer on the day of his arrest. The appellant denied all the allegations against him.

[7] The complainant testified as a single child witness. The court *a quo* accordingly correctly found that his evidence must be approached with caution. In particular, so the court *a quo* reasoned in its judgment, the court needs to guard against two elements, being imaginativeness and suggestibility. The critical question remains whether the evidence of the complainant is trustworthy.

[8] In examining the evidence before it, the court *a quo* identified a number of unsatisfactory features in the appellant's version. In this regard, the appellant was unable to explain how he knew that the grandmother he referred to in his evidence was the grandmother of the complainant. Further, during the cross-examination of the complainant, it was put on behalf of the appellant that the person who took the complainant from the street was wearing sunglasses and a hat with which the complainant agreed. The appellant failed to explain how he knew that the perpetrator was wearing sunglasses and a hat, when the complainant's testimony was silent on this aspect. Further, a crucial aspect was when the investigating officer indicated in his evidence that the complainant had told him that the perpetrator was limping and the appellant testified that 'indeed, I was limping'. This aspect of the appellant limping was only raised by the appellant and not by the investigating officer.

[9] None of the evidence of the defence witnesses raised any doubt about the identification of the appellant or that the residence in question belonged to the appellant. The possibility that a stranger might have entered his property and used his residence for the purpose of raping the complainant is therefore far-fetched, so the court *a quo* found.

[10] In argument before us, the appellant's counsel argued that all the allegations against the appellant remain in dispute as his defence was one of a bare denial. The court is therefore tasked with considering all the evidence, including whether or not the complainant was anally penetrated. The appellant argued that the complainant was only seven years old at the time of the incident and, being a single witness, the cautionary rule dictates that the evidence of the complainant must be approached with caution. It was submitted that the objective medical evidence does not support the complainant's version that he was anally penetrated and the probabilities thus should favour the finding that, in the absence of visible trauma to the complainant's anus, there was no penetration.

[11] The appellant also argued that the identity of the perpetrator was in dispute and in applying the cautionary rule, it cannot be found that the complainant had properly identified the appellant, as it was dark inside the residence. It was submitted that young children are susceptible to suggestion and the cautionary rule thus dictates that the appellant's testimony in this regard should not be accepted.

[12] Counsel for the State referred to *R v Mokoena*¹ where the court held:

'... the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by Section 284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of a single witness is clear and satisfactory in every material respect.'

[13] It was submitted on behalf of the State that the evidence of a single child witness requires that the court evaluates the evidence with caution and the evidence must be clear and satisfactory in every material respect.² The State also submitted that the cautionary rule is to be applied as a rule of practice and not law and to be applied but with the ultimate requirement remaining proof beyond reasonable doubt and that courts must guard against their reasoning becoming stifled by formalism.³

[14] The State submitted that the complainant was an impressive witness and that he gave a clear and coherent account of the events as they unfolded on the day. The

¹ *R v Mokoena* 1932 OPD 78 at 80.

² *S v Teixeira* 1980 (3) SA 755 (A) (*Teixeira*).

³ *S v Artman and Another* 1968 (3) SA 339 (A) at 341C-D.

complainant withstood cross-examination without any material deviation from his evidence and his evidence must survive the application of the cautionary rule and therefore be accepted, so it was submitted. The State further submitted that the risk of an incorrect identification was eliminated, as the appellant was known to the complainant by sight for some time prior to the incident, as the appellant had done work for the complainant's grandmother. The complainant pointed out the appellant's brother as his assailant but corrected himself almost immediately. The State submitted that the complainant therefore accurately identified the appellant and that the court *a quo* correctly rejected the appellant's version as false. It was submitted that the State had proven its case beyond a reasonable doubt against the appellant and he was correctly convicted.

[15] The court *a quo* correctly found that the count of rape rests on the evidence of a single witness and that the complainant's evidence therefore has to be viewed with caution and circumspection.⁴ In *R v Nhlapo*⁵ it was held that:

'... a cautionary rule of the kind mentioned may well be helpful as a guide to the right decision. It naturally requires judicious application and cannot be expected to provide, as it were automatically, the correct answer to the question whether the evidence of the [State] witness should be accepted as truthful and accurate.'

[16] In conclusion on the issue of a single witness, in *Sauls*⁶ it was held that:

'... the exercise of caution must not be allowed to displace the exercise of common sense.'

[17] In assessing the evidence, the court *a quo* took into account that the complainant was seven years old at the time of the incident and remarked that there may have been some discrepancies in the complainant's evidence, particularly in respect of the identification of the assailant. However, it found that these discrepancies were not sufficient enough to reject the complainant's evidence in its totality. In this regard, it was held in *S v Cwele*:⁷

⁴ *S v Sauls and Others* 1981 (3) SA 172 (A) (*Sauls*) at 180; and *ZF v S* [2016] 1 All SA 296 (KZP) para 34.

⁵ *R v Nhlapo* 1953 (1) PH H11 (A) at 17.

⁶ *Sauls* at 180G-H.

⁷ *S v Cwele and Another* [2012] ZASCA 155; 2013 (1) SACR 478 (SCA) para 19.

‘The State must therefore satisfy the court, “not that each separate fact is inconsistent with the innocence of the [appellants], but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence”.’

[18] I agree with the court *a quo* that the evidence of the complainant was trustworthy, even if the cautionary rule is applied. I am satisfied that the court *a quo* correctly rejected the evidence of the appellant as false and that the complainant accurately identified the appellant as the assailant. The risk of an incorrect identification was eliminated as the appellant was known to the complainant by sight for some time prior to the incident and the appellant had done work for the complainant’s grandmother.

[19] In *S v Ngcamu*,⁸ the court found that there was no reason why the witness would not be able to identify someone who is well known to him. In the circumstances of that matter, the witness and the appellant had worked together until one week before the robbery, occasionally as a crew in the same vehicle. The identification was therefore found to be reliable. I am similarly satisfied that there is no reason why the complainant would not be able to identify his assailant in the present circumstances.

[20] I am also satisfied on the totality of the evidence that the court *a quo* was correct in rejecting the appellant’s version as false even though the objective medical evidence does not support the complainant’s version that he was anally penetrated. The probabilities still favour the finding that the version of the appellant could not reasonably possibly be true.

[21] Insofar as the court *a quo*’s findings of fact and credibility are concerned, a court of appeal will not ordinarily depart from such findings unless they are vitiated by irregularity or unless an examination of the evidence reveals that they are patently wrong. Ultimately, the trial court has the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies.⁹

⁸ *S v Ngcamu and Another* [2010] ZASCA 70; 2011 (1) SACR 1 (SCA) para 11.

⁹ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705–706; *S v Francis* 1991 (1) SACR 198 (A) at 204c–f; *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645e–f.

[22] I am unable to find any misdirection in the court *a quo*'s consideration of the facts and the conclusion that the State had proved the rape beyond reasonable doubt. In the result, the appeal against the conviction must fail.

Sentence

[23] The jurisdiction of a court of appeal to interfere with the sentence imposed by a trial court is limited. In *S v Bogaards*¹⁰ Khampepe J stated as follows:

‘Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.’ (Footnotes omitted.)

[24] In *S v Malgas*¹¹ Marais JA held that when a court imposes a sentence in respect of an offence referred to in the Criminal Law Amendment Act 105 of 1997, it is no longer given a

‘... clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances.’

The emphasis, he held, was on ‘the objective gravity of the type of crime and the public's need for effective sanctions against it’.

[25] It was argued on behalf of the appellant that the sentence imposed by the court *a quo* was shockingly inappropriate and ought to be interfered with on this basis. The appellant submitted that the court *a quo* failed to place sufficient weight on the fact that he was 25 years at the time of sentencing and a first offender. To determine whether there is any substance to the argument, it is necessary to consider the three sets of interests that are required to be balanced in the sentencing process.

¹⁰ *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.

¹¹ *S v Malgas* 2001 (1) SACR 469 (SCA) para 8.

[26] In assessing whether an appropriate sentence was imposed on the appellant, it is necessary to consider the crime, the offender and the interests of society.¹² It has further been held in *S v Rabie*¹³ that:

‘[t]he main purposes of punishment are deterrent, preventive, reformatory and retributive’.

[27] In *Maila v S* the court held:¹⁴

‘The appellant infringed the right to dignity and the right to bodily and psychological integrity of the complainant, which any democratic society (such as South Africa) which espouses these rights, including gender equality, should not countenance for the future of its children, their safety and physical and mental health. In *S v Jansen*, the court stated it thus:

“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 civilised 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 utterly 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 behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution.” (Footnote omitted)

[28] Further, in *S v Chapman* the court held:¹⁵

‘Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives . . . The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.’

¹² *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

¹³ *S v Rabie* 1975 (4) SA 855 (A) at 862A-B.

¹⁴ *Maila v S* [2023] ZASCA 3 para 58.

¹⁵ *S v Chapman* 1997 (2) SACR 3 (SCA) (*Chapman*) at 5c-e.

[29] The court's reasoning in *Chapman* can, of course, also be applied to children in the position of the complainant.

[30] The court also held in *S v Rabie*¹⁶ that '[p]unishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'.

[31] In *S v Banda and Others*¹⁷ it was held the court will have to take into consideration the accused's personal circumstances, the interests of society as well as the seriousness of the offences.

[32] The court *a quo* considered the personal circumstances of the appellant. The court *a quo* placed sufficient weight on the fact that he was 25 years old at the time of sentencing and he has one child who was one year old at the time. The appellant's highest educational was passing grade nine at school. It was considered that the appellant was a first offender and he was employed by Eskom. The court *a quo* also took into account the interests of society and held that the members of the community look up to the courts for protection and they expect the courts to impose adequate sentences in cases of this nature. The court *a quo* found that when considering the age of the appellant and the fact that he is a first offender, the imposition of the minimum sentence of life imprisonment would be disproportionate and the appellant was sentenced to 18 years' imprisonment.

[33] The court *a quo* also considered the complainant's circumstances and the pain and humiliation suffered by the complainant. Even though no injuries were noted by the doctor who examined the complainant, the court took account of the fact that the complainant was traumatised by the incident. There was unfortunately no victim impact statement in the matter.

[34] The court *a quo* found that a custodial sentence was the most appropriate sentence in the circumstances. I can detect no misdirection in the court *a quo*'s approach to sentence. The offence, for the reasons cited above, is of a particularly

¹⁶ *S v Rabie* 1975 (4) SA 855 (A) at 862G-H.

¹⁷ *S v Banda and Others* 1991 (2) SA 352 (BG) at 356E-F.

serious nature. The personal circumstances of the appellant have properly been weighed against the seriousness of the offence and the interests of society. The carefully considered sentence imposed by the court *a quo* is found to be proportionate to 'the crime, the criminal and the legitimate needs of society'.¹⁸

[35] In the circumstances, no basis has been established for this court to interfere with the sentence imposed by the court *a quo*. The appeal against sentence must therefore also fail.

Order

[36] In the result, I make the following order:

The appeal against conviction and sentence is dismissed.

PIETERSEN AJ

MOODLEY AJ

¹⁸ *S v Malgas* 2001 (1) SACR 469 (SCA) para 22.