REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A307/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE 05/06/2015 DATE

In the matter between:

KOTZE, JOHN HAROLD Appellant

versus

THE STATE Respondent

JUDGMENT

MATOJANE J

[1] On 14 February 2006, the appellant was convicted in the Protea Regional Court on three counts of indecent assault, three counts of attempted rape, four counts of rape, one count of assault with intent to do grievous bodily harm and pointing of a fire-arm.

[2] The appellant was initially charged with 17 counts. The Regional Court acquitted him on counts 11, 12,13, 14 and 17 these charges related to alleged rapes and indecent assaults on two other minor children who were found to be unreliable witnesses. Upon his conviction, the proceedings in the lower court were stopped and the matter referred to the High Court in terms of the provisions of Section 52 (1)(b) of the Criminal Law Amendment Act, 105 of 1997 (the Act) for sentence.

[3] On 22 October 2009, the High Court per Coetzee J, confirmed appellant's convictions on count 1 to 10. The convictions on counts 15 and 16 were set aside. The appellant was sentenced to an effective 18 years imprisonment as follows:

3.1 Indecent assault – six years imprisonment

3.2 Indecent assault – six years imprisonment

3.3 Attempted rape – eight years imprisonment

3.4 Attempted rape – eight years imprisonment

3.5 Attempted rape – eight years imprisonment

3.6 Rape - 18 years imprisonment

3.7 Pointing of a firearm- 6 months

3.8 Rape - 18 years imprisonment

3.9 Rape - 18 years imprisonment

3.10 Assault GBH - 4 years imprisonment

[4] The appellant appealed against both the convictions and sentence. Leave to appeal was granted Coertzee J. The appellant's bail was on application extended and he has been on bail since his conviction on 22 October 2009.

[5] The trial court accepted complainant's evidence that she was 7 years old when the appellant started talking to her about penis and vagina. She stated that the appellant performed sexual acts on her, which included, *inter alia*, touching her vagina and rubbing her thighs, instructing her to share a bed with him and touching her on her breasts, thighs as well as on her vagina on many occasions. Complainant stated further that appellant would rub his penis against her vagina in an attempt to penetrate her.

[6] Complainant described how appellant started raping her from the age of 14 on many occasions and how at some stage she saw some brownish foul smelling stuff coming out of her vagina. Complainant testified that she was scared of the appellant who she regarded as dangerous and had threatened to shoot her with his personal firearm if she told anyone about the abuses. She stated that

she kept quite because appellant threatened her mother and herself out into the street and that they will have no food as her mother was unemployed.

[7] The complainant is the daughter of appellant's wife from her previous marriage. She was 16 years at the time she gave her evidence in court.

[8] The Regional court, as well as the high court, dealt with the evidence as to what had transpired in great detail. In essence, as a full bench, we are asked to re-evaluate the evidence that has been led, despite full analysis and assessment by both courts *a quo*. I do not intend traversing the evidence in any detail.

[9] The basis of the appeal before us is that the regional court, and the high court should not have accepted the evidence of the complainant, who was not only a child, but also a single witness who had very little schooling.

[10] It is trite that findings of fact and credibility such as these are presumed to be correct and will be upheld on appeal. Because a trial court has the advantage of seeing, hearing and appraising a witness, it is only in exceptional circumstance cases that an appeal court will

be entitled to interfere with a trial court's evaluation of oral testimony. See **S v Francis**[1], **Rex v Dhlumayo**[2].

[11] It follows that the appellant must convince the court of appeal either that the trial court materially misdirected itself in making its finding of fact, or that a reading of the record of the oral evidence demonstrates that the trial court's evaluation of the evidence cannot be supported, mere doubt that the trial court was correct will not suffice. In ***S v Van Willing & another***[3] Schoeman AJA in para 4 warned:

'The court of appeal must keep in mind that the trial court saw the witnesses and could observe and assess their conduct. If there was no misdirection as to the facts, the point of departure is that trial court's findings were correct. The court of appeal will only reject the finding of the trial court if it is convinced that the finding was erroneous. If there is doubt, the findings of the trial court must stand. However, it is not only the trial court's findings that are important but also the reasons for adopting those findings which must be set out in the judgment.'

[12] I may add also that in this matter, this court should also bear in mind that the trial court was a Child Specialized Rape Court and has

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[1] 1991 (1) SACR 198 (A) 204e-f,

[2] 1948(2)SA 677 (A) 705

[3] (109/2014) **[2015] ZASCA 52** (27 March 2015)

experience in these kind of cases. The magistrate noted that the fact that complainant kept quite about her sexual abuses for a long period is not an isolated incident as there are many instances where children who had been exposed to long periods of sexual abuse, as in this case, remain silent, purely because they are under the control of their parents who support them financially and emotionally and as result remain silent and do not report these cases.

[13] The magistrate, correctly in my view, found that complainant's fears were very real, she was scared that appellant would assault her or shoot her with a firearm he had. The witness, Lorraine Esterhuizen confirmed that complainant told her that she wanted to tell her many things but was scared.

[14] Ms Van Veenendaal, who appeared for the appellant raised three arguments. The first is that the witness, Lorraine Esterhuizen was only able to testify about the demeanor of the complainant and the appellant towards each other in 2001 or thereabout and that there are no other witnesses to testify to the same conduct, she argued that from complainant's evidence it would appear that she and the appellant did not part on good terms and she may have a motive to implicate appellant.

[15] The argument does not withstand scrutiny as Lorraine Esterhuizen's evidence corroborates that of the complainant that

appellant was given to indecently assaulting her. She stayed with appellant's family for three months at Kibbler Park and she knew appellant from church. She testified that the appellant's wife was always under the influence of alcohol or drugs as stated by complainant. She further testified that one day she had forgotten her washing outside and upon returning to the house saw the appellant grabbing complainant as she passed him and started kissing her on her mouth as if they were boyfriend and girlfriend. She also saw appellant massaging complainant on her buttocks and all over the body and complainant appeared as if embarrassed and was facing down.

[16] Lorraine Esterhuizen further testified that the following day early in the morning, she went to the toilet which was opposite appellant's bedroom and was surprised to see appellant not sleeping next to his wife but sleeping next to complainant. Complainant told the witness that the were many things that she wanted to tell her but was scared.

[17] Ms Van Veenendaal second line of attack is that Dr Irashini Govender who examined complainant could only have found objectively that the complainant was having sexual intercourse based on the evidence before her. She argued that the doctor relied on the allegations by complainant regarding sexual abuse. The findings of

the doctor after examining complainant's genitalia corroborate the evidence of the complainant about repeated sexual intercourse. She testified that it is not expected of a 15-year-old girl's hymen to be completely perforated as it was the case with complainant. She testified that her perineum was wide like that of a 25 year old woman and that is consistent with recurrent sexual intercourse.

[18] The third line of attack is that the evidence of the complainant needs to be approached with caution as she is a single witness and a child who had very little schooling. It was argued that she testified as a young woman who has been sexually active and so it is possible that her evidence could be influenced by her knowledge.

[19] The magistrate was alive to the need to approach the evidence of the complainant with caution and his judgment reflects this. Having considered both the strengths and weaknesses of the evidence of the complainant and having warned himself against the danger of believing a child who is a single witness in a case involving sexual complaints, the magistrate said:

> "the court cannot totally ignore the cautionary rule. These children were all very young when this incidents are alleged to have happened to them and the court therefore has to test the trust worthiness of their evidence to determine whether the allegations are based on fact or on fantasy.
>
> In so doing the court has kept in mind the three children's intelligence to observe what was happening at the time when the said allegations are said to have arisen. Also their power of

recollection, and the capacity to understand the questions that are being put to them by the state and by the defense.

The court has also kept in mind the three children's sincerity and their consciousness of the duty to speak the truth".

[20] The magistrate proceeded to list the following factors :(a) complainant had to testify about 10 counts that affected her personally (b) there were contradictions in her evidence (c) the court had considered the detail with which she has described each of the 10 events and the court notes that her explanation has been very chronological and very detailed (d) she repeated her evidence in chief by saying that after the police came to her house to take down her statement, that night appellant slept with her again (e) she admitted that she knew Terrence and he liked her (f) she confirmed that the last rape incident occurred on the 28 March 2004 (g) complainant told her aunt Elizabeth Harcout and aunt Baba when they phoned her what appellant had done to her.

[21] Complainant admitted that she and Terrence made up a story that she was carrying his baby in order for the appellant to release her out of the house where she was living, she maintains her version that she never had sex with Terrence despite Terrence telling appellant that they slept together. The court was aware that there were numerous incidents and during the cross examination the incidents relating to the shower incident when appellant tried to penetrate her was added during cross-examination.

[22] The magistrate was aware of contradictions and other weaknesses in the evidence of the complainant. The mere fact that a witness has contradicted herself is not decisive, it is still necessary for a trial court to evaluate the evidence as a whole because it is only then that the significance of those contradictions may be properly assessed. See **S v Trainor**[4]**.** The magistrate found corroboration of complainant's evidence, firstly, from Nikita that she used to see the appellant hitting complainant with a sjambok, secondly, the incident that Lorrain Esterhuizen mentioned when she saw appellant grabbing complainant and kissing her at the garage and rubbing her buttocks, corroborates allegations of indecent advances appellant made towards the complainant.

[23] The magistrate on the basis of the above concluded, correctly in my view, that this is all corroboratory evidence to complainant's version that she would sleep on the bed with appellant prior to his advances and after his advances.

[24] Complainant's description of her ordeal when accused penetrated her fully for the first time when she was 14 clearly shows that she was narrating the experience she went through. She first started by describing the clothes she was wearing as follows at line 6 on page 126 of the record

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[4] 2003 (1) SACR 35 SCA para 9

"I can remember I had on a black pants a tyrex pants with green stripes on the side and I have on a grayish top a long sleeve with buttons down and I had a bikini bra on a pink one with gold."

[25] Page 128 par 10 in explaining the rape itself she said:

"And then he is so heavy because his top part and his leg it is heavy he always used to hurt my tummy. He used to like put all his pressure on me like how do you say I do not know how to say the word but his whole it was so heavy he put me right down under I could not push him.

Please proceed.—And then he went inside of me already.

What went inside of you?—His penis

How do you know that? Because I felt it and it was really, really sore and it was a burning and I could not handle that pain"

[26] The magistrate has analyzed the evidence with some care, he found that the evidence implicating the appellant was overwhelming and he rejected the version of the appellant.

[27] I can detect no misdirection in so far as the magistrate's factual findings and assessment of the evidence are concerned, In the result the appeal against conviction must fail.

Sentence

[28] The provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 apply to the rape convictions. In terms of the provisions of

the aforesaid Act, unless the sentencing court is able to find that substantial and compelling circumstances exist as envisaged in Section 51 (3)(a) of the Act, the court is obliged to impose the prescribed minimum sentence, which, in this case, is imprisonment for life as the victim was raped repeatedly and is also a vulnerable person due to young age.

[29] The Supreme Court of Appeal in **State v Malgas**[5] sets out how a court is to approach the minimum sentence regime, and in particular, how the enquiry into "substantial and compelling circumstances" is to be conducted. It was stated in Malgas that a Court was now required to approach sentencing conscious of the fact that the legislature has ordained life imprisonment or a particular prescribed period of imprisonment as the sentence which should "ordinarily" be imposed for the commission of the listed crimes in the specified circumstances. In paragraph 9 at 477 d-e the following was stated.

> "The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypothesis favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances".

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[5] 2001(1) SACR 469

[30] The sentencing court did not make a finding whether substantial and compelling circumstances existed as envisaged in Section 51 (3)(a) of the Act. The court merely said :

> "In my view it would be disproportionate to the offences committed by the accused and therefore unjust to impose life imprisonment sentences for the rapes committed by him. Although the accused personal circumstances do not weigh with me as much as the elements of retribution and deterrence the fact that he has no previous convictions and only started committing crime at a fairly mature age must be given substantially weight."

[31] It follows that the sentencing court erred in not indicating whether or not in found substantial and compelling circumstances and has misdirected itself by imposing a lenient sentence. Consequently, this court is entitled to sentence the first appellant afresh. The court gave appellant written notification of possible increase in the sentence imposed and invited both counsel to file additional heads of argument dealing with the possible increase in the sentence imposed. The heads of arguments were duly filed and we have considered them.

[32] In deciding on an appropriate sentence the court takes into account the factors traditionally considered in sentencing. These are all factors relevant to the nature and seriousness of the criminal act itself, all relevant personal and other circumstances relating to the

offender which could have a bearing on the seriousness of the offence and the culpability of the offender and the interest of society.

[33] The appellant was 48 years old at the time of his conviction. At the time of his arrest in 2001 he was employed by Telkom as a supervisor and was earning R13 000.00 per month. He lost his job after his arrest and and uses his kombi to earn an income. He is married and has three children one is a minor. His wife was a domestic worker earning about R1500.00 per month. Appellant was disabled from a young age by polio and is on crutches. He is actively involved in church activities where he plays various music instruments.

[34] After his arrest in 2001 his children were removed from him by social services and placed in the custody of family members. In 2005 the children came back on their own to live with him and since then the children have been living with him. He has no relationship with the complainant. He disputes the complainant's present physical condition as stated in the victim impact assessment report and state that complainant is a happily married person and has four children. He is still adamant that he is not guilty of the offences he has been convicted of.

[35] Complainant confirmed the probation officer's report that her sexual abuse at the hands of the appellant has affected her behavior

as a young child, she stated that as a young teenager, she could not take care of herself, she felt unclean and had not self worth due to the traumatic experience of rape. She did not have intimate relationships as a teenager as she was scared to be raped and forced to do all the sexual acts that appellant forced her to do. She contracted sexually transmitted deceases for which she received treatment.

[36] Complainant testified that there were times where she would harm herself by cutting herself as a way of releasing the pain that was inside of her and would hit herself against a wall as a way of venting out anger. She told the probation officer that she suffers from insomnia and would constantly imagine all the traumatic experience of abuse which causes her anxiety. She reported that at times she would dream of the appellant abusing her and would scream and get out of bed trying to run away. She suffers nightmares and this put presure on her marriage.

[37] There are serious aggravating circumstances present in the case. Despite overwhelming evidence that appellant committed these outrageous crimes, appellant is unrepentant. He does not show any remorse and denies involvement in the commission of these crimes. It is further aggravating that complainant; a defenseless young girl was robbed of her innocence and traumatized by the perverted sexual acts from an early age.

[38] **Section 28 (1) (c) of the Constitution** states,

"Every child has a right to be protected from maltreatment, neglect, abuse and degradation."

[39] **Section 28 (1) (d) of the Constitution** states,

"Every child has a right:

(f) Not to be required or permitted to work or provide services that

(i) are in appropriate for a child's age,

(ii) place at risk the child's wellbeing, education, physical or mental health or spiritual, moral or social development.

[40] Having due regard to everything that has been stated above I am of the view that there are no substantial and compelling circumstances which justify a deviation and imposition of a lesser sentence. The Legislature has ordained life imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the offence committed by the appellant and the court's obligation to respect and not pay mere lip service to that view. See **S v Malgas** par 25. The rape of children is very serious and the consequences are severe and permanent. In my view, a sentence of life imprisonment is not disproportionate under the circumstances of this case.

[41] The following order is made

1. The sentences imposed in count 1, count 2, count 3, count 4, counts ~~count 4~~, count 7 and count 10 are confirmed

2. The sentences imposed by the sentencing court in count 6 rape, count 8 rape, and count 9 are set aside and substituted therefore with a sentence of life imprisonment for each count.

DATED AT JOHANNESBURG ON THIS THE 05 JUNE 2015

MATOJANE J

SATCHWELL J

I agree, it is so ordered

PHATUDI J

I agree