IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

Case no: CA & R 266/09

In the matter between:

SINETHEMBA DAYILE **Appellant**

vs

THE STATE **Respondent**

JUDGMENT

Makaula J:

[1] The appellant was convicted of rape by the Regional Court, Port Elizabeth, and was sentenced to an effective term of 25 years imprisonment, 10 years of which was conditionally suspended.

[2] The grounds upon which the appeal is founded are as follows:

> "The honourable magistrate erred in finding that the state has proved its case beyond reasonable doubt on the following grounds:

1.1 The Honourable Court erred in finding that the contradictions that existed between the state witnesses are immaterial;

1.2 It is submitted that there are various contradictions that are of material nature, namely:

1.2.1 The complainant testified that they were playing outside whereas the eye witness N testified that they were playing at the accused's home.

1.2.2 The complainant further testified she saw the eye witness N peeping through the window, whereas the N testified that she did not peep through the window, but entered the accused's house. *(sic)*

1.2.3 The complainant further testified that she reported the rape to the first report N the following day which was the Sunday; whereas the complainant testified she reported the matter to N on the day they went to Greenacres, which was the Monday. *(sic)*

1.2.4 The complainant further testified that N asked her what happened at the accused's home, whereas the first report testified that the report was made spontaneously to her by the complainant. *(sic)*

1.3 It is further submitted that the improbability of the state's version of the events is further highlighted by the first report not finding any injuries at the Complainant's private part on the day of the incident. *(sic)*"

AD SENTENCE:

"1. The Honourable Court correctly found there to be substantial and compelling circumstances to be present that enabled it to impose a lesser sentence than the prescribed sentence in terms of the Criminal Law Amendment Act 105 of 1997. *(sic)*

2. However, the sentence of 15 years imposed by the Honourable Court is shockingly inappropriate and harsh.

3. The Honourable Court erred in over-emphasising the interest of the community and seriousness of the offence. *(sic)*

4. The Honourable Court erred in not giving sufficient attention to the personal circumstances of the appellant more specifically the fact that he was 17 years old at the time of the offence."

It is apparent that the thrust of the appeal is premised on the nature of the contradictions and the improbabilities.

[3] It is worth mentioning at this stage that the magistrate in her reasons for conviction touched on all the various aspects on which the appellant relies for his appeal. Having analysed and considered the contradictions, the magistrate concluded that they were not of a nature that would lead her to reject the evidence of the state. She ascribed the contradictions to the fact that at the time of the incident the complainant was seven years of age and N nine years of age and both testified four and five years later respectively. The magistrate concluded that in spite of the contradictions, there was ample

evidence upon which to convict the appellant hence she convicted him.

[4] The complainant, N T who was 7 years of age at the time of the incident testified that on the 11th of December 1999 she was playing at her home next to the house with N and Mandla. Appellant called her whilst they were still playing. She went to him at the doorway. On reaching him the appellant dragged her inside the house by the arm and closed the door behind them. He caused her to lie on the bed and thereafter took off her panties and his underpants and lay on top of her. She tried to cry but appellant closed her mouth with one hand. Complainant tried to push him away but in vain. She alleged that appellant took out his penis and inserted it in her vagina and made up and down movements. While the appellant was on top of her, she saw N peeping through the window. The appellant remained on top of her until she was called by her elder sister, N. The appellant then got off her. She stood up, put on her panty and went home. On reaching her home she went to the toilet and thereafter was confronted by her sister, N who asked her why she appeared shocked. She did not respond. She was afraid of the appellant who had threatened to kill her if she told anybody about what he had done to her. The next day while on the way to Greenacres with N, she decided to tell her what the appellant did to her.

[5] The next witness called was N M (N) who testified that she was 10 years old at the time of the incident and was 16 years of age at the time of testifying. She corroborated much of the evidence of the complainant except for the fact that they did not play at the complainant's house but at the

appellant's place. She testified that she approached the complainant in the afternoon of that Saturday and complainant suggested that they should play with Mandla at his home and they did so. Whilst they were still playing she was called in by the appellant who suggested to her that they should do dirty things. She told him that she was going to report that to her father. Whilst they were still playing, with the complainant standing at the doorway, she saw the appellant grabbing the complainant with her clothes around the shoulder area and pulling her inside the house. The appellant then closed the door behind them. She thought they were playing. She continued to play with Mandla next to the toilet outside. After some time she decided to go and check what the appellant and the complainant were doing inside the house. She found the door closed and opened it and entered. She saw the complainant lying on the bed on her back and the appellant was on top of her. The complainant appeared to be afraid and she enquired what the appellant was doing. The appellant then threatened to smack her and she informed him that she was going to report the matter to N.

[6] She walked out with the intention of reporting the matter to N but did not do so as N shouted at her asking where the complainant was as she wanted to wash her. N called the complainant thrice. The complainant appeared from the house of the appellant and seemed to be dizzy and was stuttering. She decided to go home where she reported the matter to her father and mother.

[7] N P (N) testified that on the day in question she was at her home

when the complainant and N informed her that they were going to play at Mandla's home which was neighbouring theirs. It was in the afternoon when they left. Later that afternoon she called the complainant to come and wash. N came in and stood next to her. She appeared very frightened. She asked where Nandipha was but N did not respond. She went to the doorway and shouted the name of Nandipha three times. Nandipha emerged from the house of the appellant and came walking towards her. She did not see that anything amiss until she was next to her and then realised that Nandipha looked frightened and was shivering. She asked what was wrong but she did not respond and they went inside. When she was washing her she could not detect anything wrong though she still appeared frightened. Before she washed her the complainant wanted to urinate and she allowed her to do so. She enquired from her whether the appellant did not do anything to her and the complainant said that the appellant did not do anything to her except that they were seated on a couch.

[8] The following morning she noticed that the complainant was not herself. Later in the afternoon she then opened up and told her that Sinethemba did touch her private parts to the extent that he got on top of her and "made movements on top of her panty". She asked N not to mention that to their mother and father because she was afraid they would give her a hiding. She further told her that Sinethemba promised to kill her if she mentioned to anybody what had happened. They went to sleep that Sunday. The following day, she took the complainant to Greenacres for Christmas

shopping. Whilst they were in Greenacres the complainant told her that the appellant actually did something to her. The complainant told her that the appellant pulled out his penis and inserted it in her vagina. The complainant mentioned this out of her own volition. It is then that N told her that she was going to mention this to her mother. The complainant insisted that she should not because Sinethemba threatened that he would kill her if she told anybody what had happened. When she got home she told their mother what the complainant had told her. She denied that she was the one who asked complainant what the appellant did to her. She insisted that the complainant related in bits and pieces what happened. On Saturday she kept quiet and on Sunday she mentioned that the accused made movements on top of her panty and on Monday she told her that the appellant in actual fact raped her.

[9] Nomfanelo Paul, the mother of the complainant, merely testified to confirm that her child's date of birth was 1 July 1991.

[10] The next witness called was Dr James Howse who examined the complainant on the 14th December 1999 at about 11H50. He noted an abrasion with bruise marks and a laceration on the inside of the vagina. These injuries were three to four days old. The hymen was not intact. The examination was very painful and uncomfortable to the complainant. Responding to a question from appellant's attorney, he opined that it was not possible that the hymen could have been ruptured by the exploration with a finger or any other object. He concluded that the hymen was ruptured by trauma because it was wide open and there were also abrasions on both

sides of the bottom of the vagina and the laceration was on the top side of the introitus of the vagina. He concluded that there were more extensive signs of trauma than one would expect from the exploration of the vagina with the finger. He stated that it would not have been possible for a layperson to notice anything because the bruising does not become visible immediately after the sexual assault. He further concluded it would have needed a thorough examination for one to have been able to notice the bruising and the superficial lacerations which were on the introitus of the vagina.

[11] The appellant testified that on the day in question he was at home, lying on a bed while Mandla and the complainant were playing and kicking each other on the floor. At some stage Mandla cried and he comforted him. At that juncture the complainant's sister shouted the complainant's name thrice and the complainant left the house. Appellant denied that he ever raped complainant. Furthermore, he stated that the complainant entered the house on her own. He never dragged her. He further denied that he knew N thereby implying that N was not there on the day of the rape.

[12] The decision arrived at by the magistrate in accepting the evidence of the complainant and N is vindicated by the record. The record clearly shows that despite the contradictions, there was sufficient evidence and corroboration to sustain a conviction. Contradictions are expected in the circumstances of this matter. That is so because the key witnesses were children at the time the offence was committed. They testified four to five years later. It would be expected to occur even if the witnesses were adults. The two child witnesses were good and intelligent witnesses when I have

regard to their ages at the time of the occurrence of this offence. They gave a good account of the events and corroborated each other on all material aspects. There is much credence in their evidence which overshadows the contradictions.

[13] The nature of corroboration is neatly woven in the evidence of all the state witnesses. The complainant said she played with N and Mandla on that Saturday afternoon. N confirmed that N arrived in the afternoon of that Saturday and went with the complainant to play at Mandla's place. Though appellant denied the presence of N, he confirmed that the complainant was at his place playing with Mandla. However, his evidence is outweighed by that of N, the complainant and N. N and the complainant corroborated each other about how the latter ended up in the house of the appellant. N testified that the complainant was dragged into the house by the appellant who closed the door behind them. It is not material whether he dragged her by the arm or clothes. The complainant and N corroborated each other in regard to the appellant being on top of the complainant on the bed. It is not material whether N saw that through the window or was next to the bed at the time. It is unlikely that N fabricated this. Furthermore, how would she have known that at some stage the appellant was on top of the complainant in the absence of any suggestion that they had discussed this occurred. The complainant, N and N testified that at the stage when the complainant left the house of the appellant N had called her thrice. The observation by N that the complainant was frightened when she came to her is consistent with the experience she had with the appellant. That led to N enquiring about what had happened

inside the house. N stated that she was afraid to report what she had seen the appellant doing to the complainant. N observed that N appeared shocked when she was standing next to her.

[14] It is apparent that the complainant did not report the incident immediately. She advanced as a reason that the appellant had threatened to harm her if she told other people what he did. Her failure to tell someone immediately is by no means surprising considering she was a mere seven years old at the time. What is clear is that eventually, albeit in stages, she did inform N about the incident. Whether that occurred on the way to Greenacres does not reflect adversely on her overall credibility.

[15] Immediately after the report, the complainant was taken to a Doctor who confirmed that she was raped. I have dealt with his findings earlier. The findings are consistent with the report made by the complainant and so was the age of the injuries.

[16] The defence of the appellant is a bare denial. On an assessment of all the evidence I find that the appellant's version is not reasonably possibly true. The magistrate correctly rejected it and did not err in doing so. I am satisfied that the evidence established the guilt of the appellant beyond a reasonable doubt and there is no merit in the appellant's appeal against his conviction.

[17] The appellant appealed against the sentence on the grounds that it is shockingly inappropriate and harsh. The test applicable with regard to an

appeal against sentence is now trite. The test is as stated in the case of *State v Giannoulis* 1975 (4) SA 867 (A) at 868. Holmes JA summarised the test applicable as follows:

> "1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal-
>
> a) should be guided by the principle that the sentence is *"pre-eminently a matter for the discretion of the trial Court";* and
> b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "*judicially and properly exercised*".
>
> 2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[18] Scott JA in *S v Kgosimore* 1999 (2) SACR 238(SCA) at 241 para 10 had this to say:

> "It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. Whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be strikingly inappropriate or to induce a sentence of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have been imposed. All these formulations, however, are aimed at determining the same thing; viz whether there was a proper

> and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true enquiry. (Compare *S v Pieters* 1987 (3) SA 717(A) at 727G-I). Either the discretion was properly and reasonable exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so." (My emphasis).

[19] The above test is equally apposite in this appeal. The term of imprisonment imposed is 25 years, 10 years of which has been conditionally suspended, making the term of imprisonment an effective 15 years.

[20] The salient grounds upon which the appeal is based are that (a) fifteen years imprisonment is disproportionate to the personal circumstances of the appellant, the crime and the needs of society; (b) that the sentence is too severe and/or disturbingly inappropriate and falls to be interfered with; (c) that the injuries sustained by the complainant are not serious or do not have a lasting effect and there is no evidence of psychological damage to the complainant placed before court; (d) that the rape the appellant is convicted of is not of a serious nature; and (e) that the court failed to take into account the youthfulness of the appellant in that he was seventeen years old at the time of the commission of the offence.

[21] In this matter the trial court correctly found that there were substantial and compelling circumstances justifying the departure from the minimum sentence. What has to be determined is whether a sentence of 25 years imprisonment, of which the appellant must effectively serve 15 years, is

appropriate in the circumstances. I may say from the onset that the sentence which was imposed by the magistrate is strikingly inappropriate and stands to be interfered with. The substantial and compelling circumstances which the trial Court rightly found to exist justified a lesser sentence that which it imposed. While the fact that the appellant was only 17 years old when he committed the offence was recognised it does not appear that the trial Court attached sufficient weight to this. Similarly, greater weight should have been given to the absence of evidence regarding the nature and extent of the psychological harm the complainant may have suffered. There is no indication either that proper weight was given to the fact that the rape, while obviously serious, was nevertheless not the worst of its kind. The evidence of Dr J E Howse did not indicate that grave physical harm had been inflicted on the complainant. The only aggravating factor was that the complainant was 7 years old at the time. In view of these factors, this Court, sitting as a Court of first instance, would have imposed a sentence of imprisonment for fifteen (15) years and suspended five (5) years conditionally. In the circumstances, as the sentence imposed by the regional magistrate is inappropriate this Court must interfere therewith.

In the result, I make the following order:

(a) The appeal against the conviction is dismissed;

(b) The sentence of 25 years, 10 years of which was conditionally suspended is set aside and substituted with the following:

"The accused is sentenced to a term of imprisonment for fifteen (15) years of which five (5) years is suspended for a period of five (5) years on condition that the accused is not convicted of rape or attempted rape, committed during the period of suspension."

(c) The sentence is antedated to 21 April 2009.

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M MAKAULA
JUDGE OF THE HIGH COURT

I agree and it is so ordered

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Y EBRAHIM
JUDGE OF THE HIGH COURT

Appellant's Attorneys: Mr Govender

Justice Centre

GRAHAMSTOWN

Respondent's Counsel: Ms H Obermeyer

Director of Public Prosecutions

GRAHAMSTOWN

Heard on: 31 March 2010

Delivered on: 19 August 2010