FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A41/2013

In the appeal between:-

AUGUSTUS LEHLOHONOLO MOTAUNG Appellant

and

THE STATE Respondent

CORAM: MOCUMIE, J *et* SEPATO, AJ

HEARD ON: 20 MAY 2013

DELIVERED ON: 14 JUNE 2013

APPEAL

MOCUMIE, J

[1] This is an appeal from the Regional Court, Bethlehem. The appellant was convicted of one count of rape on 11 April 2008 and sentenced to life imprisonment in terms of section 51(1) of Act 105 of 1997 as amended ("the Criminal Amendment Act"). The appellant was legally represented during the trial.

[2] The complainant was fourteen years of age when the appellant, who was in a love relationship with her mother,

stayed with them in the same house. The appellant was, in other words, her stepfather.

[3] The unrefuted evidence the State led was that on 13 January 2007 the complainant, her twenty three year old sister, D, her nine year old sibling, L, her mother, and the appellant went to sleep after watching television. Around midnight or very early hours of the morning, whilst the rest of the family were fast asleep; the appellant stripped off his underwear; removed the blankets the complainant was sleeping under on the floor in D's bedroom and had sexual intercourse with her. The appellant threatened to kill her should she report the incident to anyone.

[4] The house is a one roomed house divided into a kitchen and two bedrooms. The kitchen is divided from the bedrooms by a wardrobe. The bedrooms are divided into two by a curtain.

[5] When the complainant woke up later that day the first opportunity she got, she went to her aunt, who stayed in the same premises, but in the backyard, and reported the incident to her in a letter she wrote herself and gave to her aunt's daughter. In the letter she stated (as translated):

> "Gister ouboet Lehlohonolo het my R5 gegee. Ek het gedink dit is net 'n geskenk wat hy my gegee. Maar dit was nie so nie. Hy wou my verkrag het. Toe my ma al klaar aan die slaap geraak het; dit was tussen 1 en 2 uur. Dit was vroeg in die oggend toe hy na my toe gekom en hy was kaal. Dit is ek Nana. Ek gaan

> eers nog ‘n bietjie ver. Toe hy vir my daardie geld gegee het was dit toe ek nog TV gekyk het. Dit is al.”

[6] As a single witness of fourteen years of age and clearly not sophisticated with sexual matters, there were discrepancies in her evidence, which made her evidence not satisfactory in all respects. However, her evidence was corroborated by DNA results, which linked the appellant directly as the person whose semen was found on the young girl’s underwear. Her evidence was also corroborated, *albeit* not a prerequisite, by the first report she made to her aunt at the slightest opportunity she got, hardly six hours after this incident took place and the aunt’s own observation that the young girl was crying was anxious and complained of pains in her bladder. She also had a foul smell of “a female after sexual intercourse”. She denied that the complainant ever went out during the night as the appellant alleged.

[7] In his defence the appellant simply denied that he had sexual intercourse with this young girl, except to allege that he and the mother always reprimanded her for going out with young boys during the night and coming back home late. Insinuating that this young girl must have had sexual intercourse with someone else but not him and was angry at him for reprimanding her. He, however, could not explain how his semen ended up on the child’s underwear, as confirmed by the DNA analysis conducted subsequent to the young girl’s report.

[8] It was common cause between the State and the defence that the complainant was sexually penetrated on the night or early hours of 13 January 2007. The only dispute, thus the only issue between the State and the defence to be determined by the trial court and this Court on appeal, was whether the appellant was the person who had sexually penetrated this young girl and thus raped her.

[9] Despite the complainant being a young and single witness, her evidence as a whole was satisfactory in all material respects. The trial court dealt sufficiently with this issue. It was alive to the pitfalls of the evidence of a single witness, particularly of such a young age. It addressed the discrepancies in the evidence of this young girl and correctly so, came to the conclusion that such discrepancies were not material taking into account that it was corroborated by the first report she made to her aunt and critically the DNA results. The appellant could hardly refute this evidence nor could he explain the presence of his semen on the underwear the young girl was wearing the morning she alleged he appellant raped her.

[10] Mr Van der Merwe, on behalf of the appellant, in the light of the overwhelming evidence the State presented and the careful consideration the trial court gave to the matter, conceded that he could not persuade the appeal court that the trial court erred in any manner. I am also not persuaded that the trial court misdirected itself on any aspect of the merits of this case. In the absence of any irregularity or

misdirection the court is bound by the credibility findings of the trial court. (See **S v Olivier** 1998 (2) SA 267 (A); **S v Francis** 1991(2) SACR 198 (A).) There is consequently no reason to temper with the conviction.

[11] It is trite that sentencing is pre-eminently within the discretion of a trial court and a court of appeal will only interfere with the sentence if the trial court has not exercised its discretion judiciously. The test for interference is (a) whether the discretion of a trial court has been judiciously and properly exercised and (b) whether the sentence imposed is vitiated by irregularity or misdirection or is shockingly inappropriate - **S v Malgas** 2001 (1) SACR 469 (SCA).

[12] In his grounds of appeal against sentence, Mr Van der Merwe submitted that the trial court failed to take the cumulative effect of the appellant's personal circumstances into account, particularly his relative young age (he was 40 years of age at the time of the commission of this rape); the fact that he had no previous convictions as well as the fact that this rape was not the worst kind, because the complainant was not seriously injured. Compare **S v Mahomotsa** 2002 (2) SACR 435 (SCA) at 443 g-h.

[13] It is however clear on the record that the trial court took into account as aggravating circumstances the following factors: the tender age of the complainant; the fact that the appellant raped her under the same roof her mother and elder sister were sleeping; the fact that the appellant threatened to kill

her if she reported the incident to anyone; the fact that the appellant abused his position as the complainant's stepfather; and the high rate at which the crime of rape was perpetrated against young children.

[14] Rape of a young child such as the complainant is always an extremely serious matter, even in the absence of serious injuries and despite there being no evidence of permanent psychological after effect. This is all the more so where the perpetrator is a man in a position of trust *vis-à-vis* the complainant. (See **S v Snoti** 2007 (1) SACR 660 (EC) at 663c. Over and above section 51(3)(a)A (ii) of the Criminal Law Amendment Act as amended provides:

> "When imposing sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:
>
> (ii) an apparent lack of physical injury to the complainant"

[15] There is a responsibility on courts to impose sentences in respect of certain classified crimes as the legislature prescribed without any fear or based on any flimsy reasons as set out clearly in **S v Malgas** 2001 (1) SACR 1 (SCA). Even stronger remarks were made recently in **S v Matyityi** 2011 (1) SACR 40 (SCA) at 53d-g:

> "As **Malgas** makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive

> their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, are foundational to the rule of law which lies at the heart of our constitutional order."

If this approach is consistently applied by all courts in cases where victims are of the complainant's age group which falls within the age group provided for specifically by the legislature, there is a great likelihood that this scourge can be eradicated. This is not to ordain that life imprisonment should be implemented blindly; the courts must still conduct a balancing exercise of all relevant factors. Compare **S v Mqikela** 2010 (2) SACR 589 (ECG); **S v PB** 2011 (1) SACR 448 (SCA).

[16] In this case the appellant conducted himself with total disregard of this young girl's right not to be abused and individual physical integrity. To use the words of **Ponnan JA** in **S v Matyityi** above

> "[this] is unacceptable in any civilised society, particularly one that ought to be committed to the protection of the rights of all persons, including women [and children.]"

[17] I agree with the trial court entirely that the appellant's personal circumstances and mitigatory factors referred to by the defence, in the light of the aggravating factors highlighted above, do not on their own or cumulatively, amount to compelling and substantial circumstances which justified it to deviate from the prescribed sentence.

[18] Having regard to all the circumstances in this case, the minimum sentence imposed is manifestly fair and just. This is precisely the type of matter the legislature had in mind when it enacted the minimum sentencing legislation. The trial court cannot be faulted in any manner. The sentence it imposed ought to be confirmed.

[19] In the result the following order is made:

ORDER:

1. **The appeal against both conviction and sentence is dismissed.**
2. **The conviction and sentence imposed are confirmed.**

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B.C. MOCUMIE, J

I concur.

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R.M. SEPATO, AJ

On behalf of appellant:	Mr P.L. van der Merwe Instructed by: Justice Centre BLOEMFONTEIN
On behalf of respondent:	Adv M. Lencoe Instructed by: Director of Public Prosecutions BLOEMFONTEIN

BCM/sp