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

Case No.: A74/2014

In the matter between:

Appellant

MOKETE PETER MOFOKENG

and

THE STATE Respondent

CORAM: MOLEMELA, J *et* WRIGHT, AJ

HEARD ON: 4 AUGUST 2014

JUDGMENT BY: G.J.M. WRIGHT, AJ

DELIVERED ON: 14 AUGUST 2014

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[1] The Appellant stood trial in the regional court at Phuthaditjhaba on a count of rape. It was alleged that he had sexual intercourse with the complainant, an 11 year old girl, without her consent. He was found guilty as charged on 7 February 2011 and was sentenced to life imprisonment. By exercising his automatic right of appeal, the Appellant appeals to this court against both conviction and sentence.

[2] Regarding the conviction, Miss Kruger, an attorney at the Justice Centre in Bloemfontein who represented the Appellant before us, informed the court that her instructions are to request the court to uphold the appeal and set aside the conviction. She responsibly dealt with the various issues relevant to the identification of the Appellant by the complainant. In short these aspects are:

(i) the complainant's identification of the Appellant in court during the trial,

(ii) the pointing out of the Appellant as her attacker at the police station after his arrest,

(iii) a description given by the complainant during her testimony in court and

(iv) an independent witness who saw the complainant in the company of the Appellant on the day in question.

[3] In the court *a quo* the complainant testified with the assistance of an intermediary and was not present in the actual court room while she testified. She explained how she was walking in her residential area when an older man took her by the hand. She told him that she was not allowed to walk with unknown people, but he insisted that she accompany him. After reaching some trees, he threatened her by saying that he will assault her with a screwdriver and a knife if she does not undress herself. He proceeded to remove her pants and underwear. He made her lie down on the ground and proceeded to insert his penis into her vagina and raped her.

[4] During her examination in chief, the complainant was asked by the prosecutor to give a description of her attacker. Before the complainant could respond to the question however, the magistrate interrupted the prosecutor, indicating that such a question is unfair. The magistrate went further and indicated that the complainant will get an opportunity to identify her attacker in court. [See the record p 21 lines 8 to 9] During her examination in chief, the complainant did not identify the Appellant as her attacker.

[5] After the prosecutor completed the complainant's examination in chief, the magistrate proceeded to question the complainant. It is during these questions that it was placed on record that the complainant identified her attacker at the police station. [See the record p 25 lines 17 to 22] The magistrate then requested for the complainant to be brought into the courtroom. She was asked to indicate whether she can see the man who raped her. She pointed out the Appellant. The record gives no indication of the conditions in court when she made this identification (with reference to the number people present or the position of the Appellant and so forth). The interpreter did place on record that the Appellant was pointed out without hesitation.

[6] During cross-examination the complainant finally gave a description of her attacker. This was done spontaneously on a question by the defence attorney as to whether the police arrested the correct person. [See the record p 30 lines 20 to 22] It was never disputed that the description given by the

complainant in fact matched that of the Appellant. Mrs Kruger conceded as much during argument.

[7] Is does appear that the intervention of the magistrate in stopping the state prosecutor from placing evidence on record regarding a description of the attacker could well have led to a situation where no identifying evidence was tendered. Also, the complainant may not have made any identification of the Appellant in court. Fortunately for the State the appellant's attorney cross-examined the complainant and thereby elicited the assailant's description.

[8] This was not the only unnecessary intervention by the magistrate. He questioned the prosecutor regarding the availability of the collection kit which usually accompanies the J88 medical report. This can be found on p 32 of the record. During the testimony of the investigating officer, the magistrate again enquired after the DNA evidence. At that stage the prosecutor responded that the results came back negative, to which the magistrate reacted by saying "then it won't be relevant". This exchange can be found on p 73 of the record. Before the State closed its case, the magistrate again directed enquiries as to the DNA evidence. At this point the prosecutor indicated that no DNA material could be found in the specimens which were analysed. [See record p 83 lines 12 to 24]

[9] The dangers present at identification are compounded when a witness is asked to point out an accused in court. This is

especially so in this matter where no description was given of the perpetrator before the pointing out and no identity parade was ever held. It needs to be remembered that the complainant is a young child – another reason why her testimony should be treated with caution. In the present matter there are sufficient safeguards against an incorrect identification.

[10] It would appear that the description eventually provided by the complainant does fit that of the Appellant. The magistrate had an opportunity to observe the Appellant and found that the bulge on his forehead matches that described by the complainant, and this is a unique feature. The Appellant himself testified that the bulge is not the result of an injury and that it has been like that since an early age. The pointing out of the Appellant at the police station shortly after his arrest may well serve as corroboration of the complainant's evidence. The identification at the police station was never attacked by the Appellant during cross-examination of the complainant. It was also not argued before us that the pointing out of the Appellant should be disregarded in any way.

[11] In **S v Rall** 1982 (1) SA 828 (A) certain guidelines were mentioned regarding the conduct of a presiding officer. One of these guidelines is that a presiding officer should conduct a trial in such a manner that his impartiality and fairness are manifest to all concerned. He should refrain from questioning in such a way or to such an extent as to lose judicial

impartiality and objectivity. See also **S v Maseko** 1990 (1) SACR 107 (A) and **S v Le Grange & Others** 2009 (1) SACR 125 (SCA). In **S v Msithing** 2006 (1) SACR 266 (N) the presiding magistrate entered into the arena to the extent that he was virtually prosecuting the accused. This may to some extent also be said of the magistrate in the present matter.

[12] This judgment deals with only some examples of the manner in which the magistrate acted improperly. The conduct of the magistrate may have resulted in a finding that the Appellant had an unfair trial. And this may have led to an acquittal if it was not for the testimony of one crucial and independent witness. **Teboho Modisenyane** testified that he knows the Appellant and that he knows where the Appellant was staying at the time. On the morning of 5 January 2010 (the day of the alleged incident) he saw the Appellant walking with the complainant. The Appellant of course denies this and attempted to show that the witness may have had a motive for falsely incriminating him. Modisenyane's evidence corroborates the complainant's identification of the Appellant as the person who met her on the street, took her away and raped her.

[13] The Appellant testified that on the day in question he was suffering "pains" which would have made it impossible for him to have intercourse. He further testified that he was asleep in his home during the time of the alleged rape. **Nthabiseng Mtholo**, the Appellant's cousin, testified in his defence. She attempted to indicate that there is another

person with a similar name as the Appellant and who would roughly match the description given by the complainant. **Mtholo** did not impress as a credible witness. Her testimony should not be used to corroborate the Appellant. The trial court did not expressly reject the Appellant's defence. It is however clear that, in the light of all the available evidence, the version of the Appellant cannot be accepted as reasonably possibly true.

[14] Even though the judgment of the trial court comprises only of 35 lines, it cannot be said that it contains any misdirections. This court is satisfied that the guilt of the Appellant was proven beyond a reasonable doubt. As a result the appeal against conviction should fail.

[15] The appeal against sentence holds more merit. The magistrate spent even less time considering the appropriate sentence. Because of the age of the complainant, the required sentence was that of life imprisonment, unless substantial and compelling circumstances could be found. The court *a quo* failed to find any substantial and compelling circumstances.

[16] On behalf of the Appellant it was suggested that the trial court erred in not finding that substantial and compelling circumstances do exist. During argument Mrs Ferreira, acting for the State, conceded that there are indeed substantial and compelling circumstances that justify the imposition of a lesser sentence.

[17] In considering the nature and extent of this particular instance of rape, it needs to be remembered that the Appellant took undue advantage of an 11 year old girl, forcing himself on her in an unacceptable manner. It appears as if the Appellant penetrated the complainant from behind and while she was forced to kneel on the ground. He threatened her with a knife and a screwdriver, especially after she begged him to leave her alone. Apart from the genital injuries noticed by the medical examiner, bruises on her sides were also evident. These are aggravating factors.

[18] Rape is a very serious offence (see **S v Chapman** 1997 (3) SA 341 (SCA) at 344 I – J where rape was described as "a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim"). The circumstances of the present matter do not however present as one of the worst cases of rape. The complainant did not suffer any serious or permanent injuries, either physical or psychological. Even though the Appellant threatened to use either a knife or a screwdriver, he did not in fact use a weapon to inflict violence.

[19] In the present matter it does appear that a sentence of life imprisonment is disproportionate to the crime. We agree that there are indeed substantial and compelling circumstances. These are:

(i) the youthful age of the Appellant (he was 21 years old at the time of sentencing),

(ii) that he is a first offender,

(iii) the 13 months that the Appellant spent in custody pending the finalization of the trial,

(iv) the lack of serious and permanent physical injuries to the complainant,

(v) the lack of evidence as to permanent psychological damage suffered by the complainant as a result of the incident.

In regard to this last-mentioned factor, it is troubling that the prosecutor did not lead proper evidence regarding the impact of the incident on the complainant. It can however be accepted that an incident of this nature would definitely have had an impact on the complainant's psychological well-being and sense of self. This approach has been advocated in cases such as **S v Mahomotsa** 2002 (2) SACR 435 (SCA) and **Rammoko v Director of Public Prosecutions** 2003 (1) SACR 200 (SCA).

[20] In the circumstances of this case the offence is deserving of a severe punishment that should convey to the Appellant and society at large that our children are precious and should not be abused. The gravity of the offence of rape should be reflected in the sentence while at the same time the Appellant should not be sacrificed on the altar of deterrence and revenge.

[21] In **S v Vilakazi** 2009 (2) SACR 552 (SCA) Nugent JA cautioned against the danger of heaping "excessive punishment . . . . on the relatively few who are convicted in

retribution for the crimes of those who escape or in the despairing hope that it will arrest the scourge". [see **Vilakazi**, paragraph 3] The following dicta in **S v Abrahams** 2002 (1) SACR 116 (SCA) (at paragraph 29 thereof) should also be kept in mind, namely that "some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust".

[22] Mrs Kruger suggested that 18 to 20 years imprisonment would be an appropriate sentence. Mrs Ferreira suggested 20 to 23 years imprisonment. We are of the opinion that imprisonment for 18 years will be an appropriate sentence in the circumstances.

[23] The Appellant has been in custody since arrest on 3 January 2010. He was sentenced on 7 February 2011. It is not evident why it took so long for this appeal to reach the stage of argument. The time lapse does however mean that the Appellant has already served some part of his sentence. The sentence should be antedated to allow for the time that he has been serving his sentence after imposition thereof by the trial court.

[24] In the result the following orders are made:

1. The appeal against the conviction is dismissed.

2. The appeal against the sentence is upheld and the sentence imposed by the court below is set aside and replaced with the following:
"The accused is sentenced to 18 years imprisonment."

3. The sentence is antedated to 7 February 2011.

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G.J.M. WRIGHT, AJ

I concur.

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M.B. MOLEMELA, J

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