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

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| **Reportable:** | **NO** |
| **Of Interest to other Judges:** | **NO** |
| **Circulate to Magistrates:** | **NO** |

Appeal Number: A252/2017

In the matter between:

**TSHEPISO TYS MANQU**
Appellant

And

**THE STATE** Respondent

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**CORAM:** MUSI, JP *et* CHESIWE, J

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**HEARD ON:** 04 FEBRUARY 2019

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**JUDGMENT BY:** CHESIWE, J

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**DELIVERED ON:** 9 MAY 2019

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[1] The Appellant was convicted in the Regional Court, Bloemfontein, on a charge of rape of a minor and sentenced to life imprisonment. The appeal is against conviction and sentence. Seeing that he was sentenced to life imprisonment the appeal came by virtue of his automatic right of appeal.

[2] The Appellant was legally represented by Mr Modise. Before he pleaded, the trial court informed him of the implications of section 51(1) read with Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (Act) and that the relevant minimum sentence of life imprisonment would be applicable if he were to be found guilty as charged. The Appellant pleaded not guilty and denied that he committed the act of rape of against four (4) years old R[….] M[….] (the Complainant).

[3] Due the Complaint's age and the nature of the offence the court room was cleared and proceedings were held in camera. The trial court, in terms of Section 170A of the CPA, used an intermediary for the minor child to testify.

[4] The Appellant relied on the following grounds of appeal: that the court erred in finding that the Complainant and the State witnesses were credible and reliable; that it erred in drawing a negative inference from the Appellant's version and not making a credibility finding in favour of his testimony; and that the State had not proven its case beyond reasonable doubt.

[5] The facts of this matter are briefly summarised as follows. The Complainant testified that she was playing with a friend when the

Appellant dragged her into a shack and raped her. She explained that the Appellant closed her mouth as he undressed her trouser and panty. She demonstrated, by using anatomical correct dolls, how the Appellant penetrated her vagina and anus.

[6] M[….] O[….] M[….], (M[....]) the Complainant's mother, testified that on the day of the incident she was from work and could not find the Complainant. With the help of M[….] (M[....]'s sister) they started calling the Complainant's name. The Complainant responded from within the Appellant's shack. M[....] rushed into the shack and found the Complainant next to the bed on the floor busy looking for her clothes under the bed. The Appellant and the Complainant were both undressed. She asked the Appellant why he and the Complainant were both undressed, the Appellant did not respond. M[....] took the Complainant and left the shack. After questioning the Complainant for some time she eventually told her that the Appellant hurt her using a stick, referring to the Appellant's penis. M[....] went to report the matter to the South African Police Services, and while there, the Appellant was brought into the police station by community members.

[7] The third State witness, Constable Ndamase, testified that the Appellant was brought to the police station by community members and that he had scratch marks on his head and a bleeding nose. He noted that the Appellant's underwear had some blood stains and on closer observation, he discovered that the Appellant still had a condom on his penis.

[8] The Complainant's case was corroborated and bolstered by her mother and aunt, who pointed out and placed the Appellant in the shack with the Complainant on the night the offence was committed. The Complainant's evidence is further corroborated by the J88 which was handed in as Exhibit B. It stated that the Complainant had abrasions at 5-6 o'clock position and 11 o'clock in her vaginal area as well a fresh tear at 4 o'clock position in her anus area that indicated the probability of forceful penetration.

[9] The Complainant though four years old at the time of the offence was neither hesitant nor fumbled during her testimony. She was able to testify in a formalistic way and demonstrated with the dolls how the Appellant raped her. This is noted on the transcribed record page 17 line 10 to 25 as follows:

> "Whilst I was playing on the line Tshepisho dragged me, he took me into the house he was drunk…… He raped me he closed my mouth.
>
> Prosecutor: What did he do when he raped you? ... He undressed me.
>
> Prosecutor: What is it to undressed? … It is a panty or trouser or pants.
>
> Prosecutor: And after he undressed you, your trouser and panty then what did he do? Funny things or strange things.
>
> Prosecutor: Can you explain to me Realeboga what is strange things? … It is when you rape people.
>
> Prosecutor: At that time when he was raping you, what did you do? … I cried."

[10] The Complainant knew the Appellant. He is her uncle. On page on 27 line 20 and page 28 line 5 to 15 the following is noted:

> "Prosecutor: How many people? …. There are three. Out of these three, which one is uncle Tshepisho? …. It is that one. If you are able to tell what is he wearing?
>
> Prosecutor: Can you tell us what it is that he is wearing? …. He is wearing white garment with a black pants, with black pants.
>
> Prosecutor: Where is he sitting? He is sitting on this side.
>
> Prosecutor: The person you referred to as uncle Tshepisho is on your left side, is he on the middle or is he on your right hand side? …He is on my right hand side.
>
> Prosecutor: What is uncle Tshepisho holding? … I do not know.
>
> Prosecutor: What colour is the item which uncle Tshepisho is holding? It is brown."

[11] It is trite that evidence of identification must be approached with caution. The dangers of an incorrect identification are well-known. The pointing out of a wrong person by witnesses who act in good faith has led to notorious cases of injustice. The evidence of identifying the accused has to be treated with caution because of the ever present possibility of an honest mistake being made by witnesses. In **S v Mthetwa**[1], Holmes JA stated that:

> "Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his

[1] S v Mthetwa 1972 (3) SA 766 (A).

> observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities."[2]

[12] In my view, the Complainant was a truthful and reliable witness. The Complainant correctly identified the Appellant in the dock in the presence of other people who were put in the dock with the Appellant. The Complainant was confident enough to confirm that the Appellant is "Tshepisho wa Madinayo".[3]

[13] The trial court, with the evidence before it, was correctly satisfied that the State proved the Appellant's identity beyond reasonable doubt. The trial court came to the inescapable conclusion that the Appellant was the person who raped the Complainant and correctly convicted the Appellant. From the judgment of the trial court the learned Magistrate was acutely aware of the conflicts and discrepancies in the evidence, having regard to the fact that the Complainant was a four year old at the time of the offence. Ultimately the evidence must be assessed as a whole.

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2 S v Mthetwa above at 768 A-E. See also S v Khumalo en Andere 1991 (4) SA 310 (A) at 328E – G and S v Mlati 1984(4) SA 629 (A) at 632F – 633C.

3 Page 17 line 11 of the record.

[14] The Appellant could not refute the Complainant's version except through his bare denial. The Appellant's version was brief and his evidence was so unconvincing that it could be safely rejected as not reasonably possibly true. He averred, for instance that he was not inside the shack, that he went to his shack after the incident and denied that he was found with a condom. He alleged that the Complainant was raped by someone else, but could not substantiate this allegation, nor could he give any reason or evidence as to why the Complainant would implicated him.

[15] The Appellant could not dispute the Complainant's version that a person called Malume who was drinking alcohol with the Appellant on the day the offence was committed went home after drinking and that she was alone in the shack with the Appellant.[4] On the Complainant's version Malume was not on any occasion alone with the Complainant. The Appellant simply denied that he was in the shack with the Complainant.

[16] The Complainant, who was six old when she testified, was on the witness stand for two days and was cross-examined at length by Mr. Modise. Indeed the court is an intimidating place for most witnesses and, doubtless, even more so for a child witness. In court her evidence speaks and shows her truthfulness and accuracy. She had to tell the court a straightforward story which permitted no fabrication. I am

[4] Page 41 line 1 – 5 of the record.

convinced that had she indeed not been telling the truth, this would have been obvious to the court by virtue of her demeanour and other factors.

[17] In **R v Dhlumayo and Another**[5] the majority, per Greenberg JA and Davis AJA (Schreiner dissenting) said that:

> "…The trial Judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked."[6]

[18] An appeal court will only tamper with the trial court's findings if it is shown that the findings made by the trial court were clearly wrong. It has not been submitted that the trial court committed any misdirection. Furthermore, when consideration is paid to all inconsistencies, improbabilities, there is no reason to doubt the correctness of the credibility findings made by the trial court. I am satisfied that the State proved its case beyond reasonable doubt. Furthermore, the trial court correctly found the Appellant to be an untruthful witnesses and correctly rejected his version as false beyond reasonable doubt. Before us, Mr Van der Merwe on behalf of the Appellant, conceded the merits in respect of conviction. Advocate Botha on behalf of the Respondent, submitted that the rape of a four (4) year old is a very serious offence and would have a lasting impact on the little

[5] R v Dhlumayo and Another 1948 (2) SA 677 (A).
[6] Ibid at 705.

girl though such evidence was not led during the trial. He submitted that the trial court had not misdirected itself and it dealt with the issue of compelling and substantial circumstances.

[19] In my view the trial court correctly convicted the Appellant and there is no reason to tamper with the trial court's findings on the conviction

[20] I now turn to the appeal against sentence. Counsel for the Appellant submitted that the trial court incorrectly found there were no compelling and substantial circumstances present to deviate from the prescribed minimum sentence and that there was no evidence of emotional trauma, if any, suffered by the Complainant. On that basis he submitted that this court was at large to interfere because the court a quo had committed a misdirection in sentencing the Appellant. Counsel for the Respondent submitted that the trial court did not err on the facts or the law in considering an appropriate sentence. He contended that the sentence imposed does not induce a sense of shock nor is it inappropriate and submitted that the sentence of life imprisonment is therefore appropriate.

[21] It is trite that sentencing is a matter of discretion by the trial court. A court of appeal will only interfere if the sentencing court has failed to exercise its discretion judicially. This will be in situations where the trial court misdirected itself or committed an irregularity or the sentence is shockingly inappropriate. This means the discretion must have been exercised wrongly.

[22] The crime which the Appellant was convicted of, falls within the relevant provisions of section 51 (4) read with Part 1 schedule 2,

of the Act. The sentence of life imprisonment must be imposed unless there are substantial and compelling circumstances which justify the imposition of a lesser sentence.[7] The test of what constitutes substantial and compelling circumstances was articulated in **S v Malgas**.[8]

[23] The Appellant was in a position of authority and trust in respect of the minor child. Given the gravity of the offence, there is no doubt that the he abused the trust the child had in him, as the he is her uncle. That alone is aggravating.

[24] The violence and abuse perpetrated on children is a scourge which has become prevalent in South Africa. These type of offences are on the increase and the courts has to take cognisance of these offences.[9] Rape must be considered to be amongst the gravest socially evil phenomena which our society encounters. The community values of our society must be placed at a primary of importance on the rights of women and children.[10]

[25] The trial court took into consideration the Appellant's personal circumstances, and in its view there was nothing exceptional about the Appellant's personal circumstances. The question is was there misdirection or irregularity by the trial court and if substantial and compelling circumstances existed which

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7 Section 51 (3) of Act 105 of 1997 provides that in the absence of any physical injuries that shall not constitute substantial and compelling circumstances.

8 S v Malgas 2001 (1) SACR 469 (SCA) at 482 c.

9 S v SMM 2013 (2) SACR 292 SCA Majiedt JA said at para [14], "Our country is plainly facing a crisis of epidemic propositions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmers to stem the tide, but sexual abuse of particularly women and children continue unabated."

10 S v Swarts and Another 1992 (2) SACR 380 (C).

warranted a lesser sentence. If none exists then this court is bound by the sentence imposed by the trial court.

[26] As stated, and rightly so, by the trial court, the child was a toddler that was often allowed to visit the Appellant during the day and he abused this position. He did not show any remorse. The fact that alcohol played a role, as submitted by Counsel for the Appellant cannot be regarded as substantial and compelling. There is no evidence as to how much he drank or what effect the alcohol had on him.

[27] Counsel on behalf of the Appellant submitted that the life sentence imposed on him should be tampered with as it is shockingly inappropriate and that it be reduced to between 15 to 20 years. Mr Both on behalf of the Respondent, submitted that the trial court did not misdirect itself and dealt with the compelling and substantial circumstances and correctly concluded that there were none. He supported the imposed life sentence.

[28] After careful consideration of all the relevant circumstances I could not find any substantial and compelling circumstances which justify the imposition of a lesser sentence than life imprisonment. There is nothing that persuades me to impose a sentence different from that imposed by the trial court. The sentence imposed is just and appropriate to this particular offence and there is no justification to tamper with it.

ORDER

[29] Consequently the following order is made;

1. The appeal on conviction and sentence is dismissed.

2. The conviction and sentence are confirmed.

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**S. CHESIWE, J**

I concur.

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**C.J. MUSI, JP**

On behalf of the appellant: Mr. P. L. Van Der Merwe
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. Botha
Instructed by:
Director of Public Prosecution
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