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

Appeal number: A28/2022

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

In the matter between:

B[....] P[....] K[....] Appellant

and

THE STATE Respondent

HEARD ON: 8 August 2022

CORAM: LOUBSER, J et MTHIMUNYE, AJ

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 25 AUGUST 2022

[1] The Appellant in this appeal is a 39 years old male who was found guilty of raping a 12 years old girl in the Regional Court sitting at Heilbron on 14 October 2015. On 9 March 2016 the Appellant was sentenced to life imprisonment in terms of the provisions of Section 51 (1) of the Criminal Law Amendment Act 105 of 1997. In sentencing the Appellant, the trial Magistrate found that there were no substantial and compelling circumstances justifying a deviation from the minimum sentence prescribed by the said Act. The fact that the Appellant admitted during the course of the trial that he knew that he was HIV positive at the time of the alleged crime, was taken into account by the trial Magistrate when he came to his finding.

[2] The Appellant now appeals against both his conviction and the sentence imposed. He enjoys an automatic right of appeal because of the sentence of life imprisonment. Notwithstanding, it will be noted that it took more than 6 years since the sentencing of the Appellant before this Court was placed in a position to hear the appeal. This inordinate delay is a matter of grave concern to this Court, because it does not serve the interests of justice. It speaks for itself that an Appellant who has reasonable prospects of success on appeal, may be severely prejudiced by such a long delay in the appeal proceedings. The time has come for courts to establish the identity of the person or persons who were responsible for such delays, and to hold them accountable for their breach of duty. In the present instance, it appears from the papers before us that Legal Aid South Africa received instructions from the Appellant in October 2017 to assist in his appeal. During the same month a request was made for a transcript of the trial proceedings, which transcript was not yet available by the time the Notice of Appeal was filed on 13 August 2018. It is not clear what caused the further delay of some 4 years before the appeal could be set down for hearing before this Court. Those responsible for this delay, whoever they may be, should take note that they may be held accountable by the courts, should it ever happened again in future.

[3] I now turn to the evidence that was presented in the trial Court, as it appears from the transcribed record of proceedings. The complainant chose to testify in open court and not with the assistance of an intermediary, despite her tender age at the time. She testified after the Appellant had pleaded not guilty to the charge of rape. He was legally represented by an attorney of Legal Aid South Africa, who explained

during the plea proceedings that the Appellant and complainant were living in the same house, but that they had never engaged in any sexual activity with each other. The plea of the Appellant therefore consisted of a total denial of the alleged rape.

[4] The complainant testified that she, her father, the Appellant and her brother aged 7 lived in the same house. The Appellant was her father's brother, and he was the owner of the house. She testified that the Appellant did not want her father and his two children to live in his house, and he had asked her father on more than one occasion to take his children and leave, but her father refused. When they later testified, both the Appellant and her father denied these allegations by the complainant.

[5] On the night of 12 December 2014, she was sleeping alone in her room on a double bed, the complainant testified. In the early evening her father became ill, and the Appellant called an ambulance to take her father to the hospital. Soon after the ambulance left with her father about 10 pm that evening, the Appellant entered her room, undressed himself and climbed into the bed with her. Her brother was sleeping in another room. The Appellant then undressed her, got on top of her and inserted his penis into her vagina, she testified. He made up and down movements on top of her, and when he was finished, he stood up and wiped himself and herself clean with a bandage. Up to that point she could not identify the Appellant, because it was too dark in the room. When his penis was inside her, she cried and screamed, but nobody came. She does not know whether he ejaculated. After he was done with the wiping, she identified the Appellant when he went on to urinate in a bucket in the room. She could then clearly see his face, since the light of a mass light outside was shining into the room. He thereafter left the room, she told the Court.

[6] At about 7 am the following morning her father returned from the hospital. She reported the incident to him. Her father then confronted the Appellant, who denied everything. She was then taken to the police station and the hospital where a medical doctor examined her. The doctor completed a form J88 which was handed in. The J88 indicated that the complainant had no injuries, but that the absence of injuries to the private parts did not exclude vaginal penetration. Unknown exhibits were also collected from the complainant at the hospital and forwarded to the

forensic laboratory in Pretoria. The laboratory later informed that “presumable semen could not be detected on the exhibits”.

[7] The Appellant also gave testimony in the trial Court, and he denied the evidence of the complainant. In particular, he denied that he could have entered the complainant’s room soon after the ambulance had left with her father. He testified that he had accompanied her father in the ambulance to the hospital, and that he had only returned to the house much later that night. When the complainant’s father testified, he denied that he was accompanied by the Appellant in the ambulance. The Appellant stayed at home when the ambulance took him to the hospital, he testified.

[8] In his judgement, the trial Magistrate described the complainant as one of the best witnesses that the Court had heard in a very long period of time. The Magistrate also made it clear that he was mindful of the fact that the complainant was a single witness and that she was a young child. He confirmed that her evidence should therefore be approached with the necessary caution. He then went on to refer no less than four times to the “injuries found on the private parts” of the complainant, as it appear on the form J88. In this respect, the trial Magistrate was patently wrong. As mentioned earlier, the form J88 showed clearly that no injuries to the private parts could be found.

[9] Furthermore, it is clear that this misconception played a major part in the Magistrate finding that the complainant was indeed raped by the Appellant. For instance, the Magistrate had the following to say in this respect: “The J88 confirms that she sustained injuries to her private parts and that she was probably raped.” And: “The confirmation of the injuries weighs more heavily and is her evidence absolutely credible to the Court.” Had the trial Magistrate not laboured under this misconception, and had he been mindful of the fact that no semen could be found on the exhibits, his finding that the complainant was raped might have been different.

[10] There is also another factor that causes some measure of concern as far as the conviction is concerned. After convicting the Appellant on the charge of rape, but before sentencing, a Victim Impact Report prepared by a probation officer of the

Department of Social Development, was made available to the trial Court. In this report, the following is said after consultations with the complainant: “The victim mentioned that the accused then removed her underwear and lied down on top of her as she was facing upwards, the accused placed his penis between the victim’s thighs, next to the victim’s vagina and did the up and down movement. The victim stated that the accused then climbed off and took one of the victim’s father’s bandages and wiped his penis then used it to wipe the victim on her thighs.”

[11] Further on in the report the following is indicated: The victim … mentioned that she is currently doing well but would like the accused to be punished because if he had penetrated her, she would have contracted TB(HIV) …

[12] In his judgement on sentence, the trial Magistrate mentioned that he was taking the whole of the impact report into consideration. Yet he did not refer to the passages quoted above. While it is true that he was only furnished with this report after he had convicted the Appellant, I am of the view that justice demands that this Court of appeal should take due notice of what the complainant had told the probation officer, and that it should deal with this new version accordingly. This new version no doubt casts a shadow over the initial version of the complainant to the effect that penetration had taken place and that she was therefore raped. We canvassed this issue with Mrs. Bester at the hearing of the appeal, where she represented the Respondent. She submitted that, should this Court take the new version into consideration, then the Court should find that the Appellant has made himself guilty of attempted rape.

[13] I do not agree with Mrs. Bester since there is no evidence or information before us that the Appellant had attempted to penetrate the complainant, but that he was for some reason unable to do so. However, I do agree with her that there is sufficient evidence to the effect that something has happened between the Appellant and the complainant on the night in question there on her bed where she was sleeping. As for the conviction on the count of rape, it is not only the abovementioned new version that raises some doubt. The trial Magistrate could have doubted the initial version placed before him purely on the basis of the absence of semen on the exhibits and the absence of injuries to the private parts of the

complainant. What is clear to this Court, having regard to all circumstances of the appeal, is that a measure of interference in the final outcome of the matter, is warranted.

[14] Section 261(1)(c) of the Criminal Procedure Act 51 of 1977 provides that if the evidence on a charge of rape does not prove any such offence or an attempt to commit such offence, but the offence of sexual assault as contemplated in Section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007, the accused may be found guilty of the offence so proved. The said Section 5 provides that a person who unlawfully and intentionally sexually violates a complainant without her consent, is guilty of the offence of sexual assault. Sexual violation is defined in Section 1 of the abovementioned 2007 Act as any act which causes direct or indirect contact between the genital organs of one person and any part of the body of another person.

[15] Since there is a reasonable doubt that penetration had taken place in this matter, the conviction on the charge of rape stands to be set aside. At the same time, we are of the view that the Appellant had made himself guilty of the offence of sexual assault on a child aged 12 years. We come to this conclusion on the basis of the evidence and information before us, and on the basis of the statutory provisions referred to in the preceding paragraph.

[16] The offence of sexual assault is a very serious offence, and more so where the victim is a young child. In the present case, a term of direct imprisonment is called for. Mrs. Bester submitted on behalf of the State that imprisonment for at least 10 years would be an appropriate sentence should this Court set aside the conviction on rape and substitute it with a conviction on a less serious offence. I fully agree with this submission. In the premises, the following orders are made:

1. The appeal succeeds, and the Appellant’s conviction on the charge of Rape is set aside.
2. The Appellant is found guilty of Sexual Assault as contemplated in Section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007.

3. The sentence of Life Imprisonment imposed on the Appellant on 9 March 2016 is set aside and substituted with a sentence of 10 years direct imprisonment, the running of which is deemed to have commenced on 9 March 2016.

4. The remaining orders of the trial Court made on 9 March 2016 in respect of the possession of a fire-arm and the Register of Sexual Offences are confirmed.

P. J. LOUBSER, J

I concur:

D. P. MTHIMUNYE, AJ

For the Appellant:	Mrs. V. Abrahams
Instructed by:	Legal Aid SA, Bloemfontein
For the Respondent:	Adv. A. Bester
Instructed by:	The Director of Public Prosecutions, Bloemfontein