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

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

Appeal No.: A104/2021

In the appeal between: -

PABALLO SEHLABAKA Appellant

and

STATE Respondent

CORAM: N. M. MBHELE, DJP *et* C. VAN ZYL, J

HEARD ON: 15 NOVEMBER 2021

JUDGMENT BY: N. M. MBHELE, DJP

DELIVERED ON: 21 FEBRUARY 2022

---

[1] The appellant was convicted by the Regional Magistrate, Ladybrand, of raping an 8 year old complainant. He was sentenced to life imprisonment on 10 October 2018. Aggrieved by the sentence, the appellant exercised his right to automatic appeal, due to the sentence of life imprisonment imposed, and approached this court on appeal.

[2] In the notice of appeal, heads of argument as well as submissions before us, the appellant's attack on the conviction returned by the learned Regional Magistrate in the trial court is premised upon the following main contentions: (1) that the learned regional magistrate erred in rejecting the appellant's version of bare denial and in finding that the state succeeded to prove its case beyond reasonable doubt. In respect of the sentence, the appellant contends that the sentence is shockingly inappropriate, that the court *a quo* did not apply due weight to the personal circumstances of the appellant and that it overemphasized the serious of the offence at the expense of the personal circumstances of the appellant.

[3] The appellant is the complainant's cousin who had visited the complainant's family during the time of the alleged offence. The complainant testified that she was called by the appellant who directed her to go into a shack that was separate from the main house at her parental home. The appellant followed her into the shack and ordered her to climb on the bed. While lying on the bed the appellant took her dress, tights and panty off. He thereafter covered her face with a pillow and inserted an object that she did not see in her vagina. He wiped her, gave her R2 and told her to go outside and play. She tried to report the incident to her aunt when she saw her going outside to discard dirty water but the appellant interrupted her and ordered her to go and play. Soon thereafter the complainant's mother arrived from town and instructed the appellant to prepare food for them.

[4] The following day the appellant sent the complainant into the shack to fetch his phone, the complainant resisted. When the complainant's mother asked her why she was refusing to fetch the appellant's phone from the shack she reported that the appellant wants to lure her into the shack so he can undress her. Her mother and the appellant's mother called the appellant in to enquire about the allegations but he denied.

[5] The complainant's mother testified to the effect that on 1 December 2017 she had gone to town when the alleged incident occurred. On her arrival from town she found the complainant playing outside. She asked the appellant to prepare

food for the kids, including complainant. After eating the complainant went outside and continued playing. The following day on 2 December 2017 the appellant sent the complainant into the shack to fetch his phone, the complainant refused to fetch the appellant's phone. When she asked her why she refused to fetch the phone she said that the appellant undresses her when she gets into the shack. The appellant's mother called him in to enquire about the allegations, he denied that he ever undressed the complainant. She asked the complainant to undress so she could see if there were visible injuries, she could not see anything. She did not touch the complainant's vagina during examination. She then went to the police to report the matter. The complainant was taken for medical examination at Senekal Hospital.

[6] The third witness was Dr. Katarina Johanna Gordon who examined the complainant on 05 December 2017. She observed no physical injuries on the complainant's body. When she examined her genitals she noted the following: The fornix was dilated, the hymen was not intact and there was swelling around it, the vaginal canal was dilated and red, no discharge was seen and the anus was normal. She did not use a speculum in her examination but she observed a red and slightly swollen clitoris, the urethral orifice was red and slightly swollen, the labia majora and minora were normal, the paraurethral folds were red. She concluded that sexual assault cannot be excluded, the evidence, according to her, shows that vaginal penetration was likely. She concluded that the complainant was penetrated deep into her vaginal canal up into the cervix because there was redness up into the cervix.

[7] The appellant simply denied the allegations. He confirmed that the complainant's mother had gone to town on the date of the alleged incident and that when she came back from town she asked him to prepare food. He, further, confirmed that he did send the complainant to the shack to remove his phone from the charger. What he denied was that the previous day he called the complainant to the shack and penetrated her vaginally.

[8] The trial court evaluated the evidence and came to the conclusion that the state witnesses were truthful and rejected the version of the appellant. It is trite that

factual and credibility findings of the trial court are presumed to be correct unless they are shown to be wrong with reference to recorded evidence. The acceptance by the trial court of oral evidence and conclusions thereon are presumed to be correct, absent misdirection.[1] A court of appeal may only interfere where it is satisfied that the trial court misdirected itself or where it is convinced that the trial court was wrong.[2]

[9] It is well established that where a trial judge makes findings on credibility of a witness, the court of appeal will take into account that the trial court had the advantage of seeing the witnesses whilst testifying, which benefit is not available to the court of appeal. The powers to evaluate and appraise evidence belong to a trial court and its conclusions cannot be interfered with simply because a court of appeal would have come to a different finding or conclusion. The trial court's advantage of seeing and hearing witnesses places it in a better position to assess the evidence than a court of appeal, and such assessment is sacrosanct unless there is a clear and demonstrable misdirection. The Supreme Court of Appeal held as follows in **S v Pistorius**.[3]

> 'It is a time-honoured principle that once a trial court has made credibility findings, an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong. R v Dhlumayo and Another **1948 (2) SA 677** (A) at 706; S v Kebana **2010 (1) All SA 310** (SCA) para 12.... As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings.'

[10] Ms. Abrahams, on behalf of the appellant, was unable to successfully assail the conviction. She simply made no oral submissions against the conclusion by the Regional Magistrate on the conviction.

[11] The complainant's evidence finds corroboration in the evidence of Dr. Gordon whose examination revealed history of sexual assault and found that the

---

[1] S v Francis 1991 (1) SACR 198 (SCA) at 204 e-d.
[2] *R v* Dhlumayo *&* another 1948 (2) SA 677 (A) at 705-706.
[3] S v Pistorius 2014 (2) SACR 315 (SCA) par 30.

abnormalities in the vaginal canal of the complainant were consistent with traumatic vaginal penetration.

[12] The complainant's evidence is also corroborated by her mother whom she made the first report to. Her account of events is reliable. I am unable to find any demonstrable or clear error on the part of the trial court to justify interference with its credibility findings. The trial court was correct in its assessment of evidence and credibility findings. I cannot find that the trial court erred in finding that the appellant's version is not reasonably possibly true and fell to be rejected.

[13] The sentencing powers are pre-eminently within the judicial discretion of the trial court; the court of appeal should be careful not to erode such discretion. The court sitting on appeal will interfere if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate.[4]

[14] When sentencing, the court must consider the main objectives of punishment, being the prevention of crime, retribution, the deterrence of criminals, and the reformation of the offender. Simultaneously, the court must strike a balance between the crime, the offender and the interest of society.

[15] The offence committed by the appellant is undoubtedly a serious one. The complainant considered the appellant as her brother. The complainant trusted him and he, in turn, took advantage of her fragile state. The complainant was violated in the sanctity of her own home. She was betrayed by someone she trusted and revered. This happened in a place she considered her sanctuary, where she was supposed to feel safe and cared for.

[16] Section 28 (2) of the Constitution of South Africa[5] provides that a child's best interests are of paramount importance in every matter concerning the child. The Constitution demands that the best interest of a child must take a centre stage

[4] S v Rabie 1975 (4) SA 855 (A) at 857 D-E; also S v De Jager and Another 1965 (2) SA 616 (A).
[5] The Constitution of the Republic of South Africa, 1996.

whenever an issue concerning a child comes to the fore. It is the single most important factor to be considered when balancing or weighing competing rights and interests concerning children. All competing rights must defer to the rights of children unless unjustifiable. Whilst children have a right to *inter alia*, protection from maltreatment, neglect, abuse or degradation, there is a reciprocal duty to afford them such protection. Such a duty falls not only on law enforcement agencies but also on right thinking people and, ultimately the court, which is the upper guardian of all children.[6]

[17] It is clear from the above *dictum* that the society as a whole, including the court as the upper guardian, have a duty to ensure that children are safe from harm and grow up in nurturing environments. The society has pinned its hopes on the courts to deal with their tormentors.

[18] In ***S* v Abrahams**[7] Cameron JA remarked as follows with regards to sexual violation of minor children in the domestic sphere.

> "Of all the grievous violations of the family bond the case manifests, this is the most complex, since a parent, including a father, is indeed in a position of authority and command over a daughter. But it is a position to be exercised with reverence, in a daughter's best interests, and for her flowering as a human being. For a father to abuse that position to obtain forced sexual access to his daughter's body constitutes a deflowering in the most grievous and brutal sense."

[19] It is clear from the above *dicta* that the rape of minor children must be viewed in a serious light, worse if committed by those entrusted with the care and safety of the child. Home is supposed to be a place where children are cared for and protected. Sexual abuse in the domestic sphere is not the type that victims can easily escape from. It thrives on intimidation and blackmail. The victims have to live with their predator, see them every day and disguise their pain. It is clear that the appellant would have continued with his criminal conduct had the complainant not blown the whistle on time.

---

[6] De Reuck v DPP WLD 2003 (1) SACR 448 (WLD) at 457 par 10.
[7] S v Abrahams 2002 (1) SACR 116 (SCA) at par 17.

[20] The appellant was 23 at the time of the commission of the offence and 24 years old during sentencing. He was a first offender, single, with no children and went to school up to matric. He was doing odd jobs earning R2000 per month. The court found no compelling and substantial circumstances warranting deviation from the prescribed minimum sentence of life imprisonment.

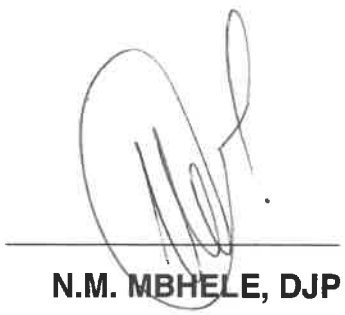
[21] Sentence must be tailored to suit the offender, the crime and the circumstances surrounding the case and punishment must be proportionate to the offence. Although the appellant was relatively young and in his early stages of adulthood his actions must be frowned upon. The offence he committed calls for a lengthy jail sentence. He brutally took away the innocence of a young child.

[22] There is nothing out of the ordinary with the appellant's personal circumstances. When weighing up the mitigating factors against the aggravating circumstances, this matter as well as the interest of community, I am not persuaded that there is a just cause to interfere with the sentence imposed by the trial court. The appeal ought to fail.

[23] I make the following order:

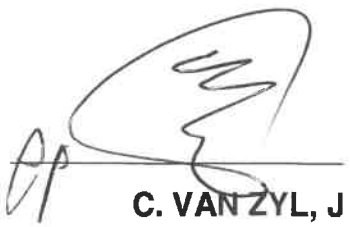
ORDER

1. The appeal against conviction and sentence is dismissed;
2. The conviction and sentence are upheld.



N.M. MBHELE, DJP

I concur.



C. VAN ZYL, J

Appearances:

For the Appellant:	Ms. V. Abrahams Instructed by Legal Aid South Africa Bloemfontein
For the Respondent:	Adv. L. B. Mpemvane Instructed by Director Public Prosecutions Bloemfontein