

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

APPEAL NUMBER: A44/2021

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

In the matter between:

LEPITA LAZARO NKOTO

APPELLANT

and

THE STATE

RESPONDENT

HEARD ON: 14 FEBRUARY 2022

CORAM: NAIDOO, J et DANISO, J

JUDGMENT BY: NAIDOO, J

DELIVERED ON: 12 MAY 2022

[1] The appellant was convicted on 9 December 2020, in the Bloemfontein Regional Court, on two counts of rape in respect of two minor children. He was sentenced on 25 January 2021 to life imprisonment. The appellant approaches this

court in terms of his automatic right of appeal, and the appeal lies against both his conviction and sentence. Adv (Ms) L Smit appeared for the appellant and Adv (Mr) A Busakwe for the respondent.

[2] The Appellant's grounds of appeal against the convictions and sentences in respect of counts 1 and 2 are, in essence, that in respect of the convictions, the court *a quo* erred in finding that:

- 2.1 the state had proved its case beyond reasonable doubt,
- 2.2 the complainants' versions satisfied the requirements of the cautionary rule;
- 2.3 the contradictions in evidence of the state witnesses, particularly the complainants were not material;
- 2.4 the versions of the appellant and *his witness were not reasonably possibly true;

[the appellant did not call a witness, and it is assumed that this is therefore an error]*

In respect of sentence, the court erred by:

- 2.5 imposing sentences that are shockingly inappropriate;
- 2.6 over-emphasising the interests of the community and the seriousness of the offences over the personal circumstances of the appellant;
- 2.7 imposing sentence in a spirit of anger;
- 2.8 not taking into account the time spent in custody by the appellant, awaiting trial; and
- 2.9 not finding that substantial and compelling circumstances existed to justify a deviation from imposing the prescribed minimum sentence.

[3] The background to this matter, briefly, is that the appellant worked as a herdsman for a neighbour of the complainants. He was known to the complainants as well as the first state witness, M[....] S[....] K[....], the so-called first report. The complainants reported that on 24 October 2017, he lured the complainant in count 1 (B[....]) to the field where the cows/goats were grazing on the pretext that he needed help to graze the cows/goats. There he raped B[....] by penetrating him anally. B[....] was eight years old at the time. He threatened to kill him if he told anyone what had happened. On 27 October 2017 he did the same to the complainant in count 2

(T[...]/T[...]). T[...] was four years old at the time. He however reported the incident that afternoon to Ms M[...] K[...], who is his neighbour. B[...] is the child of M[...] K[...]'s older sister. Thereafter B[...] revealed that the same was done to him three days earlier. Ms K[...] then reported the matter to the police, which led to the arrest of the appellant. The complainants were also taken to the hospital where they were examined by a nurse. The medical reports (J88) completed by the nurse in respect of each complainant were handed in as exhibits in the trial court. The nurse found no physical injuries on both complainants, but concluded that the absence of injuries did not exclude "violent behaviour".

[4] The task of analysing and evaluating evidence is vested in the trial court. An appeal court is limited in its ability to interfere with the trial court's conclusions, and may not do so simply because it 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 than a court of appeal to assess the evidence, and such assessment must prevail, unless there is a clear and demonstrable misdirection. This is a principle that is well established in our law.

[5] In *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 the majority, per Greenberg JA and Davis AJA (Schreiner dissenting) said: "The trial court has the advantages, which the appeal judges do not have, in seeing and hearing the witness and being steeped in the atmosphere of the trial. Not only has the trial court the opportunity of observing their demeanour, but also their appearances and whole personality. This should not be overlooked." A similar view was adopted in *S v Pistorius* 2014 (2) SACR 315 (SCA) par 30, which cited, *inter alia* *Dhlumayo* with approval:

"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. It can hardly be disputed that the magistrate had advantages which we, as an appeal court, do not have of having seen, observed and heard the witnesses testify in his presence in court. 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.”

[6] In the present matter, the trial court undertook a comprehensive analysis of the evidence for the state and the appellant. It is so that there were differences and contradictions in certain aspects of the versions proffered by the state witnesses. The court was acutely aware of these and dealt with such discrepancies. The Court correctly reminded itself of the extreme caution required when dealing with the evidence not only of single witnesses, but particularly where a single witness was a very young child. In this case the complainants were four and eight years old respectively, when the incidents occurred. They testified three years later, and not all in one day. Due to their short attention spans and the fact that they tired easily, their evidence was taken on different occasions until they had completed testifying.

[7] The trial court was alive to this and to the tender ages of the complainants. I should perhaps remark that it is common sense that children of four and eight years do not have the mental and intellectual maturity to fabricate incidents of sexual violence to the extent that the two young complainants in this matter were able to describe. It seems that T[...] did not even have the vocabulary to describe what happened to him, and expressed it as “funny things” that were done to him. The fact they testified three years after the incident is a factor that would also have played a part in the contradictions in their evidence. The court concluded that in spite of the differences and even contradictions in their evidence, both complainants were steadfast in their versions as to the identity of the appellant and the details of how he had sexually violated them.

[8] The contradictions or discrepancies in their versions concerned the sequence of events after they were violated by the appellant, and did not affect their identification of him, nor what was done to them by the appellant. It was, for example, not clear whether the first person to whom B[...] reported the rape was Whane or M[...] K[...]. He was also somewhat confused about the day he actually reported the rape, that is whether it was the 25th or 27th October 2017. The objective evidence in this regard is the version of M[...] K[...] that the rape in respect of B[...] came to her knowledge on 27 October 2017, and the J88, reflecting that he was

examined on 28 October 2017. Similarly, with T[....], he testified that he told M[....] K[....] about the rape and she said he should report it to his mother, which he said he did. Thereafter he and his parents visited the shack where he alleged that the rape took place. He recanted this evidence later. M[....] K[....] testified that T[....]'s mother was not present, and was suspected to be out drinking. Hence she took charge of the situation. The J88 in respect of T[....] indicates that she accompanied him to the hospital and informed the nurse of the history of the matter. T[....]'s evidence during cross-examination indicated that he was very suggestible and also could not remember details of the sequence of events after he was raped. Nothing sinister can be ascribed to these lapses on T[....]'s part, if regard is had to the fact that he was only four years old at the time and that he had just been subjected to traumatic abuse. The trial court in my view, correctly assessed the cogency and impact of the discrepancies in the evidence, especially of T[....] and B[....], and concluded that they were not material. For these reasons, the court found that they were honest witnesses, whose evidence in respect of the rapes was reliable and trustworthy. I cannot fault the reasoning or these findings of the trial court.

[9] In view of what I have said, the appellant's grounds of appeal, which I have listed above, cannot be sustained. In addition, the appellant alleged that the trial court did not account for all the evidence, without specifying which evidence was not dealt with by the trial court. It is indeed so that the court must account for all the evidence, but it is trite that it is not necessary for a court to deal with every minute detail of the evidence led at the trial, particularly if those details are immaterial to or have no bearing on its conclusions. In the absence of specificity in the appellant's allegation in this regard, this court is unable to deal with that allegation.

[10] With regard to sentence, it is well established that sentencing is a matter which is within the discretion of the trial court. It is trite that an appeal court will only interfere with a sentence if the trial court misdirected itself in imposing sentence or its discretion is vitiated by irregularity, or if the sentence is unreasonable, unjust or disproportionate to the offence. This trite principle has been well settled in our law, and was succinctly enunciated approximately 47 years ago in the case of *S v Rabie* 1975(4) 855 (A) at 857, where Holmes JA said:

“1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court";

and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate”.

This principle was subsequently re-iterated in the much-quoted case of *S v Malgas 2001(1) SACR, 469 (SCA) at, 478 para12*, where the court remarked that:

“...A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh...”.

[11] In this matter, the personal circumstances of the appellant placed on record are that he is a 42 year old citizen of Lesotho who is married with a [...] year old son. His wife and son reside in Lesotho. He is a first offender, the state having proved no previous convictions against him. The appellant never attended school and worked as a shepherd, earning R1000 per month. His parents are deceased. His legal representative submitted that although he was not in possession of any medical records, the appellant has a problem with his kidneys as a result of a previous assault upon him by members of the South African Police Service. This has caused health problems for him. In addition, he was raped in custody after his arrest in this matter.

[12] The trial court undertook a comprehensive analysis of the case law relevant to sentencing, and applied the established principles of sentencing to its consideration of the appellant’s personal circumstances. The court took into account the defence’s

submissions regarding the appellant's alleged health challenges, his alleged rape in custody and the time spent in custody, awaiting trial. The court correctly found that in the absence of medical or other documentary evidence regarding the appellant's health issues and the rape in custody, not much weight could be attached to the submissions in respect thereof. With regard to the time spent in custody, the court correctly pointed out that the accused failed to appear in court, was re-arrested and was found guilty of contempt of court. This resulted in his incarceration. The court further referred to case law indicating that the time spent in custody is not *per se* a ground for deviating from the imposition of the prescribed minimum sentence, but is a factor to be considered with all other relevant factors.

[13] The trial court's comprehensive analysis of the various factors relevant to sentencing in this matter cannot be faulted, and I am unable to find any misdirection in the imposition of the sentences in this matter, nor that sentences were imposed in anger, as alleged by the appellant, without substantiation. The seriousness of the offences in this matter is deserving of harsh sanction, and I am of the view that the sentences of life imprisonment on each count are neither shocking nor inappropriate. The court also made orders in terms of the relevant provisions of various statutes as follows, which are:

13.1 Section 280 of the Criminal Procedure Act 51 of 1977, ordering the two life sentences to run concurrently;

13.2 Section 103(1) of the Firearms Control Act 60 of 2000, in terms of which the appellant is deemed to be unfit to possess a firearm;

13.3 Section 50 of the Criminal Law Amendment Act, Sexual Offences and Related Matters Act 32 of 2007, directing that the appellant's name be added to the National Register of Sex Offenders; and

13.4 Section 120(4) of the Children's Act 38 of 2005, in terms of which the appellant was found not to be a suitable person to work with children.

[14] I point out that there does not need to be a specific order that two sentences of life imprisonment should run concurrently, as they do so by operation of law. [See section 39 (2)(a)(ii) of the Correctional Services Act 111 of 1998]. In *Director of Public Prosecutions, Gauteng v Tsotetsi 2017 (2) SACR 233 (SCA)* at para [34], the Supreme Court of Appeal made the specific order that two life sentences imposed by it had to run concurrently. [See also *S v Mashava 2014 (1) SACR 541 (SCA)*]

[15] In the circumstances, the following order is made:

15.1 The appeal against the convictions and sentences is dismissed.

15.2 The convictions and sentences imposed on the appellant are confirmed.

15.3 The orders of the trial court, referred to in 13.2 to 13.4 are confirmed.

NAIDOO, J

I concur.

DANISO, J

On behalf of appellant: Adv L Smit
Instructed by: Legal Aid South Africa
Bloemfontein Local Office

On behalf of respondent: Adv. A Busakwe
Instructed by: The Office of the DPP
BLOEMFONTEIN