



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

Appeal No: A64/2023

In the appeal between:

MOJALEFA LEBOGANG SELEKE

Appellant

and

THE STATE

Respondent

CORAM: REINDERS, J *et* DANISO, J

JUDGMENT BY: REINDERS, J

HEARD ON: 21 AUGUST 2023

DELIVERED ON: 29 AUGUST 2023

This judgment was handed down in open court and on even date circulated to the parties' representatives by electronic mail communication.

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- [1] On 8 October 2020 the appellant was convicted of two counts of the rapes of minors (contravention of sec 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007, read with the provisions of sec 51(1) of the Criminal Law Amendment Act, 105 of 1997) in the Regional Court sitting in Brandfort. He was sentenced to imprisonment for life on both counts.
- [2] The appellant makes use of his automatic right to appeal in accordance with the first proviso of s 309(1)(a) of the Criminal Procedure Act 51 of 1977 and appeals

both his convictions and sentences. The appellant's grounds for appeal entails that the court erred in finding that the complainants were credible witnesses, in drawing a negative inference from the appellant's version by not making a credibility finding in his favour and in finding that the state had proved its case beyond a reasonable doubt.

- [3] The appellant was legally represented throughout the trial and tendered a plea of not guilty. He elected not to proffer a plea-explanation. As the trial progressed however, the appellant's defence gravitated towards an alibi, in essence that he was not in Brandfort during spring from September to October 2010 (the time and place of the counts of rape of which he stood accused) and could therefore not have committed the crimes. He alleged that he had been falsely implicated by the complainants who were jealous of the fact that he had secured employment in Bloemfontein.

- [4] Three witnesses, two of them being the complainants on count 1 and 2 respectively, testified on behalf of the state. Certified copies of the birth certificates of the two complainants were handed in as exhibits and confirmed that the complainant in count 1 (hereafter "Z") and count 2 (hereafter "K") were respectively 8 and 10 years old when the crimes were committed according to the charge sheets. The cousins were respectively 15 and 17 years old when they testified.

- [5] Both Z and K testified that the place where the rapes had occurred to be at the Anglican Church in Brandfort where appellant had sexual intercourse with them on a table top.

- 5.1 The upshot of the evidence tendered by K was that she was on her way from a shop with a girl who resided close to them at the accused's parental home and with whom she used to play, one Estelle, when the accused met up with them. He had sent Estelle to the shop and requested her (K) to go with him where after the appellant undressed her, covered her mouth, raped her and told her not to tell anyone, giving her some yoghurt as consolation. She refrained from telling anyone at the time as she was still a child, afraid that people would laugh or make fun and her and did not even know at the time that the deed constituted rape.

She only shared her secret in 2011 with a friend, and in the company of Z. Hereafter she gathered the courage to inform her family of the rape by writing a letter and handing it to her aunt, who testified and confirmed the circumstances of the letter being revealed. K denied that Estelle had left Brandfort at the time of the incidents as Estelle was in grade 1 at the time and she in grade 3, attending the same school.

- 5.2 The evidence of Z entailed that she was playing with Estelle when they were called by the appellant and on his request sent to a shop to buy some items with the instruction to return the items to him at the church. Upon their return appellant sent Estelle away and requested her (Z) to stay behind. Hereafter he undressed and raped her, told her not to cry or mention the incident to anybody, and gave her some cookies. She did not reveal this secret until 2011 when K spoke out in the presence of her (K's) friend.
- [6] The appellant testified and called his elderly mother as a witness. He did not deny having known the complainants or that Estelle used to live with him at his parental home. According to him, however, Estelle had already left Brandfort at the time of the alleged incidents. Although it was put to K during cross-examination that the appellant did not have access to the church but his grandfather (as custodian of the church) kept the keys to the church, it was put to Z that it was not his grandfather but "actually another gentleman who lived in the neighbourhood" who kept the keys. The appellant testified that he did not visit Brandfort at all after leaving the town in 2007 up until his return in 2011. Appellant's mother testified that both she and the appellant were devout members of the church. Appellant attended church regularly, wearing a robe.
 - [7] The learned magistrate in her judgment found it not to be disputed that both complainants knew the plaintiff well as they, the appellant and their respective families resided in the same neighbourhood and the families were at least on greeting terms. She deemed it common cause that the appellant attended the church concerned and "had some role therein".
 - [8] On a reading of the magistrate's judgment it is evident that the magistrate was well apprised that both complainants were not only single witnesses but also

child witnesses, referencing the applicable case law. In applying the cautionary rules, the magistrate considered the evidence and found both complainants' testimonies to be satisfactory in all material respects. She was satisfied that the complainants gave detailed and clear accounts of the incidents and that they did not deviate from their versions. She considered the complainants to be intelligent and honest witnesses.

- [9] The magistrate alluded thereto that the appellant presented conflicting versions on his alibi. According to the initial version put to the complainants he had not been to Brandfort from 2007 to 2010 as he was employed in Bloemfontein and returned only in 2011. It was put to the complainants that appellant's sister would at the time collect money, as assistance to the family, from him in Bloemfontein. The appellant's version was changed again to entail that he would visit Brandfort for two to three hours only at a time after having been employed in Bloemfontein. According to appellant he never returned to Brandfort in 2010 (at the alleged time of the rapes during the months of spring) as he was rendering security services with the Soccer World Cup. When confronted therewith that the World Cup was during June and July, appellant changed his version of not visiting Brandfort at the time as he "did not like the place". In an attempt to prove that he was not in Brandfort at the time of the incidents, the appellant handed in a document of his membership to a provident fund. However, the magistrate found that the document did not assist the appellant as it merely recorded that during 2010 contributions were paid, but with no reference to the appellant's whereabouts at the time. She found the evidence tendered by appellant's mother to be unreliable and of no assistance to the appellant regarding his alleged absence from Brandfort in 2010. The magistrate considered the aforementioned conflicting versions tendered by the appellant, the common cause facts, the credibility and reliability of the witnesses and concluded that the appellant's version cannot be reasonably possibly true.

- [10] It has been a long-established principle that a court of appeal must take into account that the court a quo was in a more favourable position to form a

judgment, and will not interfere with a trial court's findings if there is no misdirection, unless it is convinced that the findings are wrong.¹

[11] In **S v Francis**² it was reiterated that a court of appeal's power to interfere is limited as the trial court has the advantage of seeing, hearing and appraising witnesses. We are not at liberty to depart from the trial court's findings of fact and credibility unless it is vitiated by irregularity or upon an examination of the record of evidence it is revealed that those findings are patently wrong.³

[12] I am not convinced on any grounds that the magistrate erred or misdirected herself as was contended on behalf of the appellant in this court. In my view the appeal against the conviction cannot be sustained.

[13] The appellant appealed the sentences, relying on the grounds that the sentences are shockingly inappropriate (inducing a sense of shock), the severity of the offences were over emphasised at the cost of his personal circumstances and the court had erred in finding no compelling and substantial circumstances to cause a deviation from the minimum prescribed sentences.

[14] It is trite law that the power of this court sitting on appeal, are limited when it comes to an imposed sentence in so far as interference with same is only warranted where the sentencing court committed a material misdirection, or the sentence imposed is not proportionate, or such a court did not exercise its discretion properly or at all.⁴

[15] Appellant was convicted of having raped the complainants (Part 1 of Schedule 2) and accordingly the crime was to be read with the provisions of sec 51(1) of Act 105 of 1997. It is evident that the magistrate was well aware of and alluded to the guidelines enunciated in **S v Malgas**⁵ in respect of the imposition of or deviation from the prescribed minimum sentence for the offences of which appellant was convicted, namely imprisonment for life. The trial court had proper

¹ **R v Dhlumayo and Another** 1948 (2) SA 677 (AD) at 705-6.

See also: **Director of Public Prosecutions, Gauteng v Pistorius** 2016 (2) SA 317 (SCA).

² **1991 (2) SACR 198 (A)** (at 204 c-e).

³ **S v Hadebe** 1979 (2) SA (at 654 e-f).

⁴ **S v Rabie** 1975(4) SA 855 (A) at 857 D-F; **S v Makondo** 2002 (1) All SA 431 (A).

⁵ 2001 (1) SACR 469 (A).

regard to the personal circumstances of the appellant, including his age of 41 years, his level of education grade 11, being married and father to a one-year old. She considered that the appellant's wife was pregnant and unemployed, whilst he was employed as a security guard earning R 4 000-00 monthly. The magistrate took into account that the appellant was a first offender.

[16] The seriousness of the offence of rape, with reference to trite case law, was alluded to by the magistrate. She emphasized that the complainants grew up in front of the appellant, they had an adult and child relationship and the appellant used to send them to do some errands at the shop. The magistrate stressed that the appellant took advantage of the complainants "by ripping off their dignity as well as taking their virginity in the worst possible way", yet showing no remorse. The magistrate dealt with the prevalence of the crimes, the interest of the community and society's outcry for the courts in imposing proper and meaningful sentences. The magistrate alluded to the victim statement of Z, adding that she cannot proceed on the basis that the complainants would not have had psychological harm caused by the rapes as young children. Having assessed the aforementioned factors and having weighed the mitigating and aggravating factors, the magistrate concluded that she had not been convinced that compelling and substantial circumstances existed that would cause her to deviate from the prescribed minimum sentence.

[17] Taking into account the principles enunciated in the case law above, it is clear that sentencing is the prerogative of the trial court. I am unable to find that the magistrate had misdirected herself in any way in finding no compelling and substantial circumstances to move her to deviate from the prescribed minimum sentence and imposing imprisonment for life. In fact, this appeal came before us during August, the month when women are celebrated in our country. The rapes of the two complainants at the vulnerable and innocent ages of 8 and 10, leave a bitter aftertaste. Upon a calculation the appellant was a grown man of just over 30 years at the time. Instead of owing up to his atrocities committed against budding girl children, the appellant chose to show no remorse for the lasting

emotional scars of which he was the author. Recently, in *Maila v The State*⁶ the Supreme Court of Appeal in dealing with the effect of absence of physical injuries to a victim of rape, held as follows (per Mocumie, JA)⁷

“... because apart from this minimising the traumatic effects of rape on any victim and more so a child, it is well documented that ‘irrespective of the presence of physical injuries or lack thereof, rape always causes its victims severe harm’.”


[18] I do not find any reason to interfere with the imposed sentences. It follows that the appeal against the sentences also stands to be dismissed.

[19] Having reached the conclusions as I did, the following order will issue:

The appeal against both convictions and sentences are dismissed.


C. REINDERS, J

I concur.


The Honourable
2023-08-29 N.S. DANISO, J
N.S. Daniso

On behalf of the appellant:

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On behalf of the respondent:

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⁶ (429/2022) [2023] ZASCA 3 (delivered on 23 January 2023).

⁷ At para [47].