REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A412/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

NHLANHLA BANGALA Appellant

and

THE STATE Respondent

J U D G M E N T

MASHILE, J:

[1] This is an appeal against both conviction and sentence. The Appellant was charged with the rape of M[…] M[…], an 11 year old girl. He appeared before the regional court for the region of Gauteng held at Protea. He was legally represented throughout the duration of his trial and was warned that the provisions of Section 51 of the Criminal Law Amendment Act No. 105 of 1997 could be invoked for purposes of the imposition of sentence should he be found guilty as charged. He pleaded not guilty to the charge against him. On 13 August 2008, he was found guilty as charged and on 26 September 2008 sentenced to life imprisonment.

[2] In terms of Section 309(1)(a) of the Criminal Procedure Act 51 of 1977, the Appellant became entitled to an automatic right to appeal against both his conviction and sentence. This appeal accordingly concerns his conviction and sentence.

[3] The complainant testified on her own behalf while her mother gave evidence in support. The report of the doctor was read into the record and admitted into evidence and marked Exhibit “A” without any objection from the Appellant. The Appellant also gave evidence on his own behalf and called Nkele Ramotjapedi, his girlfriend, to give evidence in mitigation of sentence.

[4] The testimony of the complainant is in short that on 4 April 2008 she had just attended Sunday school and was playing outside the church when she was approached by the Appellant. Both she and the Appellant are members of the Zion Christian Church (ZCC) and the latter is also a prophet

of the same church. The Appellant asked if she would be going to Moria and the complainant informed him that she would not as her mother could not afford the money to send her.

[5] A discussion about steaming with the Appellant (it having religious significance), culminated in the complainant agreeing to accompany him to his house. The Appellant informed her that he would prepare the steaming ritual for her and his younger brother, Tebogo, who at the time when he (the Appellant) left the house was also intending to do so. On their way to the Appellant's house they met the complainant's friend, L[…] who walked with them for a while before the Appellant told her that she could not go all the way to the Appellant's house as she was not wearing anything on her head.

[6] L[…] turned back and the two proceeded. The complainant waited at the gate of the Appellant's property while he spoke to a neighbour. He invited her in once he finished his chat with the neighbour. Inside the house she found a boy who was older than herself playing music. The Appellant poured tea and drank it. Apparently in preparation of the steaming, the Appellant put rocks on the stove and requested her to come through to the bedroom for a prayer.

[7] The Appellant promised to give the complainant an amount of R20 and thereafter to withdraw R200, which amount was intended to cover her trip to Moria. In addition, the Appellant asked her to take off her clothes, which she did albeit that she kept on her panties. The Appellant's persuasion and assurance that she should not be scared and that he was nothing but a

brother to her, encouraged her to take off her panties as well. The Appellant went out of the bedroom and she overheard him giving money to Tebogo to buy vegetables. He came back with a black pot into which he had placed the heated rocks. He took off his clothes and covered both of them with a blanket. They both steamed.

[8] The Appellant ordered her to lie on the bed. When she did so, he also lay next to her. He said to her: "I am a boy and you are a girl." The complainant said that she did not understand what he meant whereupon he told her that she should not make herself stupid because she did understand what he meant. He left the bedroom and when he returned, he had a knife. He pointed it at her, grabbed and held her neck. She became so horror-struck that she asked if she could urinate. The Appellant gave her a bucket to use and as she did so, she also defecated.

[9] The Appellant gave her a cloth with some decorations to wipe herself. When she had finished, he pointed the knife at her heart and warned that he would stab her to death. He further grabbed her by the neck and threw her onto the bed. She fell on her back. He demanded that she should put his penis into her vagina. When she refused, he did it himself and continued to have sexual intercourse with her. Thereafter he gave her a washing rag to clean herself. She washed and noticed that there was some blood mixed with some white substance coming out of her vagina. She dressed up and told the Appellant that she wanted to leave. The Appellant told her that he was

overcome by the deed of the devil and that she should not tell anyone what had happened between them that day.

[10] She and the Appellant left the house for the church. Upon her arrival at the church, she did not find Mama Pat. By that time she was crying and she went straight to her home where she found her mother to whom she reported that the Appellant, the prophet from their church, had raped her. Her mother looked shocked at the news and suggested that they should go to the police station to report the matter. She stated in cross-examination that other than telling her that she had been raped, she did not say much to her mother. Her mother heard most of the details when she related her dreadful experience to the police.

[11] When she and her mother arrived at the police station, they were told to wait for the new shift of the police that would be taking over at 18h00. Later that night she took them to the house of the Appellant but they were told that members of the household, the Appellant and whoever lived in the house, had gone to church. They went back to the police station where she made her statement. She was then taken to Chris Hani Baragwanath Hospital for medical examination and was later dropped off at her home.

[12] Under cross examination she insisted that the Appellant raped her in the manner described by her. She denied that she was the one who asked to accompany him to his house. Instead, the Appellant asked her if she would be going to Moria and her response was that she would not be because her

mother did not have money. She further denied ever asking to be steamed. She was adamant that it was the Appellant who proposed steaming.

[13] She also denied that the Appellant gave her boiling water from the stove and that he prepared the bedroom for her to steam herself in the interim. She denied that she was left alone to steam herself in the bedroom and that she did so on her own. She was steadfast that Tebogo was not in the house when the steaming took place.

[14] M[…] M[…], is the mother of the complainant and she testified that she left her daughter at the church in Orlando to attend Sunday school. She left for her 'piece job' in Noordgesig having arranged that the complainant would obtain a lift with Mama Pat at 14h00. Later that day at about 16h00 she noticed the complainant at the gate crying. She asked her not to scream. She invited her into the house and implored her to tell her what the problem was. The complainant immediately told her that Nhlanhla, the Appellant, had raped her. The rest of her evidence with some varying degrees corroborates that of the complainant.

[15] Dr Chisana examined the complainant and the J88 that she completed was read onto the record and handed in as Exhibit "A". From the J88 the following could be discerned:

15.1 The Complainant's urethral orifice and pera-urethral urifice were bruised;

15.2 There was evidence of slight bleeding on her posterior fourchette which also had fresh erosion;

15.3 Her hymen was swollen with fresh tears at five o'clock and nine o'clock;

15.4 Synechiae at 3 o'clock and 9 o'clock of her hymen; and

15.5 There was clinical evidence which indicated that penetration of the hymen had occurred within the past 3 days using a blunt object or a penis.

[16] That concluded the evidence of the Respondent whereupon the Appellant took the stand and testified that he met the complainant outside his church on 14 August 2008. He said that the complainant asked him the whereabouts of his wife, Nkele. He told her that she was not there and that he would be fetching her after the church service some time later. The complainant then asked him about steaming and he told her that Tebogo was steaming at his house. Somewhere along the way they met the complainant's friend, Lettie, who then accompanied the complainant. The Appellant walked in front and later he noticed that L[…] had turned back. He said that he was not part of the decision to discourage L[…] to go to his house.

[17] He confirmed that he spoke to a neighbour before he went into his property. They found Tebogo in the house but he had already steamed

himself. Although Tebogo had finished steaming, there was another pot with boiling water such that the Appellant did not have to start afresh for the steaming that he was preparing. He then asked the complainant if she was used to steaming. She told him that she does it with her mother nearly every week. Tebogo substituted the music CD that he was playing for gospel.

[18] The Appellant took the boiling water to the bedroom and placed the stones inside the boiling water and told her to call him when she was through. She did so and while the two of them were on their way out the Appellant gave an amount of R20 to Tebogo to buy vegetables. He walked with the complainant in the direction of the church until he left her at the gate and proceeded with his journey to fetch his girlfriend, Nkele. The complainant was fine when he left her. He was later surprised when the police came looking for him claiming that he had raped M[…] M[…].

[19] The Appellant's defence is one of complete denial. He did not deny or admit that the complainant was raped hence the J88 was admitted into evidence without any objections from him. However, he was emphatic that he did not rape her. The *onus* of proving that an appellant is guilty beyond reasonable doubt rests with the State. See *S v Mafiri* 2003 (2) SACR 121 (SCA) at 128 and *S v Mavinini* 2009 (1) SACR 512 (SCA) at 531c. It is trite that even if a court could find the version of an appellant to be improbable or even if a Court disbelieved him, he would be entitled to his acquittal if his version was reasonably, possibly true.

[20] It is against that background that the evidence of the Appellant must be approached. The Appellant stated that his relationship with the complainant is that of acquaintances, the complainant asking him about his girlfriend, Nkele, or Jerry whose mother is his wife's friend. He did not know the complainant's mother at all yet on this day he agreed to take the young girl to perform what he had never done to a stranger in his house. All he could say was that he was surprised that he did it.

[21] The complainant told him that she was on her way to see her friend. Whilst on their way to the Appellant's house, they met L[…] and the Appellant chose to walk ahead leaving a distance of approximately 1 and a half metres, between them. He claims that he could hear the complainant discouraging L[…] not to accompany her to the Appellant's house. Strangely, he fails to find out why a girl of the complainant's age would not like her friend to come along to his house especially because her initial primary objective was to visit L[…].

[22] A more probable version is that the Appellant, having in mind what he wanted to do to the complainant, discouraged L[…] to come along pointing out to her uncovered head as being against ZCC rules. This of course ties up with his subsequent action when he gave an amount of R20 to his brother to purchase potatoes and carrots. This way he ensured that the stage was set for the complainant's ordeal in that they were completely isolated.

[23] One must not lose sight of the fact that one of the Appellant's primary reasons for heeding the complainant's request was that she would find company to steam in Tebogo. It then becomes disquieting when Tebogo, on the Appellant's version, does not participate in the steaming process. I am mindful that the evidence is that he had already done so when they got home but there was an indication that he wanted to do so again hence the boiling water on the stove. That water was utilized for the steaming by the Appellant and the complainant.

[24] The Appellant's evidence is illogical in some instances. For example, he states that the first time he raised the question whether or not she had steamed previously was in response to the complainant telling him that she has had an 'instruction' (taelo) to steam. According to his evidence the complainant said this just after they had left the church area and that is how she introduced the subject of steaming. However, he also stated that the first time he asked whether or not she had steamed before was at his house just prior to making preparations for her to steam herself.

[25] The Appellant subtly intimates that the complainant was in a way suggestive and therefore got what she was in a way looking forward to. This is clear when he testified that the first question that the complainant posed to him prior to chatting about steaming was the whereabouts of his wife. Again, he repeated this suggestion in a different context when he stated that it was the complainant, not him, who told L[…] to turn back. This of course cunningly implies that the Complainant wanted to be with him alone.

Assuming that this were true, should he not have been concerned about the conduct of a 12 year old to a 28 year old who is nothing more than just an acquaintance? Any responsible adult would have become worried and established the motive.

[26] Lastly, the Appellant unsolicitedly testified that the police remarked at the manner in which he conducted himself at the time of arrest. He did not resist or attempt to escape. Of course that statement viewed on its own appears very innocent. It is only after listening to the evidence of his girlfriend/wife, Mkele, that one can give it its proper perspective. Nkele testified in mitigation of sentence that she was in bed with the Appellant when he suddenly got up and attempted to escape. She surmised that by the time he got to the door he was already besieged by the police and his true intentions thwarted.

[27] Turning to the evidence of the complainant. Her evidence is that of a single witness insofar as the actual rape is concerned. Section 208 of the Criminal Procedure Act No. 51 of 1977 provides that it is competent to convict on the strength of the evidence of a single witness on the condition that such evidence is satisfactory in all material respects. *S v Sauls and Others* 1981 (3) SACR 172 (A). The following paragraph of Leon J in *S v Ganie* 1967 (4) SA 203 (N) at 206H is also relevant:

> "... a *court should approach the evidence of a single witness with caution and should not easily convict upon such evidence unless it is substantially satisfactory in all material respects or unless it is corroborated.*"

[28] The question then arises whether the evidence of the complainant, as a witness satisfies the test set out in the Criminal Procedure Act No. 51 of 1977 and case law. The evidence of a single witness need not to be perfect but it will be sufficient if it is satisfactory for conviction to follow. See in this respect the case of *R v Abdoorham* 1954 (3) SA 163 (N) at 165 E-F where it was said:

> "*The court is entitled to convict on the evidence of a single witness if it is satisfied beyond reasonable doubt that such evidence is true. The Court may be satisfied that a witness is speaking the truth notwithstanding that he is in some respects an unsatisfactory witness.*"

[29] To the extent that the evidence of the complainant is not as perfect as one would have liked, it is no exception to the statement quoted above from *Abdoorham* case (*supra*). Her evidence is straight forward and coherent in most respects. The contradictions that emerged are fairly understandable and do not in any event undermine the fact of the rape. Thus, it becomes immaterial whether or not the Appellant used Vaseline to facilitate penetration of the complainant's vagina.

[30] Similarly, it is irrelevant whether or not the Appellant pushed her onto the bed or whether he told her to lie thereon. Her evidence about the R20

too, falls into the same category. Was the R20 lying on the dressing table or was it given to her and then refused? All these minor unsatisfactory aspects of her evidence are peripheral once the actual rape is not challenged.

[31] Furthermore, the mother of the complainant testified that her daughter narrated how the rape had happened when they were still at home and while they were walking to the police station. The complainant on the other hand testified that she told her mother that Nhlanhla, the prophet from church had raped her without giving details. Her mother only heard the minor particulars of the rape when she was giving those details to the police. The apparent contradictions between the complainant and her mother must be viewed and understood in line with what was stated in *S v Mafaladiso* 2003 (1) SACR 583 (SCA) at 593:

31.1 It must be determined what the witnesses actually meant to say in order to determine whether there is an actual contradiction and the nature thereof;

31.2 Not every error made by a witness and not every contradiction or deviation affects the credibility of a witness;

31.3 Non-material deviations are not necessarily relevant;

31.4 The contradictory versions must be evaluated on a holistic basis;

31.5 The circumstances under which the version were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions (and the quality of the explanation) and the connection between the contradictions and the rest of the witnesses evidence should be taken into consideration; and

31.6 The final task remains a decision as to whether the evidence is reliable or not and whether the truth has been told despite any shortcomings.

[32] The evidence was corroborated by her mother to whom she made her first report of the incident and the police when she finally laid a charge of rape against the Appellant. The complainant was fairly confident and direct, at least on the record, in her answers to the questions put to her by Counsel for the Appellant. She was frank, conceding when necessary and rejecting as false that which she believed to be.

[33] It is established that in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. See *S v Monyane and Others* 2008 (1) SACR 543

(SCA) at 547i-548b. A trial court has the advantage of seeing, hearing and appraising a witness. A court of appeal would therefore only be entitled to interfere with a trial courts evaluation of oral testimony in exceptional cases. See again *S v Monyane and Others (supra)* at 548b.

[34] Generally, an overall analysis of the whole of the evidence presented by these two sides to the trial court makes it inescapable to conclude that the evidence of the Appellant is so improbable that it cannot reasonably possibly be true. That being the case, I am satisfied that it was safe for the trial court to reject the evidence of the Appellant as being false. Conversely, the Respondent has proved beyond reasonable doubt, in my view, that the Appellant did rape the complainant on 4 August 2008. Accordingly, the appeal on conviction is dismissed.

[35] Having confirmed the conviction, the next question is of course to determine whether the trial court was correct to impose a life sentence on the Appellant. The Appellant has crossed paths with the law previously. He was found guilty and convicted on the following charges:

35.1 Malicious damage to property for which he was sentenced to 3 years imprisonment, which was suspended on the condition that he did not commit a similar crime within the period of suspension;

35.2 Rape for which he was sentenced to 10 years imprisonment. He only served 7 as he was released on parole after 7 years; and

35.3 Cultivation of dependence producing drugs.

[36] The society has over time become weary of repeat serious crimes which showed no sign of abating, the arrest of perpetrators and their subsequent successful convictions notwithstanding. Needless to state that the response to this increase in crime all over the country culminated in the introduction of the minimum sentence legislation, the criminal Law Amendment Act No. 105 of 1997. Section 51(2) of the aforesaid Act prescribes a minimum sentence of life imprisonment to a person found guilty of raping another who is under the age of 16 years unless the court can in terms of Section 51(3) find substantial and compelling circumstances justifying departure from the imposition of the minimum sentence.

[37] Previously, the appeal court's approach was that it would not interfere with the trial court's sentencing discretion unless such discretion was not exercised judiciously and properly. That position persists but not in respect of the minimum sentence legislation. Currently, the test is simply whether the trial court considered the substantial and compelling circumstances of an appellant before sentencing him. See in this respect *S v PB*, 2013 (2) SACR 533 (SCA) In *S v Vilakazi* , 2009 (1) SACR 552 (SCA it was stated that where it appears that the conviction deserves a long sentence, all the

personal circumstances that one would normally regard as mitigating factors would recede to the back and the imposition of the prescribed minimum sentence to the fore.

[38] The trial court considered the personal circumstances of the Appellant and weighed them against the gravity of the crime, the method employed in executing it and the fact that the Appellant was no stranger to crossing paths with the law. The trial court, correctly in my view, concluded that the use of his respectable church position and status as a prophet to lure the girl to his house was totally unacceptable. Again, he continued to use his position and status to win her confidence in him.

[39] The manner in which he carried on this contemptible and despicable deed would leave any person flabbergasted and dumbfounded. Shocked and horrified, the girl asked if she could urinate, he responded by giving her a bucket into which he said she must urinate. Obviously, as a result of the shock the complainant also defecated into the bucket. This was a clear sign that the complainant was extremely terrified. Despite all this, the Appellant was not deterred.

[40] What should courts do to repeat offenders such as the Appellant? The Appellant was sentenced to direct imprisonment of 10 years on a charge of rape previously and released when he was 7 years into the sentence. He had just completed his parole on the said sentence when he was arrested and charged with the current offence. It must be borne in mind that while I refer

only to the previous rape charge, he was also found guilty of two other offences which are not directly in point in so far as this present offence is concerned. The Appellant cannot be rehabilitated and that is borne out by the fact that he has despite the court's display of mercy on him continued to engage in crime. The society must be saved from criminals like the Appellant. Bringing him back into the society prematurely may result in more terror being unleashed onto innocent and unsuspecting victims.

[41] In the circumstances the appeal on both conviction and sentence fails and I make the following order:

The appeal is dismissed.

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B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I Agree

_____

I OPPERMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION,JOHANNESBURG

Heard: 27 March 2014
Judgment delivered: 17 April 2014

Appearances:
For Appellant: Adv C van Veenendal
Instructed by: Johannesburg Justice Centre

For Respondent: Adv LR Surendra
Instructed by: Office of the Director of Public Prosecutions