**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION PRETORIA**

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| (1) | REPORTABLE: |
| (2) | OF INTEREST TO OTHER JUDGES: |
| (3) | REVISED. |

**.....2020** DATE ..... SIGNATURE

**CASE NO: A3/2020**

In the matter between:

**DANIEL MGWEVU** **APPELLANT**

and

**THE STATE** **RESPONDENT**

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**JUDGMENT**

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**MADIBA AJ**

**INTRODUCTION**

[1] The appellant was convicted in the Regional Division of Benoni on a charge of rape of minor child aged nine (9) years old in contravention of Section 3 of Act 32 of 2007 and was sentenced to life imprisonment. He was declared unfit to possess a firearm in terms of Section 103 (1) of Act 60 of 2000. The appeal is against both the conviction and sentence.

**FACTUAL BACKGROUND**

[2] The appellant had a love relationship with the victim's mother. The victim (O[…] S[…]) and her twin brother (O[…]) visited the appellant at his house on the fateful day of the commission of the rape offence. It is on record that the appellant is not the biological father of both O[…] and O[…].

[3] While playing outside, O[…] heard the complainant screaming inside the appellant's bedroom. O[…] broke the bedroom window and saw the appellant on top of the victim having sexual intercourse with her. He ran away to call his mother. The mother came with a group of people and accosted the appellant about the rape allegations. The police were called and the appellant was arrested.

**ISSUES ON APPEAL**

[4] The aspects placed in dispute by appellant are the following: -

(a) That the state failed to prove its case against the appellant beyond reasonable doubt.

(b) Whether the sentence imposed by the Court a quo induces a sense of shock as it is inappropriate under the circumstances.

(c) Whether the court a quo misdirected itself by finding that there are no

substantial and compelling circumstances.

(d) That the evidence of the victim's brother being a single witness was not approached with the necessary caution.

**AD CONVICTION**

[5] It is trite law that the guilt of the accused must be proved beyond reasonable doubt. The accused does not have to prove his innocence. What is expected of him is to provide the court with a version which is reasonably possible true. The court does not have to believe that his version is truthful. It does not have to be convinced that every detail of his version is true.[1]

[6] The appellant's version is that he did not rape the complainant. O[…] is implicating him because he stole his cooked meat. When the appellant confronted him, he broke appellant's bedroom window and ran away.

[7] The appellant alleged that at all material times of the alleged rape, he was seated in his yard in the company of his friends consuming alcohol.

[8] A medical practitioner, Dr Mgudlwa who examined the complainant testified that he found that the victim was sexually penetrated. Samples were collected from the complainant's vagina and her panties for DNA analysis. The appellant's DNA was found on the victim's panty and he could not explain how his DNA came to be found on the victim's underwear. It is also

[1] See S v Chabalala 2003 SACR 134 SCA; and S v Shackell 2001 (4) SA 1 SCA

the finding of Dr Mgudlwa that the complainant suffered injuries to her vagina.

[9] The incident took place during the day and the appellant was positively identified by O[…] and his mother, the girlfriend to the appellant. The court a quo accepted O[…]'s version and the evidence of Dr Mgudlwa. I have no reason to find otherwise.

**EVIDENCE OF A SINGLE WITNESS**

[10] It was contended on behalf of the appellant that O[…]'s testimony should be approached with caution as he was a single witness which the court *a quo* failed to do so.

[11] In *S v Sauls and Others*[2] the court held that there is no rule of thumb test or formula to apply when it comes to the consideration of the credibility of a single witness. The court should weigh the evidence of a single witness and should consider its merits and dements, having done so, should decide whether the truth has been told despite shortcomings or defects or contradictions in the evidence.

[12] I am of the view that the court *a quo* did consider the fact that O[…] was a single witness. His evidence and that of Dr Mgudlwa were held to be honest and credible.

[2] 1981 (3) SA 172 A

[13] In view of the above, I am satisfied that the court *a quo* did treat the evidence of Onacu with the necessary caution. The existence of the caution must not be allowed to displace the exercise of common sense.

[14] The appellant failed to present any corroborative evidence from his friends who he alleged were present during the alleged time of the rape. He is placed at the scene of the offence and there is no rebutting evidence from his side.

[15] I am satisfied that there is enough evidence implicating and linking the appellant to the offence of rape against the minor child O[…]. The appellant's version cannot be regarded as reasonably and possibly true and the court correctly rejected it as false.

[16] The probabilities and improbabilities are not in favour of the appellant in this matter. Both state witnesses came out to be honest, credible and testified in a clear, straight forward and compelling fashion as the record reflect.

[17] O[…] has no reason to falsely implicate the appellant. Accusing him of stealing meat and then breaking the appellant's bedroom window will be laughable if this heinous crime was just a comedy.

[18] As for Dr Mgudlwa, she has never had any contact with the complainant's family members and does not know or met with the appellant before and after examining the victim, O[…].

[19] The court stated in *S v Francis*[3] that the powers of a court of appeal to interfere with the findings of fact are limited. In the absence of any misdirection, the trial court's conclusion including its acceptance of a witness' evidence is presumed to be correct.[4]

[20] It is my view that the court a quo correctly accepted the evidence by the state. I am not persuaded that the court a quo erred in convicting the appellant. The appellant's guilt was proved beyond reasonable doubt. His version has been correctly rejected as not reasonably possibly true.

**AD SENTENCE**

[21] The appellant has been convicted of a serious offence. His conviction falls within the purview of Section 51 of Act 105 of 1997 which prescribed minimum sentence, unless substantial and compelling circumstances were found to exist.

[22] The appeal court must find that there are substantial and compelling circumstances justifying a lesser sentence or that the court a quo misdirected itself or did not exercise its judicial discretion properly and judicially, for the appeal to succeed.

[23] The appellant put forward the following factors before the court a quo:

[3] 1991 SACR 198 A

[4] See also S v Hadebe and others 1997 (2) SACR 641 SCA

i) That he is fifty seven (57) years old, not married and he has fathered three children who are residing with their mother.

ii) That he had no formal education and was employed at a construction company as a labourer earning one thousand two hundred per week.

iii) The appellant contributed to the maintenance of the victim and his siblings despite not being their biological father as he regarded them as his children.

iv) That he was incarcerated for a period of one year and two months before his conviction.

[24] It is to be considered whether the aforementioned factors are indeed substantial and compelling to justify a deviation from the prescribed minimum sentence.

[25] The court *a quo* found no substantial and compelling circumstances in favour of the appellant. There is no indication on the record that the court *a quo* failed to exercise its discretion properly and judicially.

[26] The court a quo did consider and take into account both the mitigating as well as the aggravating factors into consideration when imposing sentence. The court is to guard against imposing disproportionate sentences merely on the basis that they fall within the prescribed minimum sentences.

[27] In *S v Vilakazi*[5] it was held that on cases of serious crimes, the personal circumstances of the offender by themselves will necessarily recede to the background.

[28] Once it became clear that the offence deserving a substantial period of imprisonment, the question whether the accused is married, whether or not he is employed, are in themselves immaterial to what period it should be. The prescribed minimum sentences are not to be departed from lightly and for flimsy reasons.[6]

[29] Sentencing is a prerogative of a trial court and that sentences imposed by a trial court can only be interfered with where the trial court did not exercise its discretion reasonably and judicially.

[30] When passing sentence, the court a quo considered all the facts required to be considered, that is, the appellant's personal circumstances, the interest of society and the gravity of the offence. Mitigating and aggravating circumstances were taken into account.

[31] The appeal court is to apply its mind to the question whether the sentence imposed by the court a quo was proportionate to the offence.

[32] Okuhle, the victim herein was brutally raped by an old man fit to be called her grandfather and sustained serious injuries to her vagina. In *S v C*[7] the court described rape in the following terms: -

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[5] S v Vilakzi 2009 (1) SACR 552 SCA at page 574 at para 58
[6] S v Malgas 2001 (91) SACR 469 SCA
[7] 1996 (2) SACR 181 at page 186 D-E

*"Rape is regarded by the society as one of the most heinous of crimes and rightly so. A rapist does not murder his victim; he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deeds often haunt his victim and subject her to mental torment for the rest of her life. A fate often worst than loss of life".*

[33] What is aggravating is that the victim was nine years when she was violated by someone she regarded as a father figure.

[34] I could not agree more with the court in *The Director of Public Prosecutions, Grahamstown v Mantashe*[8] when it stated that:-

*"There can be no greater crime in my view, than to deprive a child of her innocence, especially a vulnerable child such as the complainant here. This heinous act was not perpetrated by a stranger, but by a person who said he considered the child to be own daughter. The reality is that South Africa has five times the global average in violence against women. There is mounting evidence that these proportionality high levels of violence against women and children have immeasurable and far reaching effects on the health of our nation and its economy…."*

[35] Counsel of the appellant submitted that the offence committed by the appellant did not fall within the worst category of offences committed in the court *a quo's* jurisdiction wherein the child would undergo surgery or her organs severely damaged. It is further contended that the victim did not suffer serious injury and was not infected with HIV.

[8] 131/2019[2020] ZASCA 05 12 March 2020 at para 14 and 15

[36] With respect to the counsel for the appellant, I do not agree with the yard stick used to determine the seriousness of the injuries to be sustained by the victim in order to quality as very serious.

[37] Be that as it may, it is indeed so that the abuse of young children in particular is very rife in the society we are living in presently. It is savaging and eating through the nerve center of our moral fibre and cannot be justified and condoned.

[38] That the offence did not fall within the worst category and that the victim was not seriously injured cannot be regarded as substantial and compelling in my view.

[39] I can find no grounds to interfere with the sentence imposed by the court *a quo*. The sentence imposed by the court *a quo* does not appear to be shockingly and disproportionate thus inducing a sense of shock. I find that the court *a quo* exercised its discretion properly and judicially.

[40] Equally so, the appeal against sentence is devoid of any merit and stands to be dismissed.

[41] In the premises the following order is proposed: -

1. The appeal against conviction and sentence is dismissed.
2. The conviction and sentence of the court *a quo* is confirmed.

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**MADIBA SS**
**ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA**

I agree, and it is so ordered

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**MAKHOBA D**
**JUDGE OF THE GAUTENG DIVISION, PRETORIA**

**Appearances:**

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| Appellant's Counsel | : Miss MMP Masete<br>Pearlma@legal-aid.co.za<br>072 805 7144 |
| Appellant's Attorneys | : Pretoria Justice Centre |
| Respondents' Counsel | : E Leonard SC<br>084 700 3279 |
| Respondents' Attorneys | : National Prosecuting Authority |
| Date of hearing | : 17 August 2020 |
| Date of judgment | : 01 September 2020 |