



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**

Date: 17 February 2022 Signature:

CASE NO: A299/2019

In the matter between:

MZANGWA VUSI

Appellant

And

THE STATE

Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] The Appellant was convicted in the Regional Court for the Gauteng Division sitting at Tsakane on charges of contravening the provisions of section 1, 55, 56 (1), 57 to 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 as amended. Further read with the provisions of section 51(1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended; (Rape of a minor).

[2] Appellant was sentenced to life imprisonment.

[3] The court made an order in terms of section 103(1) of Act 60 of 2000 declaring the Appellant unfit to possess a firearm and also ordered that his name be included in the National Register for sex offenders.

[4] The Appellant was legally represented throughout the trial.

[5] The Appellant appeals against both conviction and sentence.

[6] The Appellant's application for condonation for the late filing of heads of arguments is not opposed, and is accordingly granted.

B. SUMMARY OF SUBSTANTIAL FACTS

[7] The allegations against the Appellant are that on or about the 28th August 2010 at or near Tsakane, he did unlawfully and intentionally commit an act of sexual penetration with a female person, to wit A[....] S[....], then aged 7 years, by inserting his penis into her vagina and had sexual intercourse with her without her consent.

[8] The prescribed minimum sentencing provisions envisaged in Section 51(1) of the Criminal Law Amendment Act 105 of 1997 are applicable to the charge as stated above. These provisions were explained to the Appellant at the commencement of the trial and his confirmation of understanding same was recorded by the trial court.

C. ISSUE(S) TO BE DECIDED

[9] The issues in dispute is the identity of the perpetrator and the application of the cautionary rule.

Ad identity of the perpetrator

[10] The complainant described the perpetrator as having a hand that seemed like it was a bit burnt or floppy and that he had on a blue jersey and white tracksuit pants. (Record paginated p172 par 20; p183 par 9 and 10)

[11] The trial court also confirmed the fact of the deformity on the Appellant's left hand. (Record p184 par 9)

[12] In the course of the trial, the complainant also identified the Appellant from the dock.

[13] The Appellant sought to deflect responsibility by shielding himself behind the disability in his hand and went so far as to see a doctor. He called the doctor to testify on his behalf. According to the medical doctor, the Appellant's hand had a usability at a level of three out of five. The doctor's evidence could thus not take the Appellant's case any further since the former could not exclude the Appellant's ability to pick up and carry the complainant on his shoulders. (Record p287).

Ad the cautionary rule

[14] The learned Regional Magistrate applied the cautionary rule applicable to evidence of a single witness and was satisfied that the complainant's version was truthful and accepted it. (Record p285 par 20). There was ample corroboration regarding the type of clothing worn by the Appellant that evening.

[15] The complainant's elder sister S[....] S[....] testified that she was the first recipient of the report by the complainant on that evening. As she encountered the complainant just outside the kitchen door to their house, the perpetrator happened to walk past the street outside. The complainant saw him and was shocked and

screamed out: “here is the person”. The witness stated further that the person was wearing a blue T-shirt and white track suit pants. (Record p.127).

[16] S[....] S[....] an 11-year-old sister to the complainant testified via an intermediary that she had been with the complainant when the perpetrator picked the latter up and carried her around his neck. (Record p.206). She further stated that before the incident she had seen the perpetrator on two previous occasions with another gentleman who was his friend who stays in their street. (Record p. 207).

[17] In considering the evidence as a whole, the trial court was satisfied as to the identity of the perpetrator and convicted the Appellant accordingly.

[18] It is trite law that the trial court has the benefit of observing the demeanour of the witnesses testifying before it, in contrast to a court hearing the appeal. A court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court, save where the trial court materially misdirected itself in so far as the factual and credibility findings are concerned. (*R v Dhlumayo and Another* 1948 (2) SA 677 (A).)

D. SENTENCING

[19] As regards the life sentence imposed, it is predicated largely on the mandatory minimum sentences legislation and the interpretation thereof by the appeal courts.

[20] The trial court also had regard to the aggravating circumstances present, in particular the tender age of the victim of this heinous crime.

[21] The sentencing court could not find any substantial and compelling circumstances and was duty-bound to impose a sentence of life imprisonment.

E. CONCLUSION

[22] In the circumstances, the appeal cannot succeed and I propose the following order:

The appeal is dismissed.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

I agree and it is so ordered.

N.V. KHUMALO
Judge of the High Court
Gauteng Division,
Pretoria

Date of Judgment: 25 February 2022

On behalf of the Appellant: Mr. H.L. Alberts
Instructed by: Legal Aid South Africa
Pretoria Justice Centre
PRETORIA
Cell: 073 752 1170
E-mail: hermana@legal-aid.co.za

On behalf of the Defendant: Adv. E. V. Sihlangu
Director of Public Prosecutions
Pretoria
Cell: 082 379 1240