



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**APPEAL CASE NO: A168/22  
REGIONAL COURT CASE NO: SH 356/2019**


Delete whichever is not applicable

(1) Reportable: No.

(2) Of interest to other judges: No

(3) Revised.

27 February 2023  
Date

  
Signature

**In the matter between:**

**THABO MARULE**

Appellant

**And**

**THE STATE**

Respondent

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**APPEAL JUDGMENT**

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**Mogotsi AJ (Munzhelele J concurring)**

[1] The appellant is aggrieved by the conviction on a charge of rape read with section 3 of the Sexual Offences and Related Matters Amendment Act<sup>1</sup> and a subsequent sentence of life imprisonment handed down by the Benoni Regional court on 09 October 2022. The appellant pleaded not guilty and he was legally represented throughout the trial.

[2] The summary of the facts which gave rise to this appeal are that the complainant and the appellant were staying together. Prior to the day in question the appellant allegedly attempted on several occasions to penetrate the complainant's anus with his penis. On 16 July 2019 at about 20h00 -21h00pm, the complainant's father took his friend halfway and returned at a distance of 300-350m. The appellant and the minor child were left sleeping in separate bedrooms. The appellant took the boy to his bed. He caused him to lie on his stomach, removed his pyjama trouser. He put on a condom on his penis and penetrated the boy on his anus. It was for the first time that the complainant was seeing a condom. Upon the return of the complainant's father, he found the boy standing in the kitchen and crying. The complainant made a report to the effect that the appellant used a condom to rape him. The father could not believe it. A report was also made to the appellant's mother the same night. The complainant's father and the appellant's mother wanted to see the alleged condom. The appellant was at first, hesitant to get out of the bed so that the child could show his father and the appellant's mother a used condom thrown under the bed after the sexual intercourse.

[3] The complainant was taken to a clinic the following day. A professional nurse examined the complainant and observed "abrasions, redness bruising and tears around the orifice. The conclusion was that the injuries "were consistent with the insertion of a blunt object in the anus". The injuries "were not due to any infection or constipation". Having confirmed the report, the complainant's father took a used condom he found underneath the appellant's bed, put it in a plastic bag together with the child's underwear and proceeded to the police station where he laid a charge.

[4] The appellant is maintaining his innocence. His version is that the complainant's father is falsely implicating him. The reason being that he was asked to evict the

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<sup>1</sup> 32 of 2007



complainant's father from the house. He said that he used the condom in question, in June when he had sexual intercourse with his girlfriend.

[5] The appellant believes that another court will come to a different conclusion on the conviction because the complainant did not know a condom before and it is improbable that he told his father about a condom. The complainant was influenced by his father to falsely implicate the appellant as the latter's father wanted to sell the house. Meaning the complainant and his father were to look for alternative accommodation. The appellant's DNA was not found on the alleged condom. Considering the age on the appellant, the injuries found on the complainant are superficial.

[6] It is trite that the *onus* to prove the guilt of the appellant beyond a reasonable doubt rests on the respondent. The decision either to convict or acquit must be based on the totality of the evidence. In *S v Van der Meyden*<sup>2</sup> the court said:

'These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'

[7] The trial court has to evaluate the evidence in the light of the discrepancies, probabilities, possibilities and the law in order to arrive at the required standard. In *R v Difford*<sup>3</sup> it was explained how the court should approach the evidence before it.

'No onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives any explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but

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<sup>2</sup> 1999 (1) SACR 447(W) at 448 F-I,

<sup>3</sup> 1937 AD 370 at 373 and *R v M* 1946 AD 1023 at 1027

that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal.

The court does not have to believe that defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true.'

### **Ad conviction**

[8] A court of appeal will be reluctant to interfere with the trial court's evaluation of oral evidence unless there is a misdirection by the trial court. The trial court has the advantage of seeing and hearing witnesses, which is not the case in the appellate.

[9] The complainant was a single child witness aged 7 years at the time of the incident and 9 when he testified. The evidence of a child witness is not inherently unreliable. The article written by Chetty N<sup>4</sup> says in dealing with such evidence, it is required of the trial court to;

- (a) [...] articulate the warning in the judgment, and also the reasons for the need for caution in general and with reference to the particular circumstances of the case;
- (b) [...] examine the evidence in order to satisfy itself that such evidence given by the witness is clear and substantially satisfactory in all material respects
- (c) although corroboration is not a prerequisite for a conviction, a court will sometimes, in appropriate circumstances, see corroboration which implicates the accused before it will convict beyond reasonable doubt;
- (d) failing corroboration, a court will look for some feature in the evidence which gives the implication by a single child witness enough hallmark of trustworthiness to reduce substantially the risk of a wrong upon her evidence.

[10] The finding of a condom *albeit* not linked to the appellant through DNA, is a piece of evidence which took the allegations a step further. Even though the child may not have

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<sup>4</sup> "Testimonies of child –rape victims in South African courts "2006 (47) Codicillus 25)



known a condom before, what was found was indeed a condom. The conduct of the appellant who was reluctant to get out of his bed also became a further corroboration. While it is not expected of the appellant to assist the state, it is noted that he could not give an explanation of how the child could have known about the existence of a used condom and its location. The behaviour of the appellant when asked to make way so that the witness' father and the appellant's mother could see the said condom cannot be ignored. Corroboration was also found in the form of injuries sustained exactly where the evidence of a child's alleged penetration. The child as the only witness of what happened before, did not exaggerate or falsely implicate the appellant by saying there was penetration. He only talked of several attempts. He was left sleeping but upon his father's return, he was crying in the kitchen. There is no other evidence of why was he not sleeping.

[11] The trial court could not find material contradictions in the state's case. The fresh injuries found in the anus of the victim and a used condom were found to be corroborating factors. The appellant's bare denial was found not to be reasonably possibly true and it was rejected as it was found to be falls. The evidence of the child witness was just short and to the point. There are no inconsistencies or improbabilities. It cannot be faulted.

[12] A consideration of the totality of the evidence of the state is probably what caused the appellant's counsel to concede. This court is satisfied that the trial court correctly found that the state had proved the guilt of the appellant beyond reasonable doubt.

### **Ad sentence**

[13] Considering the sentencing principles outlined in *S v Zinn*<sup>5</sup>;

A minimum sentence prescribed by law which, in the circumstances of a particular case, would be unjustly disproportionate to the offence, the offender and the interest of society, would justify the imposition of a lesser sentence than the one prescribed by the law, *S v Malgas*<sup>6</sup>.

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<sup>5</sup> 1969 (2) SA 537 (A)

<sup>6</sup> 2001 (2) SA 1222 (SCA), 2001 (1) SACR 469 (SCA) [2001] 3 ALL SA 220 (SCA)

[14] The court *a quo* imposed life imprisonment after finding it suitable and proportionate to the crime the appellant was convicted of. He argues that the sentence is shockingly disproportionate, to the crime, the offender and the interest of society. The trial court overemphasised the seriousness of the offence, failed to accord weight to his youthfulness during the committal of the offence. The complainant did not sustain serious injuries. The appellant grew up in a violent and abusive environment and he lacked a guiding hand of a father. He spent 2 years and 4 four months in custody awaiting trial. The appellant is not a hardened criminal and there are prospects of rehabilitation. There is no evidence on the psychological impact that the offence had on the complainant and whether he will be able to overcome the ordeal with professional counselling. Also that, the appellant has succeeded to show substantial and compelling reasons for the court to deviate from the prescribed minimum sentence.

[15] The approach to sentencing remains as expressed in *Maleka v S*<sup>7</sup> where the court said;

"[10] ... the imposition sentence is pre-eminently a matter falling within the discretion of the trial court."

In *S v Phillips*<sup>8</sup> the court said;

"It is trite that a court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, assess the appropriateness of the sentence as if it were a trial court and then alter the sentence arrived at by that court, simply because it disagrees with it. To do so would be to usurp the sentencing discretion of that court. But where material misdirection has been demonstrated, an appellate court is not only entitled, but is also duty bound, to consider the question of sentence afresh to avoid an injustice."

[16] Therefore, considering the law, the facts, the aim and objective of sentencing, the question is whether the court *a quo* misdirected itself by not finding substantial and compelling reasons which would have enabled him to deviate from imposing a prescribed sentence.

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<sup>7</sup> (1209/2017) ZASCA 114 (18 September 2018 at para 10)

<sup>8</sup> 2017 (1) SACR 373 (SCA) at para .5



[17] An offence of rape by its very nature goes to the core of a victim's fundamental rights to dignity, privacy, security of a person. It is dehumanising, invasive and humiliating for the rape victim, within a psychological impact that will stay with the victim for life, *S v Chapman*<sup>9</sup>. It has a severe impact on the mental health of the victim. It commonly results in depression and post-traumatic stress disorder, which will impact the child's emotional well-being and her ability to form various relationships, *Buso v S*<sup>10</sup>.

[18] Heinous crimes *S v C*<sup>11</sup> against children in South Africa continue at a shocking rate. The government has introduced measures to stem the tide. Various forums and the courts are also continuously addressing this crisis of epidemic proportions but the sexual abuse of women and children continues at an alarming rate.

[19] There is a minimum sentence prescribed in respect of the offence of rape committed under these circumstances. The court made a finding that there exist no substantial and compelling circumstances proven in this case to depart from the prescribed sentence.

[20] The complainant was only seven years old at the time of the alleged incident. The trial court found that at "the age of 21 years, the appellant was a young man who was still trying to find his place in the society. "The pre-sentence report showed that he was raised by both parents in a caring and happy family although the father was said to be abusive and the parents parted ways when the appellant was 12 years old. He passed grade 10 and was never permanently employed. He is a first offender who was kept in custody pending the finalisation of his case. He does not have dependants. The state proved a previous conviction of unlawful possession of drugs on the 6 February 2018 and the appellant was cautioned and discharged.

[21] There were previous several attempts by the appellant to penetrate the anus of the complainant with his penis. "It happened frequently." Clearly the complainant was suffering in silence. On the day in question, the complainant's father could not believe the

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<sup>9</sup> 1997 (3) SA 341 (SCA) at 344J-345 A; *Section 12 (1) (c) and (e) of the RSA Constitution Act 108 of 1996*[10] MDT v S

<sup>10</sup> (A 256/2021) [2022] ZAGPPHC 404 (17 June 2022) para. [49]

<sup>11</sup> 1996 (2) SACR 181 (C) 186 D-F

report made. This is what sometimes causes the victims of sexual abuse to suffer in silence. On the other hand, fear of not being believed has the effect of offenders believing that they may continue without consequences. The appellant was aged 21 years at the time of the committal of the offence. He was residing with the complainant and was supposed to be trusted. The appellant had time to reflect and stop what he was doing but he chose not to do that. He is not prepared to take responsibility for his conduct. The court considered taking responsibility for one's wrongful conduct as a step towards rehabilitation. He however was found to be entitled to maintain his innocence.

[22] In *S v Nkawu*<sup>12</sup> the complainant had not suffered serious injuries as a result of the rape. In dealing with the issue of substantial and compelling reasons justifying a departure from the prescribed sentence, the court had a look at section 51<sup>13</sup> of the Criminal Law Amendment Act<sup>14</sup>, the section provides that when the court evaluates the evidence on sentence 'an apparent lack of physical injury to the complainant' shall not be regarded as a substantial and compelling circumstances. The provision restricts the discretion to deviate from a prescribed minimum sentence and that is meant to ensure a proportionality. So even if there are no serious and permanent injuries, the evidence must be considered cumulatively. In *S v PB*<sup>15</sup>, the court stressed that a prescribed minimum sentence cannot be departed from lightly or for flimsy reasons and refused to interfere with a prescribed sentence of life imprisonment imposed on a father who raped his 12-year old daughter. While that serves as only a guideline, it emphasised the necessity to impose heavy sentences in similar cases.

[23] Sexual assault is by its nature a serious offence. According to a victim impact report, the complainant used dagga as form of a coping mechanism.

[24] Having considered the law and the evidence on record, it is my well-considered view that aggravating circumstances outweigh mitigating circumstance. The appellant's counsel correctly conceded that given the evidence before court, the sentence imposed by the trial court cannot be faltered.

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<sup>12</sup> 2009 (2) SACR 407 (ECG)

<sup>13</sup> (3) (Aa)(ii) CLAA Section 51 (3) (Aa)(ii) of the Criminal Law Amendment Act, 105 of 1997

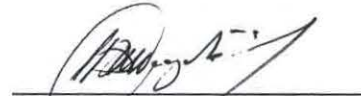
<sup>14</sup> 105 of 1997

<sup>15</sup> 2013 (2) SACR 533 SCA



## **Conclusion**

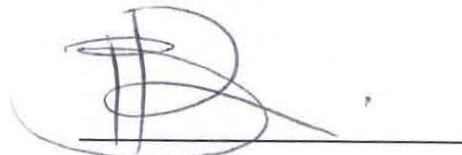
[25] In the result, the appeal against both the conviction and sentence is dismissed.



**D.D. Mogotsi**

Acting Judge of the High Court

I agree, and it is so ordered.



**M Munzhelele**

Judge of the High Court

Heard On: 17 January 2023

Judgment Delivered On: 27 February 2023

## **APPEARANCES:**

For the Appellant: Adv. J.L Kgokane

Instructed by: Legal Aid South Africa

For the Respondent: Adv. J Cronje

Instructed by: The Director of Public Prosecutions