IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A195/2022

Date of Hearing: 21 October 2024

Handed down: 15 November 2024

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED.

DATE: 15.11.2024

SIGNATURE:

In the matter between:

TSHEPO NTSHALA **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

Strijdom J

1. On 4 September 2003 the appellant was convicted in the Regional Court, Senekal on one count of rape of a female child born on 15 May 1994.

2. After his conviction in the Regional Court, the matter was referred to the High Court for sentence in terms of section 52 of Act 105 of 1997.

3. On 27 July 2004 Van Oosten J confirmed the conviction and sentenced the appellant to life imprisonment.

4. On 21 October 2014 leave to appeal both the conviction and sentence was granted to the full Court of the Gauteng Division of the High Court by Van Oosten J.

5. The appellant was legally represented during the trial in the Regional Court and the sentencing proceedings in the High Court.

6. The record of the proceedings in the Regional Court and the High Court does not appear to be complete. The charge sheet of the Regional Court is not part of the appeal record and the only indication of the preferred charge of rape can be found in the judgment on conviction of the Regional Magistrate. The reading into the record of the charge during plea was not transcribed and merely reflects that the prosecutor put the charge to the appellant.

7. The register declares that the audio proceedings of 27 July 2004 cannot be retrieved. The transcribed record for 27 July 2004 only reflects the judgment on sentence. (The address of the counsel for the State and the appellant before Van Oosten J is not transcribed. The victim impact report and pre-sentence report of the appellant respectively received as Exhibits “B” and “C”, do not form part of the appeal record.

8. The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, *inter alia,* on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal. The

requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect record of everything that was said at the trial.[1]

9. It was conceded by counsel for the State and the appellant that the appeal record is adequate for a proper consideration of the appeal. I agree with these submissions.

10. It was argued on behalf of the appellant that the Court had acted *ultra vires* by sentencing the appellant without satisfying itself or pronouncing on the guilt of the appellant, alternatively, the record does not reflect that such pronunciation was made by Van Oosten J.

11. It is evident that the appellant pleaded not guilty in the Regional Court and that a trial commenced. The provisions of section 52(3) of the Criminal Law Amendment Act 105 of 1997 was thus applicable to the High Court proceedings before Van Oosten J on 27 July 2004.

12. Section 52(3)(b) provides as follows:

> "(b) The High Court shall, after considering the record of the proceedings in the Regional Court, sentence the accused, and the judgment of the Regional Court shall stand for this purpose and be sufficient for the High Court to pass sentence as contemplated in section 51: provided that if the Judge is of the opinion that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he or she shall without sentencing the accused, obtain from the Regional Magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused."

13. Section 52(3)(b) requires the High Court to consider the record of the proceedings in the Regional Court and then to impose sentence. The proviso

[1] *S v Chabedi* 2005 (1) SACR 415 SCA

in section 52(3)(b) only comes into operation if the presiding Judge is of the view that the proceedings is not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice.

14. It is evident from the orders made by the presiding Judge on 27 July 2004 that he considered the proceedings in the Regional Court before imposing the sentence. The first order reads as follows:[2]

"Na deurlees van die stukke geliasseer, aanhoor van regsverteenwoordiger en na oorweging van die saak: Word gelas dat Skuldigbevinding is bekragtig."

15. The second order reads as follows:[3]

"Na deurlees van die stukke geliasseer, aanhoor van regsverteenwoordiger en na oorweging van die saak: Word gelas dat – Lewenslange gevangenisstraf."

16. In my view there is no merit in the submission that the Court acted *ultra vires.*

17. I now turn to consider the appeal against conviction in this case. It was contended by the appellant that the complainant's identification of the appellant as the perpetrator is not reliable.

18. The crisp issue in this appeal is whether it has been proven beyond reasonable doubt that the appellant is the person who raped the complainant.

19. The evidence tendered by the State can be summarised as follows:

19.1 The complainant T[…] M[…] L[…] testified that some time ago the appellant called her to his house, at the time she was playing on the street

[2] Record, p136
[3] Record, p137

with her friends. The appellant undress her, put her on the bed and inserted his private part in her virgina. After the rape, the appellant told her that if she tells anyone he will kill her. It was at the hospital that a nurse asked her who raped her. She told the nurse who raped her after she was threatened by the nurse. She does not remember the name of the nurse. During cross-examination she disclosed that it was not the first time that such an incident happened to her. The appellant was the only person that raped her.

19.2 Rina Mokotsi, the neighbour of the complainant testified that, on request of the complainant's mother, she took the complainant to the clinic and thereafter with a referral letter to hospital. The doctor examined the child, and she was told to wait outside. The child did not make any report to her as to what happened. She found the complainant at home after the complainant's grandfather called her. The complainant could hardly stand up and she helped her to stand. The complainant told her that she was in pain from her hips downwards and under her arms.

19.3 Dr De Kock testified that he examined the complainant on 16 May 2002. He completed a J88 report (which was marked as Exhibit "A"). She had a yellow discharge which is indicative of an infection. The infection was serious and made her systematically sick. She had fever and her urine burnt. The symptoms that she represented with is typical of a venereal disease. The allegation of penetration is possible as the hymen was absent. He noted on the J88 document that the complainant told him that this happened four times previously. He testified that the fact that he did not observe any tears or injuries to her private parts except for the absent hymen probably indicates that it was not the first time that she was penetrated.

19.4 Ms S[…] L[…], the complainant's mother, testified that on 16 May 2002 she bathed the complainant and observed a rash on the child's private part. She did not take the child to school as she was ill. The complainant remained home with her grandfather. She went to work to obtain

permission to take the complainant to the clinic. Later that day the police arrived at her house together with the complainant and Rina, her neighbour. She knows the appellant as he is an opposite neighbour. She visits the appellant's mother frequently. The appellant does not work.

19.5 David Selebalo testified that the complainant is the daughter of his brother in law. On 16 May 2022 he and the complainant were at home because she was ill. At approximately 8:00 she started vomiting. He called the neighbour to assist. The neighbour took the child to the clinic.

19.6 Inspector Desmond Kgalapa testified that on 16 May 2002 he was on official duty. He found the complainant at the charge office of the police station. The complainant told him that she can point out the place where the appellant resides. They found the younger sister of the appellant who told them that the appellant went to sing at a school. They went to the school. Three male persons approached on foot. The complainant pointed out the person walking in the middle. He arrested the appellant.

20. The appellant testified that he knows the complainant as she stays in the front opposite house from him. During the said period he was unemployed and would go to the Industrial Centre to look for employment. On the day of his arrest, he was with two friends next to the school at Jouberton Township. The police arrived in a police vehicle. They asked him if he is Tsepo and then arrested him. He testified that he knows the complainant and that there were no problems between them. He does not know why the complainant implicates him and denied that he raped her.

21. The appellant called his sister, Pinky Nshala, as a witness. She testified that on 16 May 2022 she was at her house doing homework when two police officers arrived at her house looking for the appellant. She accompanied the police in their vehicle. At the corner of a street, they saw Tshepo standing together with his friends. She pointed him out to the police. The appellant was arrested, and they were driven home. The police then drove away with

the appellant. On the previous day she was at home watching television from 14:00. The appellant only arrived home at 17:00.

22. The following facts are common cause between the parties:

22.1 The complainant was sexually penetrated and that the clinical findings of Dr De Kock shows a venereal disease transmitted through sexual penetration a day or a view days prior to 16 May 2002.

22.2 The complainant was 7 or 8 years old on 16 May 2002 when she was raped.

22.3 Complainant was taken to a clinic where she was examined b Dr De Kock and thereafter referred to a hospital.

22.4 That the complainant and the appellant are opposite neighbours.

22.5 That the complainant and the appellant know each other very well.

22.6 That the complainant's mother and the appellant's mother are friends and they visited each other.

23. In *S v Hadebe and Others*[4] the Court held:

"… in the absence of demonstratable 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."

24. The main submissions of the appellant can be summarised as follows:

24.1 That the Court *a quo* erred in finding that the State proved its case beyond reasonable doubt.

[4] 1997 (2) SACR 641 (SCA) at 645e-f

24.2 The Court *a quo* erred in rejecting the evidence of the appellant as false.

24.3 The Court *a quo* erred in that it failed to properly analyse and evaluate the evidence of the complainant who was a child witness.

25. The Regional Magistrate found that the complainant made a favourable impression on the Court whose account was truthful and reliable. She impressed the Court as a good witness and there is nothing to cast doubt on her veracity concerning the incident and subsequent events. Her evidence regarding the incident was credible and she did not contradict herself in any material way.

26. The learned Magistrate duly considered and applied the cautionary rules applicable on the evidence of a child and a single witness.[5] The learned Magistrate also found that the evidence of the complainant was corroborated by the evidence of Dr De Kock.

27. The Regional Magistrate rejected the evidence of the appellant as being false. Although the Magistrate remarked that the appellant did not create a bad impression on the Court, it is evident from the evaluation of the evidence by the Magistrate, that the remark related to his demeanour in the witness stand rather than to the veracity of his evidence.

28. The Court *a quo* found the evidence of the appellant's movement on the day of the incident to be vague and that he adjusted his testimony of where he was at the time of the incident. The Court *a quo* also found that the appellant's sister, adjusted her evidence.

29. It being undisputed that the complainant was raped, I do not have the slightest hesitation to find that the appellant is the person that raped the complainant. I

[5] Record, Judgment p91-93

can find no misdirection by the Magistrate on the facts or the law. The Court *a quo* correctly convicted the appellant of rape.

The Sentence

30. The complainant was under the age of 16 years when she was raped. Rape of a person under the age of 16 is one of the offences listed in Part 1 of Schedule 2 of Act 105 of 1997. Life imprisonment is mandate, unless substantial and compelling circumstances exists which necessitate the imposition of a lesser sentence.

31. The record of the proceedings in the Court *a quo* and in the High Court do not contain information that Section 51(1) of the Criminal Law Amendment Act 105 of 1997 was applicable or that the appellant was properly informed about the minimum prescribed sentence of life imprisonment.

32. It was conceded by counsel for the State that there is no indication in the appeal record that the State relied on section 51(1) or that the appellant was informed of the minimum prescribed sentence. It was further conceded by the State that the failure to inform the appellant of the minimum prescribed sentence would be a substantial and compelling reason not to impose life imprisonment.

33. As a general rule, where the State charged an accused with an offence governed by section 51(1) of the Act, it should state this in the indictment. An accused faced with life imprisonment must know from the outset what the implications and consequences of the charge were.

34. Mpati JA, in *S v Ndlovu*[6] endorsed this approach, stating:

"The enquiry, therefore, on a vigilant examination of the relevant circumstances, it can be said that an accused had a fair trial and I think it is

[6] 2003 (1) SACR 331 (SCA)

implicit in these observations that where the State intends to rely upon the sentencing regime created by the Act, a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge sheet then in some other form, as that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences."

35. In the circumstances of this case, it cannot be said that the appellant suffered no prejudice from the court's failure to warn him of the consequences of life imprisonment. By invoking the provisions of the Act without it having been brought pertinently to the appellant's attention rendered the trial in that respect unfair. That in my view, constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed.

36. Regarding the sentence the court found that the appellant was born on 21 September 1982, that he was a first offender and that he was in custody awaiting trial for merely two years as he was arrested on 16 May 2002. It correctly found that there were aggravating circumstances in the case, namely that the complainant was a minor and that rape is a very serious offence. The court also considered a pre-sentence report which set out the personal and background circumstances of the appellant. The court also considered the victim impact report of the complainant.

37. The victim impact report and pre-sentence report do not form part of the appeal record as already indicated and this court is limited to the facts in the record.

38. Taking all these factors into account I am of the view that a sentence fo life imprisonment would be unjust. A sentence of 20 (twenty) years imprisonment would send a strong deterrent message to the community but would take into account that the appellant was still young (19 years) old during commission of the crime; he was a first offender and spent merely two years in prison awaiting trial. The appellant has already served 20 (twenty) years of his sentence.

39. It was conceded by the State that 20 (twenty) years imprisonment under the circumstances could be an appropriate sentence.

40. The appellant's particulars cannot be included in the national register of sex offenders. The Criminal Law Amendment Act 32 of 2007 came into operation on 31 December 2007.

41. In terms of section 103(1) of Act 60 of 2000, no reasons were advanced for the Court not to declare the appellant unfit to possess a firearm. The appellant is automatically declared unfit to possess a firearm.

42. In the circumstances, I make the following order:

    1. The appeal against conviction is dismissed;

    2. The appeal against sentence is upheld. The sentence of life imprisonment is set aside and replaced with a sentence of 20 (twenty) years' imprisonment retrospectively from 27 July 2004.

    3. The appellant is ordered to be released forthwith, the sentence above already having been served.

_____

JJ Strijdom
Judge of the High Court
Gauteng Division Pretoria

I agree

_____

B Neukircher J
Judge of the High Court

Gauteng Division Pretoria

I agree and it is so ordered

_____

NA Engelbrecht AJ
Acting Judge of the High Court
Gauteng Division Pretoria

Appearances:

For the Appellant	:	Adv JM Mojuto
Instructed by	:	Legal Aid SA, Pretoria
For the Respondent	:	Adv AP Wilsenach
Instructed by	:	Director of Public Prosecutions Gauteng Division, Pretoria