**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: AR03/17

In the matter between:

**NTOKOZO SIBIYA** **APPELLANT**

and

**THE STATE** **RESPONDENT**

This appeal was disposed of without the hearing of oral argument, in terms of section 19(a) of the Superior Courts Act 10 of 2013.

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**ORDER**

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On appeal from the Regional Court, Estcourt:

The appeal against the appellant's conviction and sentence is dismissed.

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**JUDGMENT**

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**Chetty J (Koen J concurring)**

[1] The appellant, a 31 year old male, was charged with one count of rape in which the complainant was under the age of 16. He was legally represented at his trial and pleaded not guilty to the charge against him, denying all the allegations in the charge sheet. After assessing the evidence before it, the trial court convicted and sentenced the appellant to life imprisonment. This appeal comes before this Court in terms of s 309 of the Criminal Procedure Act 51 of 1977.

[2] The complainant, who was born on 6 January 2008, testified with the assistance of an intermediary in terms of s 170A of Act 51 of 1977. At the time of the incident on 20 July 2015, the complainant was seven years' old. She testified that after school she normally waits at a store near the taxi rank, from where a fruit and vegetable vendor trades. The vendor, referred to by the complainant as 'M[....]'s mum', would generally take the complainant back to her home, after which her mother would usually return from work. On the day of the incident the complainant's mother was late in arriving home and the complainant ventured towards the Pick 'n Pay shopping centre in Estcort in search of her mother. While doing so she was accosted by the appellant, who grabbed her by the hand and took her to red brick building where he removed her underwear and made her lie on the floor. He removed his trousers and undressed himself, after which he inserted his penis into her vagina. During the course of the attack, the complainant testified that the appellant covered her mouth when she attempted to scream.

[3] While on top of the complainant, the appellant was interrupted when a passerby, Mr Vukani Emanuel Mgoza, who is a driving school instructor, came across the appellant and shouted out to him 'What are you doing?' The appellant was startled by the appearance of Mr Mgoza on the scene and attempted to run away. Mr Mgoza, who was armed with a firearm, warned the appellant not to flee. A struggle then took place in which the appellant resisted the attempts by Mr Mgoza to restrain him. Eventually, with the assistance of a gentleman to whom he was giving driving lessons at the time, Mr Mgoza overpowered the appellant and managed to restrain him. Mr Mgoza testified that the appellant was naked from the waist down at the time when he apprehended him. The complainant, according to him, was also naked from the waist down. At the time when he confronted the appellant on the scene, the appellant was lying on top of the complainant as if he was having sex with

her. The police were summoned to the scene, after which the appellant was arrested.

[4] The evidence of Mr Mgoza is important as he testified that in the course of his work as a driving instructor on that day, he was travelling towards Connor Street in Estcourt when he noticed an adult forcibly pulling a child by the hand, with the child visibly resisting and crying out aloud. This caused Mr Mgoza to become suspicious, causing him to turn his vehicle around with the intention of ascertaining whether the child in the company of the appellant was safe. He denied that he had removed the appellant's trousers during the course of their struggle and was adamant that when he confronted the appellant, both he (the appellant) and the complainant were naked from the waist down. At the time when he initially saw the complainant, he recalled that she was wearing pink track pants and a top.

[5] The state led the evidence of Dr Badul, who has been in practice for 28 years, and who has vast experience in examining patients who have been the victims of sexual assault. She testified that on average in the area of Estcourt, she examines approximately 20 patients per month. She confirmed her findings and the nature of injuries sustained, as recorded on the J88. According to her notes on the J88, the complainant informed Dr Badul that an unknown man 'tried' to penetrate her with his penis. Doctor Badul said the following in her testimony with regard to her examination of the complainant:

'Emotional state and mental state, the child was very distraught and crying. Gynaecological history… this child was obviously seven years old and she had not reached her menarche as yet. Gynaecological examination, points of significance, she was definitely at Tanner stage 1 for breast development and pubic hair development. Abrasions were noted at both the labia minora and labia majora. The fossa navicularis was red and swollen. Her hymen was lunar by 0.7cm and the hymen was swollen. So a red swollen hymen and the vestibule, the vestibule area, and abrasions to the labia minora and majora are very suggestive of forceful penetration.'

[6] In commenting on the complainant's injuries, Dr Badul testified that her findings were suggestive of forceful penetration. Insofar as the suggestion that the complainant's vagina had not been penetrated, Dr Badul was confident, based on her examination and her experience, that the injuries sustained by the complainant

were consistent with a sexual assault and that penetration had occurred beyond the labia minora. She pointed out, given the age of the complainant at the time of the incident, that young children do not fully comprehend anatomical terminology. With regard to the term penetration, the doctor testified that the complainant 'does not even understand her body. She does not understand these terms.'

[7] Constable Duma testified that he had been patrolling in the area when he received a report over his police radio. He arrived at the scene and found a man naked and a child wearing pink clothing. He confirmed that Mr Mgoza reported to him that he had seen the man pulling the child by her hand, while all the time she had been resisting. The police officer described the area where the incident took place as an electrical sub-station, which is borne out from the brick structure reflected in the photographical album which formed part of the exhibits. It also emerged that although a DNA analysis was conducted on certain exhibits, these were inconclusive. This concluded the evidence for the State.

[8] The appellant testified in his defence that on the day in question he was returning from work and met the complainant near a sports field. As it was getting dark, he believed that she may have been lost and was unable to find her mother. Concerned for her safety, he took her hand and said that he intended taking her to the police. The appellant admits that the complainant cried as he forcibly pulled her hand, which is consistent with her version. He contends that the witness, Mr Mgoza, appeared on the scene and produced a firearm asking what he was doing with the complainant. He states that he was thereafter assaulted and, as he was not wearing a belt, his trousers fell down during the struggle. He was unable to provide any explanation as to why the police officer as well as Mr Mgoza testified that he was naked at the time when he was arrested, despite his insistence that he still had his underwear on and only his trousers fell below his knees. He denied that he raped the complainant or that he was found on top of her as testified to by the State witnesses. Although it was never put to Mr Mgoza or the police officer when they testified, in his evidence the appellant accused Mr Mgoza and the police officer of collaborating or fabricating their evidence to falsely implicate him. He was unable to provide any explanation as to why they would do so, especially as he did not have

any problems with either of these witnesses before the incident. This concluded the evidence for the defence.

[9] In its assessment of the evidence, the trial court took into account the version of the complainant who stated that the appellant tried to insert his penis into her vagina. The court further took into account the medical evidence by Dr Badul, who confirmed that in her expert opinion, penetration did in fact occur beyond the labia minora. Apart from the evidence of the complainant and Dr Badul, the evidence of Mr Mgoza was credible and reliable. He testified what he had observed from the time that he saw the appellant pulling the complainant by the arm until he encountered him laying naked on top of the complainant. The trial court was satisfied that evidence of even the slightest penetration was sufficient to complete an act of sexual intercourse. The evidence of Dr Badul of the complainant's hymen being red and swollen, together with the evidence of the complainant, was sufficient for the trial court to conclude that the State proved its case beyond reasonable doubt.

[10] It was contended on behalf of the appellant that the evidence of Dr Badul was that the complainant herself was uncertain as to whether or not she was penetrated. The evidence of Dr Badul was unequivocal, that from a medical perspective, penetration of the complainant had taken place. Her evidence could not be gainsaid. She is a highly experienced medical officer and provided an insight into why young children, like the complainant, would provide the type of responses they give when asked to describe the nature of the alleged sexual assault. Where a court is dealing with young, vulnerable witnesses, as in the present case, the proper approach is set out in *S v Vilakazi* 2009 (1) SACR 552 (SCA):

'[21] The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important.'

The complainant's evidence, in my view, was highly persuasive.

[11] The trial court correctly weighed the evidence presented by the State – that of the complainant and Mr Mzoga, together with the independent and objective assessment by Dr Badul - against the bare denial by the appellant. Two state witnesses, apart from the complainant, stated that the appellant was found naked at the scene. They had no reason to falsely implicate the appellant.

[12] I am not persuaded by the contention on behalf of the appellant that the evidence before the trial court, at best, established an attempted rape. The evidence of Dr Badul was unequivocal – the complainant was raped, even if she (the complainant) herself may not have thought so. In *S v Ramulifho* 2013 (1) SACR 388 (SCA), para 11, the court said the following in relation to medical evidence:

'In every rape case the objective evidence provided by the medico legal examination of the complainant is essential to determine where the truth lies. This evidence must always be carefully scrutinised by the presiding judicial officer, as the examination and the injuries found will usually determine the outcome of the trial. If the results of the examination show that a sexual assault has taken place, the accused's denial of intercourse will usually be rejected. If the results of the examination are inconsistent with the complainant's description of a sexual assault, the accused's denial of intercourse will usually be accepted as reasonably possibly true.'

[13] I am unable to find any misdirection on the part of the trial court in accepting the evidence of Dr Badul that her medical examination of the complainant established that penetration had taken place. As our courts have articulated in numerous judgments, once a detailed and critical examination of all the components of evidence has been done, a court must step back and observe the mosaic of evidence as a whole (see *S v Shilakwe* 2012 (1) SACR 16 (SCA), para 14). The version of the appellant that he was pulling or dragging the complainant to a police station is so highly improbable that the trial court correctly rejected this explanation as being false. In addition, there is nothing to gainsay the evidence of Mr Mgoza that he saw the appellant forcibly pulling the complainant. This aroused his suspicion that she was being taken against her will. The evidence against the appellant was overwhelming. I am satisfied that the trial court properly assessed the evidence before it and that there is no basis for this court to interfere with the conviction of the appellant on the count of rape.

[14] With regard to the sentence of life imprisonment imposed by the trial court, it was submitted on appeal that the court *a quo* gave insufficient attention to the personal circumstances of the appellant, including that he was 32 years' old at the time of his conviction; that he had already spent eight months in custody and that there were no *severe* physical injuries sustained by the complainant. The court a quo however gave due attention to the personal circumstances of the appellant and weighed these against the personal circumstances of the complainant, including her Victim Impact Statement containing a drawing of a little girl with tears running down her face. The court a quo paid heed to all of the guidelines pertaining to sentencing in such cases and found that there were no substantial and compelling circumstances justifying a departure from the prescribed sentence of life imprisonment. The gravity of the offence outweighs the personal circumstances of the appellant. I am unable to fault the trial court in any manner as to its approach in arriving at the decision to impose life imprisonment; there is no evidence of any misdirection on its part.

[15] In the result, I make the following order:

The appeal against the appellant's conviction and sentence is dismissed.

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**Chetty J**

Heads of argument prepared by:

For appellant: P Andrews
Instructed by: Legal Aid South Africa
PIETERMARITZBURG

For respondent: R du Preez
Instructed by: Director of Public Prosecutions
PIETERMARITZBURG

Date of Appeal 5 February 2021

Date of judgment 11 February 2021