

SOUTH AFRICA / JUDGMENT

D v S (CA 20/21) [2024] ZANWHC 68 (6 March 2024)

[2024] ZANWHC 68

COURT

North West High Court, Mafikeng

BEFORE

Reddy, Roux

CASE / FILE NUMBER

CA 20/21

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION - MAHIKENG

CASE

NO: CA 20/21

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In

the matter between:

H[...]

D[...]

Appellant

And

THE

STATE

Respondent

Coram: Reddy AJ & Roux AJ

Heard: 29 November 2023
Handed
down: 06 March 2024
ORDER
The
appeal against the conviction and sentence is dismissed.

JUDGMENT

ROUX AJ

INTRODUCTION

- [1] This is an appeal to this court against the conviction and sentence premised on the automatic right of appeal by virtue of the imposition of a sentence of life imprisonment on the Appellant.
- [2] The Appellant was charged with rape in that it was alleged that during the period 2010 to 2012 in Jouberton, the Regional Division of North West, he unlawfully and intentionally committed an act of sexual penetration with the complainant who will be referred to as “KD” by virtue of the fact that she is a minor, by having sexual intercourse without the consent of the complainant.
- [3] The provisions of Section 51 (1) of Schedule 2 of the Criminal Amendment Act 105 of 1997, as amended, found application on the basis that the complainant was born on 10 February 2001 together with the fact that the acts of sexual penetration (the rape) occurred on more than one occasion.
- [4] Various witnesses gave evidence. The most important witness was KD as she was the person revealing the unlawful sexual intercourse forced upon her by her grandfather, the Appellant.
- [5] She was 9 years old in 2009, when according to her evidence the Appellant raped her for the first time and according to her evidence he raped her on a number of occasions during the years 2009 to 2012. She stayed with her grandfather and her grandmother. Although he is not her biological grandfather, he adopted and raised her as her mother was unemployed and not able to financially support KD. KD lived with him, and his wife and he was responsible for her upbringing. KD would seemingly on a monthly basis visit her mother, Ms K[...]. In her evidence, KD interchangeably referred to the Appellant doing “snaakse” things with her and that he raped her. She explained what the “snaakse” things were and her evidence was clear that according to her evidence her grandfather had put his penis inside her vagina and had sexual intercourse with her. It later on became clear that the reason for also using the word “rape” in her evidence was because after the revelations at the Crisis Centre, her mother had explained to her that she was raped.

[6] There was some dispute in the trial whether, when she revealed the unlawful sexual deeds to her mother, she identified the Appellant as the offender or whether she only did so after her mother had taken her to the clinic where she was then interviewed at the Crisis Clinic. According to her mother's evidence, in 2012, when KD visited her, she observed that KD's gait was strange as she walked with her legs slightly open. She asked her about it and KD started to cry in an angry manner. This was after she had told KD that she would take her back to her grandfather and she did not want to

go. She described the walk as if KD was walking in a difficult manner. KD wanted to urinate and that is when she saw what appeared to be that her panty was dirty as if she did not bath regularly. KD told her that she had inflammation. She made KD to lay on her bed and she examined her. She saw a yellow discharge and blood discharging from her vagina. She kept on asking KD what had happened, but KD did not give her an answer because as it was put by her mother, she was afraid to talk.

[7] The following day she was supposed to go back to her grandparents but instead her mother took her to the clinic where she was examined by a doctor at the Crisis Centre. At the Crisis Centre she told the counsellor about the unlawful sexual deeds perpetrated by her father (the grandfather of KD). The mother was present when KD revealed to the counsellor the unlawful sexual deeds and the detail thereof over a period of time.

[8] The mother's statement to the police was handed in as Exhibit "E". In terms of the statement KD revealed the identity of the Appellant when she for the first time revealed the conduct of the Appellant to her mother. This is contrary to the evidence of her mother that she revealed the identity of the Appellant for the first time when she was at the Crisis Clinic and that it was done in the presence of the counselling her. The police officer responsible for taking the statement from KD's mother confirmed that she had written everything down and read the statement back to her although it was the evidence of KD's mother that she did not read the statement back.

[9] Nothing substantial turns on this as a reading of paragraph 4 of Exhibit "E" makes it clear that it is a summary of events and not a detailed statement. Furthermore, it became clear in evidence that the interview was in Setswana and the investigating officer translated it into English. It is a discrepancy not disturbing the credibility or

reliability of KD's evidence.

[10] The medical evidence was consistent that sexual penetration had taken place but injuries could not be observed. The absence of injuries in itself is not significant having regard to the fact that the incidents took place over a number of years by the time that KD was examined by the doctor.

[11] The Appellant gave evidence and he denied that he ever committed any sexual act with KD.

- [12] I do not deal with the evidence of Appellant's wife who was charged with her failure to report the commission of a sexual offence against a child, but she was acquitted.
- [13] I have considered all the evidence on record including the judgment by the trial court and in the context of all the evidence. I considered whether the credibility and reliability of KD was to the extent that it satisfied the onus of proof in a criminal matter that it could be said that her evidence beyond a reasonable doubt proved the allegations against the Appellant particularly in view of the Appellant's protestations of innocence.
- [14] In consider the evidence of KD, I am well aware of the fact that she is a single young witness in relation to the core allegations relevant to the charges and I reminded myself that there is no onus on the Appellant to prove his evidence and if his evidence is reasonably possibly true, that the Appellant is entitled to the benefit of the doubt which should have led to his acquittal.
- [15] However, in the context of all the evidence and a careful analysis of the evidence of KD, I am satisfied that her evidence was credible and reliable and met the standard of proof beyond a reasonable doubt.
- [16] The fact that the Appellant's evidence cannot be rejected as an outright lie does not mean that his evidence refuted the credibility and reliability of KD's evidence as ultimately the assessment of the sufficiency of evidence takes place in the context of all the evidence and subject thereto that the court must be constantly reminded of the evidentiary approach to the evidence of a child and a single witness and that there is no duty on an accused to convince the court of the truth of his version as long as his version is reasonably possibly true.
- [17] I am persuaded by all the evidence, considered in proper context, that the State proved its case beyond a reasonable doubt against the Appellant and that the trial court was correct in convicting the Appellant in accordance with the charges put to him. Consequently, I propose that the appeal against the conviction be dismissed.
- [18] The Appellant was sentenced to life imprisonment, and I had regard to all the factors placed on record on behalf of the Appellant and considered by the court in imposing the life sentence. I considered not only whether there were substantial compelling circumstances justifying a lesser sentence than the prescribed sentence of life imprisonment in terms of the Criminal Law Amendment Act 105 of 1977 but I also considered the approach in *S v Malgas* 2001 (1) SACR 469 SCA .
- [19] I have given serious thought to factors that may ameliorate the conduct of the Appellant to justify a departure from the prescribed sentence, which is not mandatory. When considering comparable reported matters, I found the case in *S v MDT* 2014 (2) SACR 630 (SCA) to be instructive where the court at 632 said the following:

“their mother was in receipt of child support grants. Their mother was caring for them. In respect of injuries, the doctor had regard to the fact that the medical evidence indicated that there was a tear in the victim's vagina and to the complainant's testimony that she experienced pain during the rape. The court below correctly regarded the offence as serious. One can rightly ask what could be considered more heinous than the rape of a child by the father. See the remarks of Cameron JA in S v Abrahams C 2002 (1) SACR 116 (SCA) paras 17 – 23.

- [7] In remarkably similar circumstances, this court in S v PB 2013 (2) SACR 533 (SCA) ([2012] ZASCA 154), after stressing that a prescribed minimum sentence cannot be departed from lightly or for flimsy reasons, refused to interfere with a prescribed sentence of life imprisonment imposed on a father who had raped his 12-year-old daughter. While this can only serve as a guideline, it emphasises the necessity to impose heavy sentences in cases such as the present, to

prevent young girls from being abused. Before us counsel for the appellant was constrained to concede that child rape is becoming

prevalent in Limpopo. [1] Indeed, child rape is a national scourge that shames us as a nation.

- [8] In imposing punishment for rape relative to the circumstances one is evaluating degrees of heinousness. Furthermore, counsel accepted that the record shows that the court below had carefully considered the appellant's personal circumstances. In short, counsel for the appellant F was unable to point to substantial and compelling circumstances justifying a departure from the prescribed minimum sentence. In our view the court below cannot be faulted for imposing life imprisonment. Consequently the appeal against sentence is dismissed.”

- [20] I, in particular, considered the fact that the complainant was a 9 year old child when the Appellant as a person in his 60s exploited and abused his power over his grandchild who had no choice but to live with him due to her mother's financial position. I may have considered to deviate from the prescribed sentence by virtue of his age and the fact that he had an irrelevant previous conviction for assault of about 40 years old which played no role and that he was responsible for taking care of a family. However, he repeatedly over a period of 4 years carried on with his heinous deeds with no regard to a young girl who he was supposed to love and protect. He turned her into his sexual object and if this was not exposed, he may have carried on with his heinous deeds for even a longer period.

- [21] I am unable to find that the limited mitigating factors relevant to his personal situation would carry sufficient weight to consider any other sentence but the prescribed sentence of life imprisonment. I therefore propose that the appeal against the sentence be dismissed.

- [22] Order:

- (i) The appeal against the conviction and sentence is dismissed.

B ROUX

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

A REDDY

ACTING JUDGE OF THE HIGH COURT,

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Date of hearing: 29 November 2023

Date of judgment: 06 March 2024

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Prepared on 9 October 2026 · Esheria