

SOUTH AFRICA / JUDGMENT

Vilakazi and Another v S (A177/2017) [2021] ZAGPPHC 479 (27 July 2021)

[2021] ZAGPPHC 479

COURT

North Gauteng High Court, Pretoria

BEFORE

L Barit, D Makhoba

CASE / FILE NUMBER

A177/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Appeal

Case No. A177/2017

Date

of hearing: 3 May 2021

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

27/07/2021

In

the matter between: FICUBANI
 JOHANNES
 VILAKAZI 1ST
 Appellant
 SIPHIWE
 PRAISEGOD
 FAKUDE 2ND
 Appellant
 and
 THE
 STATE Respondent

JUDGMENT

BARIT, AJ

Introduction

[1.] The appellants in this matter were both charged and convicted in the regional court sitting in Ermelo on one count of rape each of a minor girl. The appellants were legally represented and pleaded not guilty to the charges. At the conclusion of the trial on 14 December 2016 both appellants were found guilty as charged. Subsequently on 26 February 2017, the appellants were sentenced. The first appellant to 20 years imprisonment and the second appellant to five years imprisonment. The appellants applied for leave to appeal, against both conviction and sentence, in the trial court. This application was granted.

The

facts

[2.] The first appellant was charged with the rape of a minor girl, which took place in 2014. The second appellant was charged with the rape of the same minor girl, which took place in 2015. In 2014 the victim (the minor) was 8 years of age.

[3.] The two accused and the minor had lived on the same plot, but in different houses, with the families having good relationships. In addition they were all extended family members. 1st appellant, the uncle of the minor and 2nd appellant being a first cousin.

[4.] The appellants both now appeal on the following threefold basis, against both the conviction and the sentence:

1. That the state failed to prove that the complainant was raped in the light of the medical evidence.

2. That the presiding magistrate in the trial court, erred in rejecting the evidence of the appellant in the light of the fact that the complainant was a single witness only nine years of age at the time of her evidence.
3. That the sentences imposed on the appellants are shocking and inappropriate.

[5.] The state opposed both appeals against conviction and sentence. The state maintaining that the guilt of both the accused had been proved beyond reasonable doubt. Further that the sentences imposed do not induce a sense of shock and are not unduly harsh.

[6.] The complainant was the only State witness that testified about the conduct of the two appellants, as it was not witnessed by any other person.

[7.] The three doctors' reports of whether there was "sexual abuse" and / or "sexual assault" were unanimous. The child had been inflicted with such an act. However the difference which existed with respect to the three doctors was whether the hymen "of the victim had been broken". Two of the three doctors who had assessed the minor stated the hymen was "intact". A third stated that it was not intact.

[8.] After having had the benefit of hearing and seeing the witnesses, the trial court found that the state witnesses' evidence reliable and credible and further the child's evidence was corroborated by two witnesses as well as the doctor's evidence in court. The applicants' bald denials were rejected by the trial court.

The trial

[9.] The state called four witnesses in the following order. Dr Olumfeni Onolabi. The complainant. N.N. (the friend of the complainant). The complainant's mother.

[10.] The first witness was Dr Onalabi: He told the court that the child (the complainant) had bruising at the vagina and tested positive for syphilis. He testified that syphilis is a sexually transmitted infection and it is presumed that with this kind of infection there must have been sexual intercourse.

[11.] The doctor further stated that "it is possible that also there was just penetration just to the mouth of the vagina and not up to the hymen." With respect to why he found the hymen intact, the doctor stated that the bruising is caused by a forceful attempt to penetrate, on a small child, by an adult penis and hence there is not full penetration to break the hymen.

[12.] The second witness was the complainant, the child: The trial magistrate's judgement in this matter dealt specifically with respect to the evidence of the complainant as to the circumstances under which the alleged rape by the appellants took place. How, the first appellant would, by way of example, send her for a cold drink and then when she arrived back would grab her and close the door. Further she gave evidence as to how he would undress her and then subsequently dress her. Also the pain she later felt in her vagina. With respect to the second appellant, she specifically spoke about how he had sent her for plates, from his house. How he penetrated her after he got her to undress. How she saw "sous" which was interpreted as semen.

The complainant stated that she had reported both instances to her child friend N.N. When confronted by the legal representative of the two accused that what she was saying was not true she stated "they lie".

[13.] The third witness was the child's friend, N.N. Though she was unsure about her age, reading through the record, she must have been about the same age as the complainant. She stated that her friend (the complainant) had told her that she had been raped. When asked by who, she named both the 1st and 2nd appellant. What this witness said was consistent with what the complainant had told the trial court. The defence did not cross examine this witness.

[14.] The fourth witness was the mother of the complainant: she testified that she examined her daughter, the complainant, as the child could not sit properly, nor was she walking properly. The mother's evidence was that the child was injured in her private parts. The mother further said that her child stated that it was caused by the 2nd appellant. On the way to the clinic, the mother stated that the child informed her that 1st appellant had also raped her. The mother's

evidence supported what the daughter had told the trial court. The mother further confirmed that the daughter told her that she had been raped many times by 2nd appellant (the cousin of the complainant). The mother also stated that the daughter said that she had been penetrated. With respect to the 1st appellant, the daughter had told her that this had taken place on numerous occasions.

[15.] Both appellants gave evidence in their defence. Both denied any incidences involving rape ever occurred. Both were emphatic that they had not raped the complainant. Both appellants were cross-examined by the State and stood firm with their denials.

[16.] The trial court must consider evidence implicating the accused as well as evidence exculpating an accused. Such is then evaluated in its totality and the trial court will then weigh up the evidence before it.

[17.] In *S v Munyai* 1986 (4) SA 712 (V) at 715 G, van der Spuy AJ said:

"A court must investigate a defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false."

[18.] In *S v Molaza* (2020) 4 All SA 167 (GJ) 31 para 45 Joubert AJ stated:

"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence that the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable, but none of it may be simply ignored."

[19.] The approach laid down in the case of *R v Mlambo* 1957 (4) SA 727 (A), at 738 A-C was per Malan JA:

"In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man after mature consideration comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged. He must in other words, be morally certain of the guilt of the accused. An accused's claim to the benefit of the doubt that may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable influences which are not in conflict with, or outweighed by the proved facts of the case."

In the case of *S v Phallo and Others* (1999) (2) SACR 558 (SCA) at 562g to 563e, Olivier JA approved the above approach by Malan JA, referring to it as a classic decision. Olivier went on to state that the approach of our law as represented by *R v Mlambo*, *Supra*, corresponds with that of English courts. Olivier went on to quote from *Miller v Minister of Pensions* [1937] 2 All EL 272 (KB) It was said at 373h by Benning J:

"(T)he evidence must reach the same degree of cogency as required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man to leave only a remote possibility in his favour, which can be dismissed with a sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice."

[20.] This must be approached by looking at the general principle in evaluating evidence in a criminal case. It was stated as follows in *S v van der Meyden* 1999 (1) SACR 447 (WLD) at 448 f-h:

"The onus of proof in a criminal case is discharged by the State. If the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see for example, *R v Difford*, 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from the opposite perspective. 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 whatever the 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, it does not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."

[21.] With respect to the facts of the appeal before this court, the trial magistrate in his judgement took into account the factors elucidated above.

The child single witness aspect

[22.] The appellants contend that the magistrate in the trial court erred in rejecting the evidence of the appellant in the light of the fact that the complainant was a single witness, alludes to the cautionary law.

[23.] Numerous factors exist as to why caution should be taken when a child gives evidence at a trial. These include, a grudge against the complainant, a failure of the child to distinguish between reality and fancy and susceptibility to the influence by suggestion. In the case of *S v Artman and Another*, 968 (3) SA 339 (A) at 340 H, the following was stated:

"There is a cautionary rule of practice, in regard to the testimony of accomplices, complainants in sexual cases and young children, in terms of which trial courts must:

- a. Warn themselves of the dangers inherent in the evidence
- b. Require some safeguard reducing the risk of wrong conviction.

The safeguard need not consist of corroboration, but if corroboration is relied upon as a safeguard it must go to the lengths of implicating the accused in the commission of the crime."

[24.] In *S v Hanekom*, 2011 (1) SACR 430. (WCC) (para 8), the court stated:

"The starting point in any criminal matter must of course always be that the State must prove the guilt of the accused beyond reasonable doubt. This must never be lost sight of even when a number of cautionary rules come into play. However to assist the courts and to determine whether the onus has been discharged, they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution. See also *R v Mokoena* 1956 (3) SA 81 (A) at 85- 86."

An application of this rule means that a court must be alive to the danger of relying on the evidence of only one witness on the basis that it cannot be checked against other evidence. In this regard, see *S v Dyira* 2010 (1) SACR 78 (ECG) para 6.

[25.] This is based on the notion that certain kinds of witnesses including complainants in sexual cases especially young children, could not be safely relied on without some form of corroboration or other evidence to support the trustworthiness of the allegations. (see *S v Haupt* 2018 (1) SACR 12 (GP)).

[26.] In the matter of *S v Jackson* 1998 (1) SACR 470 (SCA) at 476 E. Olivier JA stated:

"In my view the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law the burden is on the state to prove the guilt of an accused beyond reasonable doubt - no more and no less."

[27.] A court should not easily convict unless the evidence of the child has been treated with due caution. A child's evidence, if not corroborated will therefore be scrutinised with great care in terms of the rule. In other words, it will be accepted but with great caution. In the case of *S v Hadebe* 1998 (1) SACR 422 (SCA) at 426F - 426H it was stated:

"But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is after all, a mosaic of proof. Doubt about one aspect of the evidence led in a trail may arise and that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that the broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substituted for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done it is necessary to step back a pace and consider the mosaic as a whole. If that is one done one may fail to see the wood from the trees."

The broad concept of the reliance placed on witnesses should involve corroboration - which applies to the cautionary rule when tested with respect to the evidence of a child.

[28.] In *Woji v Santam Insurance Co. Ltd* 1981 (1) SA 1020 (A) at 1027- 1028 the court stated:

"Trustworthiness of a child depends on factors such as the child's power of observation, his power of recollection and his power of narration on the specific matter to be testified. His capacity of observation will depend on whether he appears intelligent enough to observe. Whether he had the capacity of recollection will depend again on whether he has sufficient years of discretion to remember what occurs while the capacity of narration and communication raises the question whether the child has the capacity to understand the questions put and to frame and express intelligent answers."

[29.] In *S v Viveiros* (2000) 2 All SA 86 A, the complainants were minors at the time of the alleged offences. Some were very young whilst others were more or less of the age of puberty . Zulberg JA stated at para 2:

"In view of the nature of the charges and the age of the complainants, it is well to remind oneself at the outset whilst there is no statutory requirement that child's evidence must be corroborated, it is long been accepted that the evidence of young children should be treated with caution [*R v Manda* 1951 (3) SA 158 (A) at 163 C; *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1028 B-DJ and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach: *S v J* 1998 (2) SA 984 (SCA) at 1009 B."

Evidence of a child

[30.] In the matter of *R v Manda* 1951 (3) SA 158 (A) at 163 C- D Schreiner JA stated:

"... it might perhaps be unfortunate if the courts acted upon a rigid rule that corroboration should always be present before the child evidence is accepted. Nevertheless the dangers inherent in reliance upon the uncorroborated evidence of a young child must not be underrated. The imaginativeness and suggestibility of children are only two of a number of elements that require the evidence to be scrutinised with care, amounting perhaps to suspicion."

It must be noted that the statement of Schreiner, read in context specifically deals with "uncorroborated evidence" of the young child.

[31.] In the present case we are confronted with the aspect of a child's evidence, together with the fact that it is the evidence of a single witness. The reality is that in virtually all rape cases the victim is a single witness in the matter, as it very unlikely that the rape would have taken place in open view of the public.

[32.] In applying the single witness rules, with respect to a child's evidence, the court can be said to be guided by the following:

- 1.] Is the witness (the child) a competent witness.
- 2.] Is there corroboration of the child's evidence.
- 3.] The court will check for any contradictions, in original statements or during the course of the evidence of the child.
- 4.] The manner in which the child gives the evidence.
- 5.] Was the child's evidence consistent.
- 6.] Is the version of the child highly probable.
- 7.] Studying all the evidence a whole.

The trial court will then, based on the above factors , scrutinise the child's evidence with care. It is essential that each case must be measured on its own merits.

[33.] If the trial court is then satisfied that there is proof beyond a reasonable doubt that the accused is guilty, a verdict of guilty will follow.

[34.] In *S v Sauls and Others* 1981 (3) South Africa 170 (A) Diemont JA explained how the rule should be applied in trial courts (at 180 E):

"There is no rule of thumb, test or formula to apply when it comes to a consideration of the credibility of a single witness. (see the remarks of Rumpff JA in *S v Webber* 1971) (3) SA 754 (A) at 758). The trial judge will weigh his evidence, will consider his merits and demerits and having done so will decide whether it is trustworthy and whether despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told."

[35.] At this point I think it is necessary to look at the failure of the defence, to cross examine the third witness. In this respect, the comments of the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football and Union and Others* 2000 (1) SA 1 (CC) at 36J - 37 E must be taken into account:

"The Institution of Cross-Examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness' attention to the fact by questions put in cross examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness' testimony is accepted as correct."

In *Browne v Dunn* (1983) 6 R. 67 (HL), a famous British House of Lords decision sets down that a cross examiner cannot rely on evidence that is contrary to the testimony of the witness without putting the evidence to the witness in order to allow them to attempt to justify the contradiction. This has become known as the "Browne versus Dunn rule". It simply means that if a witness gives a testimony that is inconsistent with what the opposing party wants to lead as evidence, the opposing party must raise the contention with that witness during cross examination.

In the Australian case of *Allied Pastoral Holdings (Pty) Ltd v Commissioner of Taxation* (1983) 1 NSWLR 1 at 16 Hunt J stated:

"... it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from the evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the inference sought to be drawn."

See for example *S v Govazela* 1987 (4) SA 297 (0) at 2985 and *Small v Smith* 1984 (3) SA 434 (SWA) at 438 E-H

The fact that the third witness was not cross examined must have played an influence with respect to substantiate the evidence of the complainant and acted as further corroboration of the complainant's version of events.

The question of penetration

[36.] The Sexual Offences Act 23 of 1957, defines rape in the following terms:

"Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B is guilty of the offence of rape."

[37.] The Criminal Law (Sexual Offences and Related Matters) Amendment Act 22 of 2007, defines sexual penetration as follows:

"Sexual penetration includes any act which causes penetration to any extent whatsoever by ... the genital organs of one person into or beyond the genital organ, anus or mouth of another person. "

[38.] In *H v S A400/2012*[2014] ZAGPJHC 214 (16 September 2014). The court in this matter accepted that full penetration had not occurred. However on appeal the conviction on rape was confirmed, based on the fact that penetration need not be a full penetration as long as the penetration occurred. The victim was 11 years of age at the time of the incident. Further it was alleged that the sexual abuse on her had been long-standing. Spilg, J stated (para 51):

"Our common law held that the slightest penetration was sufficient to complete the act of sexual intercourse. Burchell (3rd edition) puts it as follows at 706: "It is thus irrelevant that the male does not emit semen, nor does it matter that the woman's hymen is not ruptured"."

[39.] Section 39 (1) of the Constitution provides that our courts may consider foreign law. In this respect it is useful to look at The United States Department of Justice Archives (6 January 2012) where it states that rape is:

"The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim."

[40.] In *S v K 1972 (2) SA 898 (A)* at 900c, it was stated that it does not matter that the woman's hymen is not ruptured in the act. This, settles any argument that might exist with respect to one doctor saying that the hymen had been ruptured whereas two others said it hadn't been ruptured. That is irrelevant. The point is that, the unanimous evidence by the doctors was that the complainant had been sexually penetrated, no matter how small. Burchell, (Principles of Criminal Law, (3rd ed), 2005 Juta & Co Landsdowne P706 fn 47) states: ... entry into the labia (the utmost part of the female genital organ is sufficient).

[41.] From the above it can be seen that whichever way one looks at the question of penetration, even the slightest penetration both in terms of our common law, our legislation and also in terms of practice elsewhere (eg the United States example), any form of penetration, no matter how slight, is rape. In this respect the trial court's finding of rape is sound.

[42.] In the current appeal, the trial court, with respect to the evidence of the complainant, had properly cautioned itself, and in weighing the evidence, was satisfied that such was reliable. The child's evidence was further consistent with that of the other witnesses who corroborated the child's story. The trial magistrate looked at the single witness aspect of the "child" bearing in mind that the complainant was only 9 years of age at the time of her giving evidence. We can see that, in terms of the judgement in *S v Artman and Another* (above), the corroboration went to "the length of implicating the accused in the commission of the crime". In this matter the state proved beyond reasonable doubt that the appellants had raped the minor and the appeal against conviction must be dismissed.

Sentence.

[43.] In the matter of S v Rabie 1975 (4) SA 855 (A) at 857 D-F, the principle regarding appeals against sentence was stated to be:

- i. "In every appeal against sentence, whether imposed by a magistrate or Judge, the Court hearing the appeal -
 - a. Should be guided by the principle that punishment is "pre- eminently" a matter for the discretion of the trial court"
 - and
 - b. Should be careful not to erode such discretion: hence the further principle that the sentences should only be altered if the discretion has not been 'Judicially and properly exercised'.
- ii. The test under "b" is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

[44.] In the case of S v Ma/gas 2001 (1) SACR 469 SCA at 478 D-E Marais JA stated:

"A court exercising appellant jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentences if it were the trial court and then substitute the sentence arrived at by it simply, because it prefers it. To do so would be to usurp the sentencing discretion of the trial court."

The Supreme Court of Appeal, went on to say at 478 E-H:

"Where material misdirection by the trial court vitiates its exercise of that discretion an appellate court is of course entitled to consider the question of sentence afresh. In doing so it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate

court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate ". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or the court prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation."

[45.] An appeal court is loath to interfere with the sentence of a trial court. As far back as 1920, the Appellate Division in the case of R v Maphumulo and Others 1920 AD 56 at 57 stated that:

"The infliction of punishment is pre-eminently a matter for the discretion of the trial Court. It can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal. And we should be slow to interfere with its discretion."

The exception being where there is evidence indicating that it was activated by a material misdirection or that the sentence is

disturbingly inappropriate, or that it induces a sense of shock.

[46.] The two appellants' appeals in respect of their convictions can therefore only succeed if the trial courts' findings were vitiated by material misdirections or if it is shown from the record to be clearly wrong. (See *R v Dhlumayo and Another* 1948 (2) SA 677 (A)).

[47.] In *R v Zulu and Others* 1951 (1) SA 489 (N) 496 at 497 it was stated:

"Where no such grounds exist, the appeal court will not interfere merely because the appeal judges considered that they themselves will not have imposed the sentence."

See also *ex parte Neethling and Others* 1951 (4) SA 331 AD 335.

[48.] In *R v S* 1958 (3) SA 102 at 104, the court stated:

"There are well recognised grounds on which the court of appeal would interfere with the sentence. Where the trial judge or magistrate, as the case may be, has misdirected himself from the law or facts or has exercised his discretion capriciously or upon a wrong principle or so unreasonable as to induce a sense of shock."

[49.] There is what is known as a basic triad when fundamental policy with respect to sentencing is considered. In *Zinn v S* 1969 (2) SA 537 (A) 540 G. Rumpff J stated that the assessment of a sentence, the following has to be considered - namely that it is a "triad consisting of the crime, the offender, and the interests of society."

[50.] With this in mind, the main purposes of punishment has been described by the appellate division as: Firstly deterrent. Secondly preventative. Thirdly reformatory. Fourthly retributive (See *R v Swanepoel* 1945 AD 444 at 455; and *S v Rabie* 1975 (4) SA 855 (A) at 863 A-B).

[51.] At the same time the words of Holmes JA in *S v Sparks* 1972 (3) SA

(396) (A) 410 H should not be forgotten: "Punishment should fit the criminal as well as the crime, be fair to the State and to the accused and blemished with a measure of mercy."

[52.] In *S v Theron* 1986 (1) 826 (A) 896, Botha JA in referring to what an appropriate sentence is, said that the trial judge weighs up the various factors, which forms part of the court's discretion as to what, under the circumstances an appropriate sentence should be.

[53.] The two appellants have been found guilty of rape. The seriousness of such is clearly described in the case of *S v Chapman* (1997) ZASCA 45; 1997 (3) SA 341 (SCA) at 345 C-D:

"Rape is a very serious offence, constituting as it does, a humiliating degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, and the dignity to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully in the streets, to enjoy their shopping, and their entertainment, to go and come from work and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and insecurity which constantly diminishes the quality and enjoyment of their lives."

[54.] In the case of *S v C* 1996 (2) SACR 181 (C) 186 D-F the court stated:

"Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim, he murders her self-respect and destroys her feeling of physical mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life - a fate often worse than loss of life. Serial rapists and murderers are regarded by society as inherently evil beings. They are the most feared and loathed criminals in our community. Society demands protection in the form of heavy and deterrent sentences from the courts against such atrocious crimes."

[55.] In the matter of *S v Vusimuzi* (2018 ZASCA. 06 23/2/2018) the court referred to a test of "is the sentence disproportionate or unjust". In this matter, the rape occurred of a sixteen year old girl (para 14) twice on the same day, by the appellant. The complainant was both beaten and dragged from one place to another, with one rape taking place at the first place and a second rape taking place at the second place. She sustained bruises to her legs and swelling of her face. In this instance the sentence of life imprisonment was not interfered with.

[56.] In *S v Matyityi* (2011) SACR (1) 40 (SCA) para 13, the court increased the sentence which was originally imposed by the trial court from 25 years to life imprisonment based on the factor that the respondents conduct themselves, was a flagrant disregard for the sanctity of human life or individual physical integrity. In the case of the court stated that the case of *Matyityi* shows that where people "acted in a manner that was unacceptable in any civilised society particularly one that ought to be committed to the protection of the rights of all persons including women", no mercy should be accepted.

[57.] Any civilised society demands that such atrocious crimes as the ones perpetrated against the complainant in the current appeal - namely an innocent 9 year old or younger child - must be adequately punished. This is where an appropriate sentence is most important. This, in this matter, was part of the function of the trial court.

[58.] The magistrate in the matter before this court gave a detailed reasoning as to how the sentences were formulated. These varied from the seriousness of the crimes, the interests of the community to the personal circumstances of both the appellants. Mitigating and aggravating circumstances were taken into account.

[59.] The magistrate was well alive to the particular circumstances of both, and that is spelt out by the fact that the magistrate deviated from minimum sentences as well as taking into account the age of the 2nd appellant when passing sentence.

[60.] The sentences imposed by the trial court are not "shocking" nor was there a material misdirection. The child, only 9 years of age and those older than her, especially living in the same community, were in a position to look after and protect her. Instead what they did was to violate her. The situation is further aggravated by the close family relationship between the victim and the two appellants, one being the uncle and the other a first cousin. In the circumstances, there is no room for an appeal court to find any fault with the trial court's sentencing.

Summing up

[61.] I believe that the trial magistrate was correct in convicting the appellants and, further, in respect of the sentences imposed.

[62.] In the circumstances I make the following order:

1. The appeal against convictions and sentences in respect of both appellants is dismissed.
2. The convictions and sentences of both appellants are upheld.

L Barit

Acting Judge of the High Court of South Africa, Pretoria

I AGREE

D MAKHOBA

Judge of the High Court of South Africa, Pretoria

APPEARANCES

For the Appellants: Adv L Augustyn

Instructed by: Legal-aid

South Africa

For the Respondent: Adv J Cronje

Instructed by: Directorate

of Public Prosecutions, Pretoria

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