IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

CASE NO. CA&R 87/2024

In the matter between:

MASIXOLE MAMAYO **Appellant**

and

THE STATE **Respondent**

JUDGMENT

LAING J

[1] This is an appeal against conviction and sentence. The appellant was charged with the rape of the complainant on 1 May 2021 at Fort Grey. The complainant was 13 years old at the time. The appellant denied the charge but offered no plea explanation. The Regional Court, sitting in East London, found the appellant guilty and sentenced him on 10 April 2024 to a period of life imprisonment. The appellant relies on his right to appeal in terms of section 309(1) of the Criminal Procedure Act 51 of 1977 ('CPA').[1]

[1] The provisions allow a person to note an appeal without applying for leave to do so where he or she has been sentenced to life imprisonment by the Regional Court under section 51(1) of the Criminal Law Amendment Act 105 of 1997.

[2] The complainant's testimony can be summarized, briefly, as follows. The complainant resided with her mother and father (the appellant).[2] On the day of the incident, she had been with her friends. Despite having been required to return home by 17h00, the complainant continued to socialize; she purchased and consumed liquor later that evening. The appellant eventually found her at about 22h00 in the vicinity of the local tavern. He remonstrated with her and took her home, where her mother reprimanded her for her disobedience. When it became clear to the complainant that the appellant intended to punish her, she alleged that her mother was cheating on him. This led to an altercation between the couple. The appellant left the house to sleep at the home of his sister, who was away at the time. The complainant asked to accompany him because she was afraid of what her mother would do to her. Along the way, the appellant confronted the complainant about her allegation, to which she responded that her mother's lover was a certain 'Sakkie', who resided in the village.

[3] Upon their arrival at the home of the appellant's sister, they prepared a single bed and went to sleep, but not before the appellant had smoked *tik*. They slept with their heads on opposite sides of the bed. At some point during the night, the complainant awoke to find the appellant with his hands around her neck, accusing her of having caused the quarrel with her mother. The appellant pulled the complainant into the kitchen, held a knife to her neck, forced her to undress, and proceeded to rape her.

[4] After the incident, the appellant returned to bed. The complainant joined him out of fear of his reaction if she refused. As soon as it became light, the complainant left the house, eventually finding her way to the home of her closest friend, Ms T…, to whom she reported the incident. Ms T… summoned her mother, as well as the complainant's mother, after which the matter was referred to a member of the local police forum. The complainant was taken to the Cecilia Makiwane Hospital where she was examined. She was also given medication for her voice, which had been affected by the injuries sustained to her neck.

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[2] There was some dispute about whether he was the complainant's biological father. This seems to have been a factor in the events that followed.

[5] The medical findings were admitted as evidence. These revealed that the complainant had been physically assaulted; there were no injuries to her genitalia but the medical practitioner who conducted the examination could not exclude the possibility of sexual assault. The J88 included diagrams that depicted hymenal tears that had healed, as well as scratch marks on the complainant's neck.

[6] The complainant's friend, Ms T…, testified about how the incident had been reported to her. In that regard, the complainant had narrated to her the events of the previous night, including the rape itself. Ms T… alleged that the appellant was not the complainant's biological father; she identified the appellant, in court, as the complainant's stepfather. She went on to indicate how the matter had been reported to the complainant's mother.

[7] The complainant's mother, Ms J…, testified too. She was adamant that the appellant was the complainant's father. Ms J… described the events that occurred on the night in question and how she had been summoned by Ms T… on the following morning. The complainant's neck had been bruised, and she had lost her voice. She had informed Ms J… about the rape. Ms J… denied having ever assaulted the complainant.

[8] In his defence, the appellant's version largely accorded with the testimonies of the complainant and state witnesses. He stated, however, that the complainant's mother, Ms J…, had found her earlier in the day and assaulted her. That night, he and the complainant had indeed shared a bed at the home of his sister, but nothing untoward had happened. The appellant said that the complainant had left him early the next morning. He denied that he had placed a knife against the complainant's neck and raped her. He attributed the charge to a scheme on Ms J…'s part to falsely implicate him so that she could continue her affair with 'Sakkie'.

[9] The final witness for the defence was Sgt Janisa Tshona, who testified about the circumstances in which she obtained a statement from the complainant. This did not seem to have taken the matter much further.

[10] On appeal, the appellant contended, *inter alia*, that the court *a quo* erred in not treating the complainant's evidence with sufficient caution. This was because she was a single witness to the events that took place at the home of the appellant's sister. He also contended that the court *a quo* erred in not finding that the appellant's version was not reasonably possibly true.

[11] The correct approach of an appeal court was addressed by the erstwhile Appellate Division in *S v Francis*,[3] where Smalberger JA held that:

> 'The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection, the trial court's conclusion, including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness' evidence- a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of oral testimony.'[4]

[12] Some years later, the Supreme Court of Appeal reiterated the above principles in *S v Hadebe and Others*,[5] where Marais JA observed that:

> '…in the absence of demonstrable 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.'[6]

[13] Regarding a single witness, section 208 of the CPA clearly stipulates that an accused may be convicted of any offence on the single evidence of a competent witness.

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[3] 1991 (1) SACR 198 (A).
[4] From the headnote.
[5] 1997 (2) SACR 641 (SCA).
[6] At 645e.

The cautionary rule, when correctly applied, is designed to minimise the obvious dangers associated therewith.

[14] When dealing with the evidence of a single child witness, extra care is required. This is especially so in cases involving a sexual offence, where the corroboration of the child's evidence serves as a useful safeguard against the risks posed by imaginativeness, suggestibility, and an immature understanding of the ways of adults. As Du Toit observes:

> 'There is no statutory requirement in our law that a child's evidence must be corroborated. Nor have the court's insisted upon a "rigid rule that corroboration should always be present before the child's evidence is accepted" (*R v Manda* 1951 (3) SA 158 (A) at 163C). However, it has been accepted that the evidence of young children should be treated with great caution owing to the dangers inherent in such evidence (*R v Manda* (supra) at 162). And, although corroboration is not a prerequisite for a conviction, a court will sometimes in appropriate circumstances seek corroboration which implicates the accused before it will convict (see *S v Hanekom* 2011 (1) SACR 430 (WCC) at [15]).'[7]

[15] In the present matter, it was common cause that the complainant had disobeyed her parents' request or expectation that she be home by a reasonable hour. She had also consumed alcohol. The complainant's parents had confronted her about her behaviour, which had resulted in an altercation after the complainant had alleged that her mother had been unfaithful. It was also common cause that the complainant had left with the appellant and shared a bed with him at the home of his sister. No-one else had been present. The testimonies of the appellant and the complainant differ, however, in relation to what happened that night.

[16] There is nothing in the record to suggest that the complainant's evidence ought not to have been trusted. She conceded that she had made the allegation about her mother's infidelity to avoid punishment for her misbehaviour. Her subsequent accompaniment of the appellant to his sister's home is understandable, given how her

[7] E du Toit (et al), *Commentary on the Criminal Procedure Act* (Juta, service 69, 2022), at 24-9.

mother would have reacted to such betrayal. She went on to describe in detail how the appellant had confronted her later that night, accusing her of having caused the quarrel with his wife and asserting that she was not his child. The complainant narrated, too, the events of the incident itself, how the appellant had held her neck and strangled her before dragging her into the kitchen. He had held a knife to her throat and forced her to undress. He had then pressed her head against the floor and raped her from behind. The complainant indicated that she had been raped twice. The complainant's explanation for why she had returned to share the bed with the appellant is plausible, considering the nature of the parent-child relationship and her fear of further repercussions if she defied him.

[17] Significantly, however, it is the testimony of the remaining witnesses that corroborates the material aspects of the complainant's evidence. Both Ms T… and Ms J… stated that the complainant had informed them about the rape. She had, moreover, lost her voice and was frightened. Ms T… was particularly consistent in this respect, saying that the complainant had been crying and emphasised this under cross-examination as follows:

> 'MR SANQELA: When [the complainant] came to you and she started telling you what had happened, in what mood was she in?
>
> MS T…: She wasn't in a right state.
>
> MR SANQELA: Are you able to explain what do you mean when you say she was not in a good state?
>
> MS T…: She was crying. She was shivering and she was scared.'

[18] Of considerable importance is Ms T…'s testimony that she had noticed injuries on the complainant's neck. She referred to scratch marks. This was corroborated by Ms J…, whose testimony under cross-examination went as follows:

‘MR SANQELA: You said that [the complainant] had bruises on the neck; are you able to describe these bruises that you saw on [the complainant’s] neck?

MS J…: Yes, I can.

MR SANQELA: Please share with the court.

INTERPRETER: May the Court observe as the witness is making hand gestures, Your Worship, showing how these marks were.

COURT: Can she repeat?

MS J…: She was bruised (and the witness showing to her neck area, Your Worship). That she had white marks as if a chicken scratched her.’[8]

[19] The description of the injuries was corroborated, in turn, by the contents of the J88. This was accepted without objection from the defence.

[20] Overall, the evidence pointed to a traumatic event that had occurred during the night before. The complainant had clearly been terribly upset when Ms T… and Ms J… encountered her in the morning afterwards. The injuries on the complainant’s neck were consistent with the allegation that the appellant had strangled her. It should be noted that nothing turns on the apparent discrepancies between the complainant’s statement to the police that her mother had assaulted her earlier in the day, prior to the incident, and her testimony to the contrary under cross-examination. In that regard, she denied that her mother had assaulted her. Ms J…, too, was emphatic that this had never happened. The statement itself gave no indication at all that the complainant’s mother was the cause of the injuries to her neck.

[21] Turning to the rape allegation, the complainant admitted that she had been sexually active some two months prior to the incident. The J88 recorded clefts that had subsequently healed, as well as a ‘history of sexual assault’. A gynaecological

[8] Sic.

examination revealed no fresh injuries to the genitalia but the absence thereof 'does not exclude genital penetration'.

[22] At this stage, I pause to mention that the court *a quo* expressed the view that the clefts mentioned in the J88 could have healed in the intervening period of two or three days between the date of the alleged incident and the date of the examination. There was, however, no evidence upon which such a view could have been based. The state never called the medical practitioner in question to clarify her findings. Consequently, the magistrate was, with respect, incorrect in that regard.

[23] Notwithstanding the above, the cumulative effect of the state's evidence must be considered. The complainant's testimony, the testimonies of both Ms T… and Ms J… in relation to the complainant's condition and her narration to them of the incident itself, as well as the evidence disclosed by the J88, prevent me from finding any reason to interfere with the magistrate's conviction of the appellant for the alleged rape.

[24] This is not disturbed in any way by the appellant's testimony itself. He offered no reasonable explanation for why the complainant had chosen to leave the home of the appellant's sister at 05h00 the following morning, just when it had started to become light; he gave no indication whatsoever of the possible cause of the trauma suffered by her and observed by the witnesses for the state. The appellant's assertion that the complainant's mother had instructed her to implicate him so that she could continue her affair with Sakkie was entirely fanciful; it ignored the obvious tensions between Ms J… and her daughter and the outright hostility that emerged on the day of the incident when the complainant alleged that her mother had been unfaithful. For the complainant to have conducted herself in the way that she did during the following morning would have required remarkable skills of manipulation and play-acting. It cannot be said that the court *a quo* was wrong to have rejected the appellant's version.

[25] Regarding the sentence of life imprisonment, the appellant contended that the magistrate had failed to consider properly his personal circumstances. The pre-sentence report described him as a 42-year-old man with limited formal education but who had

acquired plumbing skills that enabled him to secure employment from time to time; he had been working as a gardener when he was arrested. The appellant has two dependants, but no further details were provided. He is a drug-user. The state proved several previous convictions, including house-breaking, assault, possession of an unlicensed firearm, and rape.

[26] The offence attracted the minimum sentencing provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 ('CLAA') because the complainant had been under the age of 16 years and had been raped twice. In *S v Malgas*,[9] the Supreme Court of Appeal, per Marais JA, made it clear that prescribed sentences were not to be departed from lightly and for flimsy reasons that could not withstand scrutiny.[10] Similarly, in *S v Vilakazi*,[11] Nugent JA held that, in cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background.[12] The above approach must be balanced by the principle that the sentence imposed must not be disproportionate to the particular offence.[13]

[27] In the present matter, there were two key aggravating factors. The first was the appellant's previous conviction for rape, in relation to which he had been sentenced to 12 years' imprisonment. The second was the father-daughter relationship between the appellant and the complainant.[14] It was clear from the victim impact statement that, prior to the incident, the complainant had enjoyed a close relationship with the appellant; she had loved him as her father. After the incident, however, she was a different person; the incident had changed her. The statement reflected a troubled young person, unable to focus on her academic studies, and with a complicated view of her father and the atrocity that had been committed against her.

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[9] 2001 (1) SACR 469 (SCA).
[10] At paragraph [9].
[11] 2012 (6) SA 353 (SCA).
[12] At paragraph [58].
[13] See the discussion in Du Toit (n 7), at ch28-p18D-8G to 10E.
[14] There was, as mentioned earlier, some dispute about whether the appellant was indeed the biological father of the complainant or her stepfather. The distinction, I submit, is irrelevant. From the record, it is evident that the appellant had fulfilled a parental role until the date of the offence.

[28] There were, quite simply, no substantial and compelling circumstances to have warranted a departure from the minimum sentencing provisions of the CLAA. I find no reason to interfere with the sentence imposed.

[29] Ultimately, I am not of the view that the court *a quo* misdirected itself, in relation to either conviction or sentence. In the circumstances, I would order that the appeal be dismissed.

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JGA LAING
JUDGE OF THE HIGH COURT

I agree.

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JM ROBERSON

JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant:	Mr Charles
Instructed by:	Legal Aid South Africa MAKHANDA
For the respondent:	Adv Mgenge
Instructed by:	The Director of Public Prosecution 94 High Street MAKHANDA
Date heard:	29 January 2025.
Date delivered:	11 February 2025.