THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE

Case No: 545/13

In the matter between:

PETER MASHUDU NEVILIMADI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Peter Mashudu Nevilimadi v The State* (545/13) [2014] ZASCA 41 (31 March 2014)

Coram: Mhlantla, Wallis and Saldulker JJA

Heard: 5 March 2014

Delivered: 31March 2014

Summary: Criminal law and procedure - appeal against conviction on a charge of rape - sentence – whether sentence of 39 years' imprisonment appropriate. On appeal – conviction confirmed – sentence set aside and replaced with one of 15 years' imprisonment.

ORDER

On appeal from: Limpopo High Court, Thohoyandou (Lukoto J sitting as court of first instance):

1 The appeal against conviction is dismissed and the conviction is confirmed.

2 The appeal against the sentence is upheld.

3 The sentence imposed by the court below is set aside and replaced with the following:

'The accused is sentenced to 15 years' imprisonment.'

4 The sentence is antedated in terms of section 282 of the Criminal Procedure Act 51 of 1977 to 24 December 2001, being the date upon which the sentence was imposed.

JUDGMENT

Mhlantla JA (Wallis and Saldulker JJA concurring):

[1] Mr Mashudu Nevilimadi (the appellant) stood trial in the Sexual Offences Court, Thohoyandou, Limpopo on a charge of rape.[1] He pleaded not guilty and at the end of the trial was found guilty of rape involving a girl under the age of 16 years. The magistrate stopped the proceedings in terms of section 52 of the

[1] The charge sheet read:
"The accused is guilty of rape in that upon or about the 10 February 2001 and at or near Masia Sinthumele in district of Vuwani, Northern Province Regional Division the said accused did wrongfully, unlawfully and intentionally have sexual intercourse with Ms X, a female person."

Criminal Law Amendment Act 105 of 1997 (the Act)[2] and referred the matter to the Limpopo High Court, Thohoyandou for sentence. On 24 December 2001 the court below (Lukoto J) imposed a sentence of 39 years' imprisonment. The appeal against conviction and sentence is before us with leave granted by Makhafola J on 4 December 2012.

[2] The trial in the Sexual Offences Court commenced on 8 June 2001. The appellant pleaded not guilty and in amplification of his plea stated that the complainant was his girlfriend and that they had consensual sexual intercourse. The complainant was due to testify when it became evident that she was 12 years old. The magistrate immediately stopped the proceedings and warned the appellant about the consequences in the event of conviction on a charge of rape involving a girl under the age of 16. In this regard, he warned the appellant that the minimum sentence was 15 years' imprisonment and that his case would be referred to the high court for sentencing. It is noteworthy to state that the prescribed sentence in the circumstances of this case was imprisonment for life. The magistrate thereafter adjourned the proceedings and afforded the appellant an opportunity to engage the services of an attorney.

[3] The case was postponed on numerous occasions to enable the appellant to secure the services of a legal representative. On 27 October 2001 the trial resumed. At that stage the appellant was legally represented. The complainant

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[2] Section 52 prior to its amendment provided:
Committal of accused for sentence by High Court after conviction in regional court of offence referred to in Schedule 2– (1) If a regional court, following on –
(a) a plea of guilty; or
(b) a plea of not guilty,
has convicted an accused of an offence referred to in –
(i) Part I of Schedule 2
(ii) …
The court shall stop the proceedings and commit the accused for sentence as contemplated in section 51(1) or (2), as the case may be, by a High Court having jurisdiction.

and Ms Rosinah Rasimphi, to whom the first report was made, testified on behalf of the State. A medical report (J88 form) prepared by Dr Sivhada of Tshilidani Hospital was handed in by consent between the parties. The appellant testified in his defence. It is not in dispute that sexual intercourse between the appellant and the complainant took place on the day in question. The only issue that had to be determined by the trial court was whether the sexual intercourse was consensual. The essential facts may be briefly stated.

[4] The complainant's version was that she was alone at home when the appellant approached her. He requested some water to drink. She was inside the hut when she discovered that the appellant had entered the hut. Upon enquiry, he told her not to ask questions. He took a knife that was on the table and locked the door. He threatened her with it and ordered her to lie down. She resisted whereupon he wielded the knife at her. She eventually complied and removed her clothes. The appellant had sexual intercourse with her. She felt pain in her vaginal region and cried during this encounter. She could not scream for help as the appellant had covered her mouth and was still in possession of the knife. He eventually stopped and put on his clothes. As he left, he ordered her not to tell anyone about the incident otherwise he would assault her.

[5] As her mother had not yet returned from attending a funeral, she waited outside her home for her neighbour Ms Rasimpi to return. She subsequently made a report to her and Ms Rasimpi in turn related this to her mother when she returned. Her mother thereafter took her to the clinic and to the police station.

[6] The complainant denied the appellant's version that they had an intimate relationship which had been on-going for three years. She stated that this was her first sexual encounter and it was without her consent. She and the appellant were not friends, albeit she knew him as at some stage they had attended the same school and been in the same class. She denied ever arranging to meet him or telling him that her parents would be away attending a funeral and that he could visit her.

[7] She testified that the incident had emotionally affected her as she had become afraid of men. She struggled to play with other children and has lost her self-esteem and confidence.

[8] Ms Rosinah Rasimpi confirmed that she and the complainant were neighbours. On the day of the incident at about 19h00 she was proceeding to her house when she saw the complainant standing outside her premises. The complainant appeared upset, withdrawn and was crying. Upon enquiry, the complainant just shook her head and followed her inside her house.

[9] Once inside, the complainant made a report about the incident; that she was alone at home when the appellant arrived; entered the hut under false pretences, closed the door; threatened her with a knife and raped her. He did this after enquiring about the whereabouts of her parents and siblings. Rosina took the complainant to her home and related what she had been told by the complainant to her mother. After reporting the matter, the complainant was taken to the clinic and to the police station.

[10] The medical report was handed in by agreement between the parties. The examination was conducted on the same day of the incident by Dr T H Sivhada. He recorded that the complainant was physically small and had small breasts which were still developing. She was healthy and mentally healthy. He recorded that the complainant had never menstruated. The doctor's gynaecological examination was painful for the complainant. Her vagina admitted only one finger of the doctor. The labia[3] were normal whilst the hymen was rugged. Rugged means having a rocky and uneven surface. There was no bleeding. A slight watery discharge was detected. The doctor concluded that the absence of injuries did not exclude forceful penetration.

[11] The appellant testified in his defence and stated that he was born on 16 June 1983. His defence was that he and the complainant had been having an intimate relationship for more than a year and that they had sexual intercourse on more than ten occasions. In this regard, he denied the earlier version put by his counsel that the relationship had been on-going for three years. He stated that on the day in question, the complainant had initiated everything. He denied the complainant's version that he had threatened her with a knife and was unable to explain why this was never contested when the complainant testified. He conceded that the complainant appeared to be very young. He thereafter closed his case.

[12] On 1 November 2001, the regional magistrate rejected the appellant's version as not being reasonably possibly true and convicted him of rape involving a girl under the age of 16 years. Pursuant to the conviction, he stopped the proceedings and referred the matter to the Limpopo High Court,

[3] The inner folds of the skin forming the margins of the vaginal orifice.

Thohoyandou, in terms of the provisions of the section 52 of the Act for sentencing.

[13] On 24 December 2001, the matter came before Lukoto J in the court below. He confirmed the conviction of the appellant. At that stage all the parties were aware that the prescribed sentence was imprisonment for life in terms of section 51(1) of the Act. The defence adduced evidence in mitigation. The judge thereafter proceeded to consider the question of an appropriate sentence. The judge found that the youthfulness of the appellant as well as other mitigating factors constituted substantial and compelling circumstances to deviate from imposing the sentence of imprisonment for life. He imposed a sentence of 39 years' imprisonment. The appellant appeals against this conviction and sentence.

[14] At the commencement of the appeal, counsel for the appellant conceded, correctly in my view, that the conviction was in order. He advised us that the appellant had abandoned his appeal against conviction and only persisted in his appeal against the sentence imposed. In the light of this concession it remains only for me to consider the appeal against sentence.

[15] Suffice it to state that I agree that there is no merit in the appeal against conviction. The appellant's version that he had a long - term relationship with a 12 year old girl was patently false. If true, that would mean that the relationship commenced when the complainant was nine or eleven years old. The trial court observed that she was very young. Furthermore his version that he had sexual

intercourse with her on more than ten occasions is inconsistent with the medical evidence which clearly showed that the complainant was not sexually active.

[16] On a conspectus of the evidence and the findings of the court below, I am satisfied that the appellant's version was correctly rejected. His conviction must stand. The appeal against conviction therefore fails.

[17] Regarding the appeal against sentence, the imposition of sentence is pre-eminently within the discretion of the trial court. A court of appeal will be entitled to interfere with the sentence imposed by the trial court if the sentence is disturbingly inappropriate or out of proportion to the seriousness of the offence or is vitiated by a misdirection showing that the trial court exercised its discretion unreasonably.[4]

[18] Counsel for the appellant submitted that the court below, notwithstanding its conclusion that substantial and compelling circumstances did exist, over-emphasised the seriousness of the offence and interests of society and imposed a sentence that is startlingly inappropriate and excessive. Counsel for the respondent, rightly conceded, that the sentence was indeed shockingly inappropriate and that this Court should interfere and impose sentence afresh.

[19] I agree. It is difficult to comprehend how the court below determined the sentence it imposed in this matter. This Court is at large to interfere.

[4] *S* v *Romer* 2011 (2) SACR 153 (SCA) para 22.

[20] It is important for the court to maintain the delicate balance between the triad. In *S* v *Banda and others*[5], the court said:

'The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try and balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern. This conception as expounded by the Courts is sound and is incompatible with anything less.'

[21] Rape is a horrific offence which deserves severe punishment. In *S* v *Chapman*,[6] Mahomed CJ stated:

'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.'

[22] The aggravating factors in this case are: the complainant was a very young girl of 12 years of age. She had not reached puberty and her breasts were still developing. She was at an early stage of her sexual development. She endured the humiliation of being attacked in the sanctity of her home. The experience left her traumatised and has emotionally affected her.

[23] On the other hand, the appellant's personal circumstances are that he was 17 years old when the offence was committed and 18 years of age at the time of

[5] *S* v *Banda and others* 1991 (2) SA 352 (BGD) at 355A-D.
[6] *S* v *Chapman* 1997 (*2*) SACR 3 (SCA) at 5B.

sentencing. He was raised by a single parent, his mother and due to financial constraints left school in Standard 3; he was employed as a general worker and has no previous convictions.

[24] The appellant has been convicted of a very serious offence and deserves a sentence of direct imprisonment. However, the sentence to be imposed must not have the effect of over – emphasising the elements of retribution and deterrence. Having regard to all the relevant factors, I am of the considered view that a sentence of 15 years' imprisonment will be appropriate under the circumstances.

[25] In the result, the following order is made:

1 The appeal against conviction is dismissed and the conviction is confirmed.
2 The appeal against the sentence is upheld.
3 The sentence imposed by the court below is set aside and replaced with the following:
'The accused is sentenced to 15 years' imprisonment.'
4 The sentence is antedated in terms of section 282 of the Criminal Procedure Act 51 of 1977 to 24 December 2001, being the date upon which the sentence was imposed.

N.Z MHLANTLA
JUDGE OF APPEAL

APPEARANCES:

For Appellant: A L Thomu
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For Respondent: A Madzhuta
Instructed by:
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